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# POMEROY'S EQUITY JURISPRUDENCE

AND

### EQUITABLE REMEDIES

SIX VOLUMES

# POMEROY'S EQUITY JURISPRUDENCE

By JOHN NORTON POMEROY, LL.D.

FOURTH EDITION, ANNOTATED AND MUCH ENLARGED

AND SUPPLEMENTED BY

A TREATISE ON EQUITABLE REMEDIES

By JOHN NORTON POMEROY, Jr.

SECOND EDITION

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### TREATISE

ON

### EQUITABLE REMEDIES

(xxv)

### EQUITABLE REMEDIES.

### CHAPTER XX.

### INJUNCTION AGAINST EXERCISE OF THE POWER OF EMINENT DOMAIN.

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§ 466. No injunction against prosecution of condemnation proceedings.

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§ 471. Changing grade of streets; other uses of streets; vacating streets.

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§ 1879. (§ 465.) General Principle.—It has come to be generally recognized that injunction against the unlawful or improper exercise of the power of eminent domain constitutes an independent head of equity jurisdiction, uncontrolled in its exercise by the principles which regulate injunctive relief against trespass. The constitutional guaranty that "property shall not be taken for public use without just compensation" by agents of the state to whom this power is delegated, is deemed to establish a right of so high and sacred a character that any threatened infringement of the right

should be restrained, without consideration of the inadequacy of the legal remedy. Injunction, in this class of cases, is a matter of strict right, not of equitable discretion; although it is true that special equities, such as acquiescence or estoppel, may constitute a defense. is eminently true, in this connection, that "judges have been brought to see, and to acknowledge, contrary to the opinion of Chancellor Kent, that the common-law theory of not interfering with persons until they shall have actually committed a wrong is fundamentally erroneous; and that a remedy which prevents a threatened wrong is, in its essential nature, better than a remedy which permits a wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess." The fundamental principle now generally accepted is well expounded in the following extract from the opinion of a most able court, and is further elucidated in the excerpts in the following note: "The principle upon which a court of equity proceeds, in interfering to prevent bodies corporate having compulsory power to enter upon, take, and appropriate for their own uses the lands of others, differs materially from the principle upon which it intervenes to prevent the commission or continuance of waste, or of nuisances, or of trespasses, when only private rights, or the acts of persons, natural or artificial, not having such powers, are involved. In the latter class of cases, if the right be strictly legal, and there is no relation of privity between the parties, it is of the essence of the jurisdiction of the court that a case of irreparable injury should be shown—a case for which the courts of . law do not furnish an adequate remedy. . . . It is most essential to the preservation of the rights of private property, to the protection of the citizen, and to

<sup>1 3</sup> Pom. Eq. Jur., § 1357, quoted and applied in a case of this character, Payne v. Kansas & A. Val..R. Co., 46 Fed. 546, 553.

the preservation of the best interests of the community, that all who are invested with the right of eminent domain, with the extraordinary power of depriving persons, natural or artificial, without their consent, of their property, and its possession and enjoyment, should be kept in the strict line of the authority with which they are clothed, and compelled to implicit obedience to the mandates of the constitution. A court of equity will intervene to keep them within the line of authority, and to compel obedience to the constitution, because of the necessity that they should be kept within control, and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable. The owner of the land has the right to say that, unless they keep within the strict limits prescribed by law, they shall not disturb him in the possession and enjoyment of his property. The power is so capable of abuse, and those who are invested with it are often so prone to its arbitrary and oppressive exercise, that a court of equity, without inquiring whether there is irreparable injury, or injury not susceptible of adequate redress by legal remedies, will intervene for the protection of the owner."2

<sup>2</sup> East & West R. Co. of Alabama v. East Tennessee, V. & G. R. Co., 75 Ala. 280, by Brickell, C. J.; Birmingham Traction Co. v. Birmingham R'y & Elec. Co., 119 Ala. 129, 24 South. 368; City Council of Montgomery v. Lemle, 121 Ala. 609, 25 South. 919; Mobile & M. R'y Co. v. Alabama Midland R'y Co., 123 Ala. 145, 26 South. 324; Western R. of Alabama v. Alabama G. T. R. Co., 96 Ala. 272, 17 L. R. A. 474, 11 South. 483. "Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition. Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character, or irreparable in its nature; and the appropria-

While the above seems the sounder principle on which to base injunctive relief in this class of cases, many

tion of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded ex debito justitiae''; Fuller, C. J., in D. M. Osborne & Co. v. Missouri Pac. R. Co., 147 U. S. 248, 37 L. Ed. 155, 13 Sup. Ct. 299. "There are numerous cases in this court wherein equity has interfered by injunction to restrain road supervisors and others from removing or interfering with fences, hedges, watercourses, and the like, in the discharge of their official duty. Relief in these cases was not based upon the grounds of the irreparable character of the injury and the insolvency of the defendants [citing Bills v. Belknap, 36 Iowa, 583; Grant v. Crow, 47 Iowa, 632; McCord v. High, 24 Iowa, 336; Quinton v. Burton, 61 Iowa, 471, 16 N. W. 569].... Justice and sound public policy demand that for the protection of both the landowner and the supervisor the question of the legality of the supervisor's proposed act should be determined before the injury should be done to the farm, and the liability of the latter should be incurred. The law provides a remedy for the settlement of the controversy between the parties, in advance of the injury to the one and the liability incurred by the other, by an action in chancery, wherein an injunction will suspend the act of the supervisor until the question of law and facts involved in the controversy are judicially settled": Bolton v. McShane, 67 Iowa, 207, 25 N. W. 135, by Beck, Ch. J. "It is not disputed that injunction is the proper remedy against the appropriation of land for the use of a public corporation which has not acquired a right to the proposed use either by purchase or by condemnation; and, contrary to the general rule that equitable relief is granted only when equitable considerations require it. the injunction in such cases may be, and perhaps more frequently than otherwise is, sought in vindication of a purely legal right; and, if the technical right and a threatened infraction of it be established, the relief will be granted without inquiry into the general equities of the case. By this we do not mean that a specific equity, like an estoppel, may not be a defense to such a suit; but, if a complete defense be not shown, the court will not refuse the relief on grounds of equitable discretion, as it might do in a suit for specific performance or rescission or other cause involving no special constitutional or statutory right of such a nature as to be capable of vindication only by injunction": Bass v. Metropolitan West Side El. R. Co., 82 courts are content to rest it on the general doctrines concerning irreparable injury of a permanent character, going to the destruction of the inheritance.<sup>3</sup> On which-

Fed. 857, 39 L. R. A. 711, 27 C. C. A. 147, by Woods, Cir. J. "In cases of this character courts of equity have acted on broader principles [than in ordinary cases], and have adopted as a rule that an injunction will be granted to prevent a railway company from exceeding the power granted in their charter. . . . The courts do not require when the effort is manifested by a railway company to wrongfully appropriate private property, or force their structures to places not authorized, that there should be a want of remedy at law": Cobb v. Illinois & St. L. R. & C. Co., 68 Ill. 233. See, also, in support of the view that the question of irreparable injury is not involved, but that injunction is a matter of right: Eidemiller v. Wyandotte City, 2 Dill. 376, Fed. Cas. No. 4313, by Dillon, Cir. J., as reported in the Federal Cases; observations of Brewer, J., in McElroy v. Kansas City, 21 Fed. 257, quoted post, § 471; Sidener v. Norristown Turnpike Co., 23 Ind. 623; Western Maryland R'y Co. v. Owings, 15 Md. 199, 74 Am. Dec. 563 ("the nature of the damage complained of, whether irreparable or not, has nothing to do with the question''); Commonwealth v. Pittsburgh & C. R. Co., 24 Pa. St. 159, 62 Am. Dec. 342; Bird v. Wilmington & M. R. Co., 8 Rich. Eq. (S. C.) 46, 64 Am. Dec. 739; Searle v. City of Lead, 10 S. D. 312, 39 L. R. A. 345, 73 N. W. 101; Travis County v. Trogdon (Tex. Civ. App.), 29 S. W. 46; Hodges v. Seaboard & R. R. Co., 88 Va. 653, 14 S. E. 380; Manchester Cotton Mills v. Town of Manchester, 25 Gratt. 828; Foley v. Doddridge County Court, 54 W. Va. 16, 46 S. E. 246; Brown v. City of Seattle, 5 Wash. 35, 18 L. R. A. 161, 31 Pac. 313, 32 Pac. 214; Bohlman v. Green Bay & M. R. Co., 40 Wis. 157; Stolze v. Milwaukee & L. W. R. Co., 104 Wis. 47, 80 N. W. 68; Lewis, Eminent Domain, § 632.

Where, as is usual in recent state constitutions, the provision is that "property shall not be taken for public use, unless compensation is *first* made or tendered," it is obvious that injunction is the only remedy by which the provision can be enforced according to its terms: See Searle v. City of Lead, 10 S. D. 312, 39 L. R. A. 345, 73 N. W. 101; Travis County v. Trogdon (Tex. Civ. App.), 29 S. W. 46; Brown v. City of Seattle, 5 Wash. 35, 18 L. R. A. 161, 31 Pac. 313, 32 Pac. 214.

3 See Bonaparte v. Camden & A. R. Co., 1 Baldw. 218, Fed. Cas. No. 1617; Eidemiller v. Wyandotte City, 2 Dill. 376, Fed. Cas. No. 4313 (as reported in Dillon's Reports); Payne v. Kansas & A. Val.

ever ground the jurisdiction is based, the rule is now almost universal that "an entry upon private property under color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the constitution and the laws," whether such compliance is lacking either through failure to pay, tender, or deposit just compensation as required by law, or through invalidity of the condemnation proceedings, or of the statute under which the right to enter is claimed.<sup>4</sup>

R. Co., 46 Fed. 546; Ex parte Martin, 13 Ark. (8 Eng.) 198, 58 Am. Dec. 321; Commissioners v. Durham, 43 Ill. 86; City of Peoria v. Johnston, 56 Ill. 45; Lowery v. City of Pekin, 186 Ill. 387, 51 L. R. A. 301, 57 N. E. 1062; Erwin v. Fulk, 94 Ind. 235; City of New Albany v. White, 100 Ind. 206; Kern v. Isgrigg, 132 Ind. 4, 31 N. E. 455 (contempt proceedings not an adequate remedy); Welton v. Dickson, 38 Neb. 767, 41 Am. St. Rep. 771, 22 L. R. A. 496, 57 N. W. 559; Bigler's Ex'r v. Penn. Canal Co., 177 Pa. St. 28, 35 Atl. 112; post, chapter XXIII, "Trespass," §§ 495, 499. "The injury complained of as impending over his property is, its permanent occupation and appropriation to a continuing public use, which requires the divestiture of his whole right, its transfer to the company in full property, and his inheritance to be destroyed as effectively as if he had never been its proprietor. No damages can restore him to his former condition, its value to him is not money which money can replace, nor can there be any specific compensation or equivalent; his damages are not pecuniary (vide, 7 Johns. 731), his objects in making his establishment were not profit, but repose, seclusion, and a resting place for himself and family. If these objects are about to be defeated, if his rights of property are about to be destroyed, without the authority of law; or if lawless danger impends over them by persons acting under color of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of equity for a trespass, a court of equity will enjoin its commission": Bonaparte v. Camden & A. R. Co., 1 Baldw. 218, Fed. Cas. No. 1617, per Baldwin, J.

4 Lewis, Eminent Domain, § 632, and cases cited. In addition to the cases cited in the preceding notes, see St. Louis & S. F. R. Co. v. Southwestern T. & T. Co., 121 Fed. 276, 58 C. C. A. 198; Colorado

Eastern R. Co. v. Chicago, B. & Q. R. Co., 141 Fed. 898, 73 C. C. A. 132; Jones v. Florida, C. & P. R. Co., 41 Fed. 70; Dancy v. Alabama Power Co. (Ala.), 73 South. 901; Seaboard Air Line R'y Co. v. Thompson, 173 N. C. 258, 91 S. E. 1013; Midland R'y Co. v. Smith, 113 Ind. 233, 15 N. E. 256; Hudson v. Voreis, 134 Ind. 602, 34 N. E. 503 (proceedings for laying out highway invalid); Town of Hardinsburg v. Cravens, 148 Ind. 1, 47 N. E. 153 (taking land for street without compensation or notice); City of Fort Wayne v. Fort Wayne & J. R. Co., 149 Ind. 25, 48 N. E. 342 (same); Hibbs v. Chicago & S. W. R. Co., 39 Iowa, 340; State ex rel. Cotting v. Sommerville, 104 La. 74, 28 South. 977 (injunction not dissolved upon giving bond); Spurlock v. Dorman, 182 Mo. 242, 81 S. W. 412; Mayor of Frederick v. Groshon, 30 Md. 436, 96 Am. Dec. 591; Williams v. New Orleans, M. & T. R. Co., 60 Miss. 689; Zimmerman v. Kearney County, 33 Neb. C20, 50 N. W. 1126; Kime v. Cass County, 71 Neb. 677, 8 Ann. Cas. 853, 99 N. W. 546, 101 N. W. 2 (taking land for street); Folley v. Passaic, 26 N. J. Eq. 216; Murdock v. Prospect P. & C. I. R. Co., 73 N. Y. 579; Thompson v. Manhattan R'y Co., 130 N. Y. 360, 29 N. E. 264; Stratford v. City of Greenboro, 124 N. C. 127, 32 S. E. 394 (appropriating property for private use by municipality); Warner v. Columbus etc. R. Co., 39 Ohio St. 70; Ft. Worth & R. G. R. Co. v. Jennings, 76 Tex. 373, 8 L. R. A. 180, 13 S. W. 270; Cummings v. Kendall County, 7 Tex. Civ. App. 164, 26 S. W. 439 (opening road; no notice, and no order allowing damages); City of San Antonio v. Sullivan, 23 Tex. Civ. App. 658, 57 S. W. 45 (unauthorized changes in location of street after damages assessed); Olson v. City of Seattle, 30 Wash. 687, 71 Pac. 201 (dictum); Boughner v. Town of Clarksburg, 15 W. Va. 394; Wenger v. Fisher, 55 W. Va. 13, 46 S. E. 695; Spencer v. Point Pleasant & O. R. R. Co., 23 W. Va. 406; Clayton v. Gilmer County Court, 58 W. Va. 253, 2 L. R. A. (N. S.) 598, 52 S. E. 103; Lovett v. West Virginia Central Gas Co., 65 W. Va. 739, 24 L. R. A. (N. S.) 230, 65 S. E. 196; Bohlman y. Green Bay & L. P. R'y Co., 30 Wis. 105; Baier v. Hosmer, 107 Wis. 380, 83 N. W. 645.

A few cases appear to be contra to the weight of authority or depend on special facts: Atchison, T. & S. F. R. Co. v. Meyer, 62 Kan. 696, 64 Pac. 597 (no injunction against improvement of roadbed of railroad, when injury slight and capable of compensation); Jersey City v. Gardner, 33 N. J. Eq. 622 (no injunction against use for street of land condemned for street purposes, after damages assessed; remedy at law adequate); Thomas v. Grand View Beach R. Co., 76 Hun, 601, 28 N. Y. Supp. 201 (operation of railroad already con-

structed not restrained, when ejectment an adequate remedy); Raleigh & W. R'y Co. v. Glendon etc. Co., 112 N. C. 661, 17 S. E. 77; Wellington & P. R. Co. v. Cashie & C. R. & L. Co., 116 N. C. 924, 20 S. E. 964; Cherry v. Matthews, 25 Or. 484, 36 Pac. 529 (no injunction where constitution does not require prepayment of damages); Delaware County's Appeal, 119 Pa. St. 159, 13 Atl. 62 (power of taxation is sufficient security when property is taken or damaged by a municipal corporation); Colby v. City of Spokane, 12 Wash. 690, 42 Pac. 112; Rockwell v. Bowers, 88 Iowa, 88, 55 N. W. 1 (adequate remedy by certiorari to review proceedings for condemnation of street). That injunction will not issue where the defendant's title is uncertain or in dispute, see Troy & B. R. Co. v. Boston, H. T. & W. R'y Co., 86 N. Y. 107; Kanawha G. T. & E. R. Co. v. Glen Jean, L. L. & D. W. R. Co., 45 W. Va. 119, 30 S. E. 86; but that mere denial of plaintiff's title is not sufficient to prevent relief, see Birmingham Traction Co. v. Birmingham R. & E. Co., 119 Ala. 129, 24 South. 368; Mobile & M. R'y Co. v. Alabama Midland R'y Co., 123 Ala. 145, 26 South. 324; Lewis, Eminent Domain, § 633. The last four cases concern the condemnation of a right of way across the property of a rival railroad. That the owner of an easement for the use of water for mill purposes cannot restrain the taking of water by a municipality from the mill pond, if he-is not the owner of the land covered by the pond, unless his easement is materially impaired, see Bass v. City of Fort Wayne, 121 Ind. 389, 23 N. E. 259.

The giving of a sufficient bond to pay damages has been held to dispense with the necessity of a preliminary injunction: Davis v. Port Arthur Channel & Dock Co., 87 Fed. 512, 31 C. C. A. 99.

That the purchase of the land, pending condemnation proceedings, by the president of a rival railroad, for the purpose of delay and obstruction, may defeat the right to an injunction, see Piedmont & C. R'y Co. v. Speelman, 67 Md. 260, 10 Atl. 77, 293; Ocean City R. Co. v. Bray, 55 N. J. Eq. 101, 35 Atl. 839; Kanawha, G. T. & E. R. Co. v. Glen Jean, L. L. & D. W. R. Co., 45 W. Va. 119, 30 S. E. 86.

The grantor of a right of way for mining purposes may enjoin use of the railroad as a common carrier: Jackson v. Big Sandy, E. L. & G. R. Co., 63 W. Va. 18, 129 Am. St. Rep. 955, 59 S. E. 749.

The eminent domain power should be distinguished from the police power; the exercise of the latter by a city in keeping open a street which had been used by the public for many years does not present a proper case for an injunction at the suit of one claiming to own the land comprised within the street: City of Chicago v. Wright, 69 Ill. 318.

It appears that the entry may be enjoined pending appeal from the condemnation proceedings,<sup>5</sup> unless the statute declares that the right to enter is not suspended by appeal, in which case the constitutional guaranty is sufficiently satisfied by the award of damages by the inferior tribunal, and the payment, tender, or deposit of the same.<sup>6</sup>

The above cases illustrate the principle as applied to railways, streets and highways. Illustrations of its application to takings for other public uses are appended in the note.<sup>7</sup>

Sometimes equity will decline to intervene although an admitted legal right has been violated, when it appears that intervening rights of the public should be taken into consideration, and that an injunction would do serious public injury without a corresponding gain to plaintiff: Fraser v. City of Portland, 81 Or. 92, 158 Pac. 514.

- <sup>5</sup> Eidemiller v. Wyandotte City, 2 Dill. 376, Fed. Cas. No. 4313; City of Terra Haute v. Farmers' Loan & T. Co., 99 Fed. 838, 40 C. C. A. 117 (where fraud or failure to comply with statutory requirements); City of Kansas v. Kansas Pac. R'y Co., 18 Kan. 331; Travis County v. Trogdon (Tex. Civ. App.), 29 S. W. 46. Compare Seaboard Air Line R'y Co. v. Thompson, 173 N. C. 258, 91 S. E. 1013.
- 6 Bauchman v. Heinselman, 180 III. 251, 54 N. E. 313; Central Branch U. P. R. Co. v. Atchison, T. & S. F. R. Co., 28 Kan. 463; Chicago & A. R. Co. v. Maddox, 92 Mo. 469, 4 S. W. 417; Shoppert v. Martin, 137 Mo. 455, 38 S. W. 967 (no injunction where owner refuses to prosecute appeal); Lionberger v. Pelton, 62 Neb. 252, 86 N. W. 1067.
- 7 An injunction will issue when private property is about to be taken without compensation for the following purposes: For a ditch—McGhee Irr. Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 398; for a reservoir—Gardner v. Village of Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; for a school-house—Church v. Joint School District, 55 Wis. 399, 13 N. W. 272; for a telephone line—Burrall v. American Telephone & Tel. Co., 224 Ill. 266, 8 L. R. A. (N. S.) 1091, 79 N. E. 705; Canadian Pac. R. Co. v. Moosehead Telephone Co., 106 Me. 363, 20 Ann. Cas. 721, 29 L. R. A. (N. S.) 703, 76 Atl. 885. It is proper when an attempt is made, without compensation, to flood land—Wilmington Water Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083; or to build a pier in a mill-race—McMillian v. Lauer (Sup. Ct.), 24 N. Y.

§ 1880. (§ 466.) No Injunction Against Prosecution of Condemnation Proceedings.—It is to be observed that where injunction is granted against the exercise of the power of eminent domain, the entry upon or appropriation of the plaintiff's land is the specific act enjoined. No injunction lies against the prosecution of condemnation proceedings when the matter which is set up as a ground for injunction may be urged as a defense in such proceedings.<sup>8</sup>

Supp. 951. Likewise, it will issue where a city, without compensation, discharges surface water at a certain point in such a manner as to make a channel through plaintiff's land: Miller v. Morristown, 47 N. J. Eq. 62, 20 Atl. 61. When property has once been taken for public use, it cannot be taken again, unless there is an express authorization. A preliminary injunction will issue to prevent a city from taking railroad property for street purposes until it can be determined whether the two uses can exist together: City Council of Augusta v. Georgia R. & B. Co., 98 Ga. 161, 26 S. E. 499. An injunction will issue against a taking for an unauthorized use: Bigler's Ex'r v. Penn. Coal Co., 177 Pa. St. 28, 35 Atl. 112, 38 Wkly. Not. Cas. 408.

8 See Lewis, Eminent Domain, § 646, and cases cited; Eureka & K. R. R. Co. v. Cal. & N. R'y Co., 103 Fed. 897, 902 (proceedings by two rival railroads to condemn the same land; procedure provided by statute); Black Hills & N. W. R. Co. v. Tacoma Mill Co., 129 Fed. 312, 63 C. C. A. 544; St. Louis & S. F. R. Co. v. Southwestern T. & T. Co., 121 Fed. 276, 58 C. C. A. 198; Birmingham R'y & Elec. Co. v. Birmingham Traction Co., 121 Ala. 475, 25 South. 777 (no injunction, though the court in which the proceedings are pending has no jurisdiction; adequate remedy by appeal or prohibition, etc.); Winkler v. Winkler, 40 Ill. 179; East St. Louis Connecting R. Co. v. East St. Louis Union R. Co., 108 Ill. 265 (no injunction against rival railroad condemning tracks for crossing); Chicago & N. W. R'y Co. v. City of Chicago, 151 Ill. 348, 37 N. E. 842 (question of condemning for street property already taken for public use); Smith v. Goodknight, 121 Ind. 312, 23 N. E. 148; Boyd v. Logansport R. & N. T. Co., 161 Ind. 587, 69 N. E. 398; Waterloo Water Co. v. Hoxie, 89 Iowa, 317, 56 N. W. 499 (question of condemning property already appropriated to public use); Western Maryland R. Co. v. Patterson, 37 Md. 125; Detroit, G. H. & M. R'y Co. v. City of Detroit, 91 Mich. 444, 52 N. W. 52; National Docks R. Co. v. Central R. Co., 32 N. J.

§ 1881. (§ 467.) Railroads in Streets and Highways. In approaching a consideration of the vexed subject of the abutting owner's remedy in equity against railroads of various kinds in streets, it is necessary first to lay to one side two classes of cases: (1) Those holding that a railroad of some particular sort is a legitimate and proper use of the street or highway, and does not create an additional burden or servitude. This is generally

Eq. 755, 767; Kip v. New York & H. R. Co., 6 Hun (N. Y.), 24 (question of constitutionality of statute authorizing condemnation); Grafton & B. R. Co. v. Buckhannon & N. R. Co., 56 W. Va. 458, 49 S. E. 532. See, also, Morris & E. R. Co. v. Hoboken & M. R. Co., 68 N. J. Eq. 328, 59 Atl. 332. See, however, Colby v. Village of La Grange, 65 Fed. 554, where it seems to be held that the proceedings may be enjoined when they are brought for a wholly unauthorized purpose. See, also, Riley v. Charleston Union Station Co., 67 S. C. 84, 45 S. E. 149; Chestatee Pyrites Co. v. Cavenders Creek G. M. Co., 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422.

In Rutland R'y, L. & P. Co. v. Clarendon Power Co., 86 Vt. 45, 44 L. R. A. (N. S.) 1204, 83 Atl. 332, the text is cited as stating the general rule. But the court continues: "But if the matter so relied upon cannot be urged as a defense to the proceedings to condemn, equity has jurisdiction to enjoin the proceedings, and that upon the broad ground of the inadequacy of the legal remedy." See, also, Fayetteville Street R'y v. Aberdeen & Rockfish R. Co., 142 N. C. 423, 9 Ann. Cas. 683, 55 S. E. 345.

In Schneider v. City of Rochester, 160 N. Y. 165, 54 N. E. 721, reversing 33 App. Div. 458, 53 N. Y. Supp. 931, the city, being dissatisfied with the award of commissioners in proceedings to open a street, sought to apply for the appointment of new commissioners; this was enjoined, at the suit of the property owner. The latter had no remedy by appeal from the order of appointment, and thus might be subjected to all the expense and trouble of defending her title or securing her rights before numerous commissioners successively appointed.

At times an injunction may issue at the suit of the corporation to protect its rights pending suit. Thus, where a contract for the stringing of telegraph lines along a railroad right of way has expired by limitation, and the telegraph company has commenced condemnation proceedings, it may enjoin interference pending suit: Louisville & N. R. Co. v. Western Union Tel. Co., 207 Fed. 1, 124 C. C. A. 573.

held of horse and electric railroads, while the contrary, at the present day, is generally held of steam railroads. If the particular use is held to be a proper and legitimate one, the abutting owner has no substantive right to be protected by an injunction.<sup>9</sup> (2) Cases where the railroad is constructed without proper authority, and the question, therefore, is one, not of restraining the exercise of the eminent domain power, but of the remedy of the abutting owner, as one specially injured, to restrain a public nuisance.<sup>10</sup>

9 Cases holding steam railroad not an "additional servitude": Moses v. Pittsburgh, Ft. Wayne & C. R. Co., 21 Ill. 516 (since overruled); Lexington & O. R. R. Co. v. Applegate, 8 Dana (Ky.), 289, 33 Am. Dec. 497; Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R'y Co., 113 Mo. 308, 18 L. R. A. 339, 20 S. W. 658; Decker v. Evansville Suburban & N. R'y Co., 133 Ind. 493, 33 N. E. 349. See Dillon, Mun. Corp. (4th ed.), § 725 (576).

Cases holding horse or electric railway constructed in the usual manner not an additional servitude: Chicago, B. & Q. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008; Snyder v. Ft. Madison St. R'y Co., 105 Iowa, 284, 41 L. R. A. 345, 75 N. W. 179; Louisville Bagging Mfg. Co. v. Central Pass R'y Co., 95 Ky. 50, 44 Am. St. Rep. 203, 23 S. W. 592; Green v. City & Suburban R'y Co., 78 Md. 294, 44 Am. St. Rep. 288, 28 Atl. 626; Poole v. Falls Road Elec. R'y Co., 88 Md. 533, 41 Atl. 1069; Nagel v. Lindell R'y Co., 167 Mo. 89, 66 S. W. 1090; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. (2 C. E. Greene) 75, 86 Am. Dec. 252; Morris & E. R. Co. v. Newark Pass. R'y Co., 51 N. J. Eq. 379, 29 Atl. 184; West Jersey R. Co. v. Camden, G. & W. R'y Co., 52 N. J. Eq. 1, 29 Atl. 423; Budd v. Camden Horse R. Co., 61 N. J. Eq. 543, 48 Atl. 1028; Aycock v. San Antonio Brewing Ass'n, 26 Tex. Civ. App. 341, 63 S. W. 953 (street railway for transporting freight); Birmingham Traction Co. v. Birmingham R'y & Elec. Co., 119 Ala. 137, 43 L. R. A. 233, 24 South. 502, and exhaustive citation of authorities; Dillon, Mun. Corp. (4th ed.), §§ 722, 723.

10 See, for example, Garnet v. Jacksonville, St. A. & H. R. R. Co., 20 Fla. 889; Birmingham Traction Co. v. Birmingham R'y & Elec. Co., 119 Ala. 137, 43 L. R. A. 233, 24 South. 502. Post, chapter XXIV, Public Nuisance.

Granting that the railroad whose construction or operation is sought to be enjoined creates an "additional servitude" in the street, it is found that the abutting owner's remedial right to an injunction, or even his right to any remedy whatever, is, in many jurisdictions, made to depend upon the fact of his ownership of the fee of the land included in the street. If the fee is in the abutting owner, affected only by an easement in the public for legitimate street purposes, a permanent diversion of the street to other purposes, authorized by the proper public authority, constitutes a "taking" of such owner's property which will readily be enjoined if just compensation is not provided. The case is otherwise if the ownership of the street is in the municipality. This rule has been most strongly reprobated by eminent writers, as making the owner's remedial or substantive rights depend on the merest technicality; and it was thought that the departure from the rule by the courts of New York in the Elevated Railroad cases marked a period of transition, and pointed to the eventual overthrow of the rule. It can hardly be said that that result has yet been reached.

§ 1882. (§ 468.) Same; Fee of Street in Abutting Owner.—It is the almost universal rule, that the owner of land abutting upon a public street, who owns the fee in such street subject to the public easement, can enjoin the laying of tracks, and the use and occupation of such street by a steam railroad company under authority of a municipal ordinance, in such manner as to create an additional servitude upon the street, where no compensation to such owner has been ascertained or made.<sup>11</sup>

<sup>11</sup> Bond v. Pennsylvania Co., 171 Ill. 508, 49 N. E. 545, reversing 69 Ill. App. 507; O'Connell v. Chicago Terminal Transfer Co., 184 Ill. 308, 56 N. E. 355; Rock Island & P. R. Co. v. Johnson, 204 Ill. 488, 68 N. E. 549 (injunction against laying second track); O'Connor v. Southern Pac. R. Co., 122 Cal. 681, 55 Pac. 688; Schurmeier

In most of the cases no distinction appears to be made between the owner's remedial right to an injunction against a taking without compensation, when his land in thus affected with a public easement, and when he has the full beneficial use of the land. In others, the

v. St. Paul & P. R. Co., 10 Minn. 82 (Gil. 59), 88 Am. Dec. 59; Lewis v. Pennsylvania R. Co. (N. J. Eq.), 33 Atl. 932; Williams v. New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Henderson v. New York Central R. Co., 78 N. Y. 423; Hodges v. Seaboard & R. R. Co., 88 Va. 653, 14 S. E. 380; Kurtz v. Southern Pacific Co., 80 Or. 213, 155 Pac. 367, 156 Pac. 794; Harrold Bros. v. City of Americus, 142 Ga. 686, 83 S. E. 534; Ford v. Chicago & N. W. R. Co., 14 Wis. 609, 80 Am. Dec. 791; Coatsworth v. Lehigh Val. R. Co., 156 N. Y. 451, 51 N. E. 301; Mattlage v. New York El. R. Co., 35 N. Y. Supp. 704, 14 Misc. Rep. 291, affirmed without opinion, 157 N. Y. 708, 52 N. E. 1124; and see cases cited in Lewis, Eminent Domain, § 635, note 2. In the few cases, chiefly in New York, where a horse or electric railway, or a structure used in operating the latter, is held to be an additional servitude, injunction at the suit of the abutting owner in whom was the fee of the street or highway was held to be a proper remedy: See Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107, able concurring opinion of Hamersley, J.; Snyder v. Fort Madison St. R'y Co., 105 Iowa, 284, 41 L. R. A. 345, 75 N. W. 179 (injunction against unnecessary electric railway pole placed in front of plaintiff's residence to annoy); Craig v. Rochester etc. R. R. Co., 39 N. Y. 404; Spofford v. R. R. Co., 15 Daly, 162, 4 N. Y. Supp. 388; Peck v. Schenectady R. Co., 170 N. Y. 298, 63 N. E. 357 (subject re-examined in light of all the authorities, and the Craig case followed, with much reluctance, by a divided court); Dempster v. United Traction Co., 205 Pa. St. 70, 54 Atl. 501; Lange v. La Crosse & E. R. Co., 118 Wis. 558, 95 N. W. 952.

It has been held that an abutting owner who owns the fee to the center of the street cannot enjoin the construction of a railroad on the opposite side of the street, because none of his property is taken: North Pennsylvania R. Co. v. Inland Traction Co., 205 Pa. St. 579, 55 Atl. 774.

Where telephone and telegraph poles are held to impose an additional servitude, an abutting owner who owns the fee in the street may enjoin their erection until compensation is made: Donovan v. Allert, 11 N. D. 289, 95 Am. St. Rep. 720, 58 L. R. A. 775, 91 N. W. 441.

question of injunction is treated as one addressed to the discretion of the court, which should balance the relative inconvenience and injury to the parties and the public likely to result from granting or withholding the writ.<sup>12</sup> In a few jurisdictions the courts refuse

It has been held that the operation of an interurban railroad on existing street railroad tracks does not create an additional servitude which will entitle an abutting owner to an injunction: Galveston-Houston Electric R'y Co. v. Jewish Literary Soc. (Tex. Civ. App.), 192 S. W. 324.

12 In an instructive series of cases in Alabama, all the more noteworthy for the stringency of the general rule as to injunctions in eminent domain cases in that state (see ante, § 465). In Columbus & W. R'y Co. v. Witherow, 82 Ala. 190, 3 South. 23, an injunction granted restraining the defendant from the further construction, without compensation to complainant, of its embankment in a street the fee of which was owned by complainant, was dissolved upon the defendant's furnishing security deemed adequate for the damage it might do in the erection of the embankment. The court said: "The proceeding is one in restraint of a public work of great utility—the construction of a railroad—thus presenting a case in which injunctions are granted with great caution. Delay in the construction of the work may operate very oppressively against the defendant, as well as result in great injury to the public. Courts very often, in such cases, balance the question of damages to the one party, and that of benefit to the other, resulting from the maintenance of the injunction, on the one hand, and its dissolution on the other, and refuse to take any action which will cause great injury to one party, and probably be of serious detriment at the same time to the public, without corresponding advantage to the other party." In Western Railway of Alabama v. Alabama G. T. R. Co., 96 Ala. 272, 17 L. R. A. 474, 11 South. 483, a temporary injunction was dissolved, it appearing that the construction of defendant's railway would not interfere with the tracks of complainant, nor with any track it had the right to construct; that the damage to complainant would be nominal; that the defendant was not shown to be insolvent, and that to stop the work under the circumstances would probably result in grievous disaster to its enterprise, which was of a public nature, without any advantages to accrue to the complainant. See, also, Mobile & M.

to recognize any distinction as to the abutting owner's rights based on his ownership of the fee in the street, holding that there is no taking of his property, but only of the public easement in the street; and the same courts refuse to enforce by injunction the constitutional provision against "damaging" property without just compensation, unless the damaging amounts to a virtual destruction.<sup>13</sup>

§ 1883. (§ 469.) Same; Fee of Street in the Municipality.—Where the abutting owner has not retained the fee in the street, but that is vested in the municipality

R'y Co. v. Alabama M. R'y Co., 116 Ala. 51, 23 South. 57, reviewing prior cases; Hinnershitz v. United Traction Co., 199 Pa. St. 3, 48 Atl. 874.

13 Spencer v. Point Pleasant & O. R. R. Co., 23 W. Va. 406, 420ff, reviewing the then existing cases at great length, and holding that there was no "taking" of the abutting owner's fee, but only of the public easement in the street, and criticising with great force any distinction based on ownership of the fee in the street, and holding that "damaging of property for public use without just compensation" gave no right to an injunction, but only to recover damages in an action at law; unless under peculiar circumstances, as where the property is entirely destroyed in value as effectively as if it had actually been taken by the railroad company in constructing its road. All damages of a permanent character may be recovered in a single suit at law, and an injunction is therefore not necessary to avoid repeated suits at law: Smith v. Point Pleasant & O. R. R. Co., 23 W. Va. 451. The Spencer case was followed in Arbenz v. Wheeling & H. R. Co., 33 W. Va. 1, 5 L. R. A. 371, 10 S. E. 14; Watson v. Fairmount & S. R'y Co., 49 W. Va. 528, 39 S. E. 193. See, also, Planet Property etc. Co. v. St. Louis etc. R'y Co., 115 Mo. 613, 22 S. W. 616; Rische v. Texas Transportation Co., 27 Tex. Civ. App. 33, 66 S. W. 324. In Bronson v. Albion Telephone Co., 67 Neb. 111, 2 Ann. Cas. 639, 60 L. R. A. 426, 93 N. W. 201, the court said: "Where nothing is actually taken, and there is merely an injury to the rights which the abutting owner has by reason of his situation, the courts generally refuse to grant an injunction in the absence of some special circumstances."

in trust for the public, it is probably the rule still/generally held that the injury to his easements of light, air, and access caused by the authorized construction or operation of a railroad in the street constitutes no "taking" of "property" within the meaning of the constitutional inhibition, and therefore no ground for an injunction. To remedy the gross injustice and hardship of this rule, nearly all recent state constitutions have prohibited the "damaging" or "injuring" of property for public use without just compensation. This constitutional provision, however, has not, like the former, generally been construed by the courts as requiring the aid of an injunction for its enforcement. 15

14 O'Brien v. Baltimore Belt R. R. Co., 74 Md. 369, 13 L. R. A. 126, 22 Atl. 141 (statute authorizes recovery of damages for all injury); Garrett v. Lake Roland El. R'y Co., 79 Md. 280, 24 L. R. A. 396, 29 Atl. 830, and many cases cited. See, also, cases in following notes.

15 Illinois.—Doane v. Lake St. El. R. Co., 165 Ill. 510, 56 Am. St. Rep. 265, 36 L. R. A. 97, 46 N. E. 520, and cases cited; Stetson v. Chicago & E. R. Co., 75 Ill. 74; Peoria & R. I. R. Co. v. Schertz, 84 Ill. 135; Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561; Corcoran v. Chicago, M. & N. R. Co., 149 Ill. 291, 37 N. E. 68; Stewart v. Chicago General St. R'y Co., 166 Ill. 61, 46 N. E. 765; General Elec. R'y Co. v. Chicago & W. I. R. Co., 184 Ill. 588, 56 N. E. 963; Blodgett v. Northwestern El. R. Co., 80 Fed. 601, 26 C. C. A. 21; Coffeen v. Chicago, M. & St. P. R'y Co., 84 Fed. 46, 28 C. C. A. 274; but see Beeson v. City of Chicago, 75 Fed. 880.

Missouri.—Clemens v. Connecticut Mut. Life Ins. Co., 184 Mo. 46, 105 Am. St. Rep. 526, 67 L. R. A. 362, 82 S. W. 1.

Colorado.—Denver & S. F. R. Co. v. Domke, 11 Colo. 247, 17 Pac. 777; Denver, U. & P. R'y Co. v. Barsaloux, 15 Colo. 290, 10 L. R. A. 89, 25 Pac. 165; Haskell v. Denver Tramway Co., 23 Colo. 60, 46 Pac. 121.

Georgia.—See Brown v. Atlanta R. & P. Co., 113 Ga. 462, 39 S. E. 71.

A reason for making this distinction is found in the difficulty of ascertaining, before the railroad is actually in operation, the amount of damage that will be caused to abutting premises; also in the fact, sometimes referred to, that legislatures have not seen fit to provide a procedure for condemning the easements of abutting owners or appraising the damage to their property. They are therefore left to pursue their remedies at law for the recovery of such damage as they may suffer; unless, indeed, some incident such as the insolvency of the railroad company renders the collection of the damages recovered impossible, and the intervention of a court of equity essential.<sup>16</sup>

In a number of states, while the abutting owner is usually left to his legal remedy, if the operation of the railroad amounts to a total obstruction of the street or of plaintiff's access to his premises, 17 or causes a

Nebraska.—Bronson v. Albion Tel. Co., 67 Neb. 111, 2 Ann. Cas. 639, 60 L. R. A. 426, 93 N. W. 201.

But see Horton v. Grand Rapids & I. R'y Co. (Mich.), 165 N. W. 653; Peters v. Chicago & N. W. R. Co., 165 Wis. 529, 162 N. W. 916.

16 Dictum in Peoria & R. I. R. Co. v. Schertz, 84 Ill. 135.

17 Missouri.—Lockwood v. Wabash R: R. Co., 122 Mo. 86, 43 Am. St. Rep. 547, 26 S. W. 698 (street so narrow that use by railroad necessarily destroys it as a public thoroughfare, and deprives abutting owners of access to their property); Knapp, Stout & Co. v. St. Louis Transfer R'y Co., 126 Mo. 26, 28 S. W. 627 (track so close to plaintiff's building as to practically obstruct access); Schulenberg & Borckeler Lumber Co. v. St. Louis, K. & N. W. R'y Co., 129 Mo. 455, 31 S. W. 796; Sherlock v. Kansas City Belt R'y Co., 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629 (railroad in alley; injunction before running of cars has begun). In D. M. Osborne & Co. v. Missouri P. R. Co., 147 U. S. 248, 37 L. Ed. 155, 13 Sup. Ct. 299, Fuller, C. J., after reviewing the Missouri decisions and stating the general principle as to equitable relief against the exercise of the eminent domain power, makes the following general statement, which has been often quoted: "But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the

destruction of his property for the purposes for which it was used, equivalent in effect to a physical appropriation of the land, he may resort to equity for an injunction.<sup>18</sup>

§ 1884. (§ 470.) Same; New York Rule; Elevated Railroad Cases.—The New York doctrine as laid down in the "Elevated Railroad cases" appears to have, as yet, but a slight following in other states; but these cases are so notable from their vast number, the eminence of the counsel engaged in many of them, and the thoroughness with which the fundamental principles are discussed and subsidiary rules worked out, that a somewhat full statement of the chief conclusions arrived at seems called for even in a work of an elementary character. It is important to notice, however, that these conclusions are held not to apply to a steam railroad on the surface of the street, operated in such a manner as not to obstruct public traffic.

The doctrine was thus summed up in one of the leading cases of the series: "The decisions of this court have settled the rights of abutting property owners to an easement in the street occupied by the defendants' structure, for free egress and ingress, and for the free admission of light and circulation of air. That easement is property, and constitutes an interest in real estate; and because the defendants' railroad was a use of the street not originally designed, and was an appropriation to themselves of property rights, it cannot be maintained without compensation being made to the

infliction of damages in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work; and if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere."

<sup>18</sup> See cases cited ante, last section, note 13.

abutting owners for the injury inflicted upon their property and rights; and, for the annoyance caused through the operation of the road to the abutting owners, in their enjoyment of the use of their property, they are entitled to recover such damages as may be shown to be the result of the defendants' acts: Story v. New York etc. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. New York etc. Railroad Co., 104 N. Y. 268, 10 N. E. 528. Although property owners have a remedy at law for the intrusion upon their rights, yet, as the trespass is continuous in its nature, they can invoke the restraining power of a court of equity in their behalf, in order to prevent a multiplicity of suits, and they can recover the damages they have sustained, as incidental to the granting of the equitable relief: Williams v. New York Cent. R. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Henderson v. New York Central R. R. Co., 78 N. Y. 423. The violation of the property rights of abutting owners being adjudged in such an action, the awarding of damages sustained in the past from the defendants follows; they being, on equitable principles, deemed incidental to the main relief sought."19

19 Shepard v. Manhattan R'y Co., 117 N. Y. 442, 23 N. E. 30, per Gray, J. The decisions in the Story case and other elevated railroad cases are based upon the character of the structure and do not apply to a steam surface railroad operated in a reasonable way: Forbes v. Rome, W. & O. R. Co., 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 921; Drake v. Hudson R. R. Co., 7 Barb. 508. The principles of the Story and Lahr cases were again announced and explained in Abendroth v. New York El. R. Co., 122 N. Y. 1, 19 Am. St. Rep. 461, 11 L. R. A. 634, 25 N. E. 496; Kane v. Metropolitan El. R. Co., 125 N. Y. 164, 11 L. R. A. 640, 26 N. E. 278, explaining the legal basis for the doctrine of the abutter's easements in the street; Kernochan v. New York El. R. Co., 128 N. Y. 568, 29 N. E. 65; Hughes v. New York El. R. Co., 130 N. Y. 14, 28 N. E. 765; O'Reilly v. New York El. R. Co., 148 N. Y. 347, 31 L. R. A. 407, 42 N. E. 1063. See, also, Knox v. Metropolitan El. R. Co., 36 N. Y. St. Rep. 2, 12 N. Y. Supp. 848; Welsh v. Interborough Rapid Transit Co., 165 N. Y. Supp. 272, 100 Misc.

In a common-law, as distinguished from an equitable, action, the abutter can only recover such temporary damages as have been sustained up to the time of the commencement of the action, and is not entitled to damages measured by the permanent diminution in the value of his property.20 "But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides that if the conveyance is made and the money paid, no injunction shall issue. If defendant refuses to pay, the injunction issues."21 The award of damages for past injuries

Rep. 122. The doctrine of the elevated railroad cases was followed in Willamette Iron Works v. Oregon R. & N. Co., 26 Or. 224, 46 Am. St. Rep. 620, 29 L. R. A. 88, 37 Pac 1016; and appears to have been anticipated, in substance, in Scioto Val. R. Co. v. Lawrence, 38 Ohio St. 41, 43 Am. Rep. 419. In Iowa a statute provides that railroad tracks shall not be constructed in streets, etc., until damages to abutters are ascertained and compensated. The abutter may have an injunction under this statute to prevent its violation: See Harbach v. Des Moines & K. C. R. Co., 80 Iowa, 593, 11 L. R. A. 113, 44 N. W. 348.

20 Pond v. Metropolitan El. R. Co., 112 N. Y. 186, 8 Am. St. Rep. 734, 19 N. E. 487; Uline v. New York etc. R. R. Co., 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536.

21 Pappenheim v. Metropolitan El. R. Co., 128 N. Y. 436, 26 Am.
St. Rep. 486, 13 L. R. A. 401, 28 N. E. 518. See, also, McGean v. Metropolitan El. R. Co., 133 N. Y. 9, 30 N. E. 647; Van Allen v. New York El. R. Co., 144 N. Y. 174, 38 N. E. 997; Pegram v. New York

sustained being incidental to the equitable relief, the defendant is not entitled to a jury trial of such claim for damages.<sup>22</sup>

Actual damage suffered by the abutting property is of the gist of the equitable action. A court of equity is at liberty to disregard the mere technical trespass upon the abutter's rights, and to refuse an injunction, "in a case where the plaintiffs are unable to show any actual damage to their property, or loss suffered, by reason of the defendants' acts, and in the face of the fact that, by reason of the presence and operation of the elevated railroad in the street, the value of their property has greatly increased, and that it has shared equally with all the property in the vicinity in the general increase of values which has taken place."23

El. R. Co., 147 N. Y. 135, 41 N. E. 424. See, also, Woodworth v. Brooklyn El. R. Co., 29 App. Div. 1, 51 N. Y. Supp. 323 (when railroad in hands of receiver); Siegel v. New York & H. R. Co., 62 App. Div. 290, 70 N. Y. Supp. 1088; Larney v. New York & H. R. Co., 62 App. Div. 311, 71 N. Y. Supp. 27; Auchincloss v. Metropolitan El. R. Co., 69 App. Div. 63, 74 N. Y. Supp. 534, reversing 60 N. Y. Supp. 792; Lane v. Metropolitan El. R. Co., 69 App. Div. 231, 74 N. Y. Supp. 595. See, also, Muhlker v. New York & H. R. Co., 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. 522.

22 Lynch v. Metropolitan El. R. Co., 129 N. Y. 274, 26 Am. St. Rep. 523, 15 L. R. A. 287, 29 N. E. 315, ably discussing the general subject of damages as incidental to relief in equity; Shepard v. Manhattan R'y Co., 131 N. Y. 215, 30 N. E. 187; Hunter v. Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400.

23 O'Reilly v. New York El. R. Co., 148 N. Y. 347, 31 L. R. A. 407, 42 N. E. 1063, citing Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484; Kerlin v. West, 4 N. J. Eq. 449; Troy & B. R. Co. v. Boston, H. T. & W. R. Co., 86 N. Y. 123; Gray v. Railway Co., 128 N. Y. 499, 28 N. E. 498; Shepard v. Railway Co., 131 N. Y. 215, 30 N. E. 187; Hunter v. Railway Co., 141 N. Y. 281, 36 N. E. 400; Doyle v. Railway Co., 136 N. Y. 505, 32 N. E. 1008; Bookman v. Railroad Co., 147 N. Y. 298, 49 Am. St. Rep. 664, 41 N. E. 705. See, also, Purdy v. Manhattan El. R. Co., 36 N. Y. St. Rep. 43, 13 N. Y. Supp. 295; Brush v. Manhattan El. R. Co. (Com. P.), 17 N. Y. Supp. 540; Steinmetz

v. Metropolitan El. R. Co. (Sup. Ct.), 18 N. Y. Supp. 209; Pratt v. New York C. & H. R. R. Co., 90 Hun, 83, 35 N. Y. Supp. 557; Rorke v. Kings Co. El. R. Co., 22 App. Div. 511, 48 N. Y. Supp. 42; Tillson v. Manhattan R. Co., 24 App. Div. 623, 48 N. Y. Supp. 224; Marsh v. Kings Co. El. R. Co., 86 Fed. 189, 29 C. C. A. 655. Compare Maitland v. Manhattan R. Co., 9 Misc. Rep. 616, 30 N. Y. Supp. 428. The opinion of Gray, J, in the O'Reilly case, is one of the most instructive in the whole course of the elevated railroad litigation. He says, in part: "Therefore, the only ground for the claim of the plaintiffs, that they are entitled to equitable relief, is in the mere fact that the defendants have invaded their rights in the public street, without their consent, and without having first condemned the same by an exercise of the right of eminent domain. . . . But it seems to me to be perfectly clear that the court, when appealed to by the property owners to enjoin the operation by the corporation of its franchises, upon the ground that certain easements have been invaded, will consider the fact that the corporation is there for the public convenience, and is executing a quasi public work; and, if it finds that no injury is in truth inflicted, and that the property owner has suffered no actual damage, it may and should refuse to grant the relief prayed for. . . . The court recognizes the fact that the defendants had the right to appropriate the street easements by condemnation proceedings, and hence, when appealed to to enjoin them from operating their franchises, it looks into the question of the substantial nature of the damage alleged to have been done to the property, or of the loss suffered by the owner. If it is found to be such, then the court proceeds in the matter as though the proceeding was one to condemn to the defendants' uses the property appropriated, and, having ascertained the value of the property, it suspends the decree, which it finds the plaintiffs are entitled to to restrain the continuance of the defendants' acts, for a sufficient period within which to permit the defendants to acquire the right to appropriate the easements through a conveyance, as a condition of avoiding the enforcement of the decree. The proceedings by which the court ascertains and fixes the damages done to the abutting property in the deprivation of easements are, in fact, but a substitute for condemnation proceedings," etc.

Parties Plaintiff; Title, etc.: See Shepard v. Manhattan R. Co., 117 N. Y. 442, 23 N. E. 30 (joinder); Kernochan v. New York El. R. Co., 128 N. Y. 568, 29 N. E. 65 (lessor a proper plaintiff; right of action accruing after death vests in heirs, not in administrator); Hughes v. New York El. R. Co., 130 N. Y. 14, 28 N. E. 765 (evidence

of plaintiff's title); McGean v. Metropolitan El. R'y Co., 133 N. Y. 9, 30 N. E. 647 (effect of transfer of plaintiff's title pendente lite); Mitchell v. Metropolitan El. R. Co., 56 Hun, 543, 9 N. Y. Supp. 829, 134 N. Y. 11, 31 N. E. 260 (permanent damages should be paid to heirs, not to executors, of deceased owner); Hunter v. Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400 (a part of the claim for damages rests on assignment); Van Allen v. New York El. R'y Co., 144 N. Y. 174, 38 N. E. 997 (effect of conveyance pendente lite on jurisdiction of the court of equity to award damages); Pegram v. New York El. R. Co., 147 N. Y. 135, 41 N. E. 424 (same question); Domschke v. Metropolitan El. R. Co., 148 N. Y. 343, 42 N. E. 804 (conveyance pendente lite); Koeler v. New York El. R. Co., 159 N. Y. 218, 53 N. E. 1114 (pendente lite grantee may be joined as plaintiff or defendant); Mooney v. New York El. R. Co., 163 N. Y. 242, 57 N. E. 496. See, also, Welsh v. New York El. R. Co. (Com. Pl.), 12 N. Y. Supp. 545 (where plaintiff has leasehold interest, injunction only during continuance of his interest); Odell v. Metropolitan El. R. Co., 3 Misc. Rep. 335, 22 N. Y. Supp. 737; Wright v. New York El. R. Co., 78 Hun, 450, 29 N. Y. Supp. 223 (where conveyance from plaintiffs is impossible, decree should be for injunction unless defendant pay a certain sum upon conveyance, and if that could not be made, unless defendant condemn the easements); McKee v. New York El. R. Co., 79 Hun, 366, 29 N. Y. Supp. 457 (same question); Skelly v. Metropolitan El. R. Co., 1 App. Div. 51, 37 N. Y. Supp. 7, affirmed without opinion, 158 N. Y. 677, 52 N. E. 1126 (same question); Jacobson v. Brooklyn El. R. Co., 22 Misc. Rep. 281, 48 N. Y. Supp. 1072 (such claim for damages as passes to executors of owner is merely basis for common-law action).

Measure of Damages in Equity: See Drucker v. Manhattan R. Co., 106 N. Y. 157, 60 Am. Rep. 437, 12 N. E. 568; Newman v. Metropolitan El. R. Co., 118 N. Y. 618, 7 L. R. A. 289, 23 N. E. 901; Kane v. Metropolitan El. R. Co., 125 N. Y. 164, 11 L. R. A. 640, 26 N. E. 278; Pappenheim v. Metropolitan El. R. Co., 128 N. Y. 436, 26 Am. St. Rep. 486, 13 L. R. A. 401, 28 N. E. 518; Roberts v. New York El. R. Co., 128 N. Y. 455, 13 L. R. A. 499, 28 N. E. 486 (as to opinion evidence and testimony of experts); Gray v. Manhattan R. Co., 128 N. Y. 499, 28 N. E. 498 (same); Bohm v. Metropolitan El. R. Co., 129 N. Y. 576, 14 L. R. A. 344, 29 N. E. 802; Hughes v. New York El. R. Co., 130 N. Y. 14, 28 N. E. 765; Storck v. Metropolitan El. R. Co., 131 N. Y. 514, 30 N. E. 497; Becker v. Metropolitan El. R. Co., 131 N. Y. 509, 30 N. E. 499; Woolsey v. New York El. R. Co., 134 N. Y. 323, 30 N. E. 387; affirmed on rehearing, 31 N. E. 891; Sperb v.

§ 1885. (§ 471.) Changing Grade of Street; Other Uses of Streets; Vacating Streets.—Here, again, it is necessary to segregate the cases which hold that the injury caused to the abutting owner by the action of a municipal or other authority, acting within the limits of its power, in raising or lowering the grade of a street,

Metropolitan El. R. Co., 137 N. Y. 155, 20 L. R. A. 752, 32 N. E. 1050, reviewing prior cases ("the principle which should guide an award of damages to be paid by the railroad company in order to obviate the injunction is the same as in proceedings under the statute to condemn property for the railroad use"; Hunter v. Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400 (what expert testimony is admissible); Bookman v. New York El. R. Co., 147 N. Y. 298, 49 Am. St. Rep. 664, 41 N. E. 705; Jamieson v. Kings Co. El. R. Co., 147 N. Y. 322, 41 N. E. 693; Roberts v. New York El. R. Co., 155 N. Y. 31, 49 N. E. 262. See, also, Emigrant Mission Com. v. Brooklyn El. R. Co., 20 App. Div. 596, 47 N. Y. Supp. 344.

Statute of Limitations.—Since the trespass is a continuing one, the action for injunction may be maintained so long as a legal claim for the trespass exists; and no lapse of time or inaction merely on the part of the plaintiff, unless it has continued for the length of time necessary to effect a change of title in the property claimed to have been injured, is sufficient to defeat the right of the owner to damages, and, consequently, to equitable relief: Galway v. Metropolitan Elev. R. Co., 128 N. Y. 145, 28 N. E. 479.

Laches, Acquiescence and Estoppel.—Conduct not amounting to: Galway v. Metropolitan El. R. Co., 128 N. Y. 145, 13 L. R. A. 788, 28 N. E. 479; Brush v. Manhattan El. R. Co., 26 Abb. N. C. 73, 13 N. Y. Supp. 908.

Abandonment of Easements, evidenced by written consent to the building of the railroad: White v. Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Heimburg v. Manhattan R. Co., 162 N. Y. 352, 56 N. E. 899, 19 App. Div. 179, 45 N. Y. Supp. 999; see, also, Bellew v. New York, W. & C. Traction Co., 47 App. Div. 447, 62 N. Y. Supp. 242; or where plaintiff purchased from city, which had given consent: Herzog v. New York El. R. Co., 76 Hun, 486, 27 N. Y. Supp. 1034, affirmed without opinion, 151 N. Y. 665, 46 N. E. 1148. As to the effect of consent conditional on compensation, see Kornder v. Kings Co. El. R. Co., 41 App. Div. 357, 58 N. Y. Supp. 518.

confers no right of action whatever upon the abutter;<sup>24</sup> and cases holding that such structures as electric light poles,<sup>25</sup> telegraph or telephone poles, and the like, create no "additional servitude" in the street. If the abutter owns the fee in the street, and such structures are held to create an additional servitude, and are shown to abridge the right of the abutter to the use of the street as a means of ingress and egress, or otherwise, a proper case is made for an injunction until compensation is made.<sup>26</sup>

In the limited class of cases where the injury caused by a change of grade is held to constitute a "taking" of the abutter's property, it seems that an injunction may issue in accordance with the general principles governing injunction against the exercise of the eminent domain power.<sup>27</sup>

24 See, for example, Fellowes v. City of New Haven, 44 Conn. 240, 26 Am. Rep. 447; Churchill v. Beethe, 48 Neb. 87, 35 L. R. A. 442, 66 N. W. 992 (change of grade diverting surface water on to plaintiff's land); Talbot v. New York & H. R. Co., 151 N. Y. 155, 45 N. E. 382 (change of street grade in constructing bridge over railroad); and see Lewis, Eminent Domain, §§ 92-109. For further cases holding, in general, that the exercise of discretionary powers by municipal authorities will not be enjoined, see ante, § 342.

Loeber v. Butte General Elec. Co., 16 Mont. 1, 50 Am. St. Rep. 468, 39 Pac. 912. See monographic note, 28 Am. St. Rep. 229.

26 Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690. See, also, Donovan v. Allert, 11 N. D. 289, 95 Am. St. Rep. 720, 58 L. R. A. 775, 91 N. W. 441. Where the abutter's cause of action is dependent upon his ownership of the fee in the street, a bill by him to enjoin a telephone company from laying conduits under the sidewalk is demurrable, when it does not allege that the plaintiff owned the fee in the walk or street, or that the walk or street was dedicated to the public by one who at the time owned the fee: Erwin v. Central Union Tel. Co., 148 Ind. 365, 46 N. E. 667, 47 N. E. 663. For a collection of authorities as to the right to protect the right of ingress and egress by injunction, see 35 L. R. A. (N. S.) 193, note.

27 See Vanderlip v. City of Grand Rapids, 73 Mich. 522, 16 Am.

Where, under the modern constitutional provision, "damaging" property for public use without compensation is prohibited, and paying or securing the compensation is treated as a condition precedent to doing the work which causes the damage, an injunction will usually be granted until the condition is complied with. The considerations which should guide the court in granting or refusing the injunction at the suit of the abutting owner in such cases are thus stated in a most instructive opinion by Judge Brewer:

"First. A chancellor, in determining an application for an injunction, must regard not only the rights of the complainant which are sought to be protected, but the injuries which may result to the defendant or to others from the granting of the injunction. If the complainant's rights are of a trifling character, if the injury which he would sustain from the act sought to be enjoined can be fully and easily compensated, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer a large inconvenience if the contemplated act was restrained, the lesser right must yield to the larger benefit; the injunction should be refused, and the complainant remitted to his action for damages. This rule has been enforced in a multitude of cases, and under a variety of circumstances, and is one of such evident

St. Rep. 597, 3 L. R. A. 247, 41 N. W. 677, where the injury was done by raising the grade, thereby burying a portion of the dwelling-house and barn of the abutting owner. In those jurisdictions, like New York, where the plaintiff's right of action with reference to an additional servitude is not dependent upon his ownership of the fee, it seems that he cannot enjoin such a structure as a telephone conduit, authorized to be laid in the street, in the absence of a showing of substantial pecuniary damage to his property: Castle v. Bell Tel. Co. of Buffalo, 30 Misc. Rep. 38, 61 N. Y. Supp. 743, following the principle of O'Reilly v. Railroad Co., ante, § 470, at note 23.

justice as needs no citation of authorities for its support.

"Second. When the defendant has an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all those cases the legislature has placed at the command of the defendant means for ascertaining the value of the property. In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury to the complainant was large or small, but have contented themselves with holding that as the defendant had full means for ascertaining such compensation, it was his first duty to use such means, determine and pay the compensation, and until he did so the taking of the property would be enjoined.

"Third. Where the defendant has an ultimate right to do the act sought to be enjoined upon certain conditions, and the means of complying with such conditions are not at his command, the courts will endeaver to adjust their orders so on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of his ultimate rights. Thus, in the case at bar, the defendant has of course the ultimate right to grade this street. As a condition of such right is a payment of damages, but it has no means of ascertaining those damages; no tribunal has been created, no provision of law made, for their ascertainment. Hence, if possible, the court should provide for securing to the defendant this ultimate right, and at the same time give to the

complainant the substantial benefit of the prior conditions." It was further held that in applying the rule first stated to a case like the one at bar, the court should have principal regard to three matters, viz.: the amount of injury to the complainant, the solvency of the defendant, and the importance to the public of the proposed improvement.<sup>28</sup>

The courts are not in accord on the question, what right to compensation, if any, is given to owners of property abutting on a street by the constitutional provisions cited in this chapter, consequent on the authorized vacating of the street by the proper authorities.<sup>29</sup> Granting that such right to compensation exists, in a

28 McElroy v. Kansas City, 21 Fed. 257, 261, et seq., per Brewer, Cir. J.; approved in D. M. Osborne & Co. v. Missouri Pac. R. Co., 147 U. S. 248, 37 L. Ed. 155, 13 Sup. Ct. 299. It was found that the injury to the complainant's lot would be serious; that the defendant was unquestionably solvent; and that the improvement was not one of pressing public necessity. A restraining order was issued, with a provision for the appointment of commissioners by the court to ascertain and report the complainant's damages, and for vacating the injunction on payment of such damages. See, also, in support of the plaintiff's right to an injunction under the "damaged" clause of the constitution, Brown v. City of Seattle, 5 Wash. 35, 18 L. R. A. 161, 31 Pac. 313, 32 Pac. 214; Searle v. City of Lead, 10 S. D. 312, 39 L. R. A. 345, 73 N. W. 101. Contra, Moore v. City of Atlanta, 70 Ga. 611; compare Hurt v. City of Atlanta, 100 Ga. 280, 28 S. E. 65 (no injunction against bridge in street where no actual damage shown). In the well-considered case of Geurkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570, it was held that a city should be enjoined from so changing a natural watercourse as to damage an abutting owner's property by preventing a free access to and use thereof, unless compensation for such damage should be first made, or paid into court, for him.

Where it is held that the payment of consequential damages is not a condition precedent, no injunction will issue to prevent a change of grade: Clemens v. Connecticut Mut. Life Ins. Co., 184 Mo. 46, 105 Am. St. Rep. 526, 67 L. R. A. 362, 82 S. W. 1.

<sup>29</sup> See Lewis, Eminent Domain, § 134.

given case, the owner's right to an injunction until damages are paid or secured would seem to depend on the usual principles regulating injunction against the exercise of the eminent domain power, where the abutter's easements in the street are taken or impaired.<sup>30</sup>

§ 1886. (§ 472.) Acquiescence.—The equitable doctrine of acquiescence is freely applied to cases involving eminent domain rights. The underlying principle of the constitutional provisions allowing the taking of private property is that it is to be devoted to public use. Hence, when a landowner stands by until the public has acquired an interest in the use, there is a strong reason for applying the doctrine, in addition to the familiar grounds governing its application to other cases. The United States supreme court in a recent case<sup>31</sup> has laid down the rule in no uncertain language. "If one, aware of the situation, believes he has certain legal

30 That injunction will issue at the suit of owner whose property abuts on the part vacated, or whose access to his property is destroyed by the vacating, but not where other means of access remain to the owner, see McQuigg v. Cullins, 56 Ohio St. 649, 47 N. E. 595; Kinnear v. Beatty, 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341; Glasgow v. City of St. Louis, 107 Mo. 198, 17 S. W. 743; Wooters v. City of Crockett, 11 Tex. Civ. App. 474, 33 S. W. 391. See, also, Parker v. Catholic Bishop of Chicago, 146 Ill. 158, 34 N. E. 473 (where property is merely injured, tender of compensation is not a condition precedent to exercise of eminent domain power); McLachlan v. Incorporated Town of Gray, 105 Iowa, 259, 74 N. W. 773 (when certiorari an adequate remedy); Prince v. McCoy, 40 Iowa, 533 (no injunction where plaintiff not injured). In Oler v. Pittsburgh, C., C. & St. L. R. Co., 184 Ind. 431, 111 N. E. 619, it was held that the owner has an adequate remedy at law.

31 City of New York v. Pine, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. 592, quoting Pom. Eq. Jur., § 418, and many cases. See, also, Goodin v. Cincinnati & W. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95; Bravard v. Cincinnati, H. & I. R. Co., 115 Ind. 1, 17 N. E. 183; Midland R'y Co. v. Smith, 135 Ind. 348, 35 N. E. 284; Midland R'y Co. v. Smith, 113 Ind. 233, 15 N. E. 256.

rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted and the right waivedespecially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to enforce those rights, and, in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal." Accordingly, when a landowner stands by and makes no attempt to enjoin a railroad company from building over his land until large expenditures have been made, or the road has been completed, injunctive relief will be denied, and the party will be left to his remedy at law for damages.<sup>32</sup> The same principle applies to the laying of pipes or to a taking for any other public use.33

32 Midland R'y Co. v. Smith, 135 Ind. 348, 35 N. E. 284; Louisville, N. A. & C. R'y Co. v. Beck, 119 Ind. 124, 21 N. E. 471; Ross v. Elizabeth R. R. Co., 2 N. J. Eq. 422; Erie R'y Co. v. Delaware, L. & W. R. Co., 21 N. J. Eq. 283; Greenhalgh v. Manchester & B. R'y Co., 3 Mylne & C. 784; Pensacola & A. R. Co. v. Jackson, 21 Fla. 146; South Atlantic Waste Co. v. Raleigh, C. & S. R'y Co., 167 N. C. 340, 83 S. E. 618; Schuster v. Milwaukee Electric R'y & Light Co., 142 Wis. 578, 126 N. W. 26. And the rule, of course, applies when the road is built at the owner's instigation: Pettibone v. La Crosse & M. R. Co., 14 Wis. 443.

33 Biddler v. Wayne Waterworks Co., 190 Pa. St. 94, 42 Atl. 380; Kincaid v. Indianapolis N. G. Co., 124 Ind. 577, 19 Am. St. Rep. 113, 8 L. R. A. 602, 24 N. E. 1066. But where plaintiff does not learn of the construction until after it is completed, he is not estopped: Fraser v. City of Portland, 81 Or. 92, 158 Pac. 514. Where the injunction is sought for the protection of a legal right, mere delay will not bar relief; Burrall v. American Telephone & Tel. Co., 224 Ill. 266, 8 L. R. A. (N. S.) 1091, 79 N. E. 705.

And although permission is granted to take upon the distinct understanding that compensation is to be made, an injunction will not issue, after the work has been done, for the purpose of enforcing payment.<sup>34</sup> The doctrine also applies to cases involving the rights of railroads in streets.<sup>35</sup>

§ 1887. (§ 473.) Assessment of Damages by the Court, With Injunction as Alternative to Their Payment.—"Where a corporation which has the right to acquire property by an exercise of the power of eminent domain has taken possession of property, and has

Balance of Injury.—The court refused to consider the inconvenience to the public from the granting of the injunction in Burrall v. American Telephone & Tel. Co., 224 Ill. 266, 8 L. R. A. (N. S.) 1091, 79 N. E. 705.

34 Florida Southern R. Co. v. Hill, 40 Fla. 1, 74 Am. St. Rep. 124, 23 South, 566.

35 Hinnershitz v. United Traction Co., 199 Pa. St. 3, 48 Atl. 874; Baltimore & O. R. Co. v. Strauss, 37 Md. 237; Ferguson v. Covington & C. El. R. & T. & B. Co., 108 Ky. 662, 57 S. W. 460; Byron v. Louisville & N. R. Co., 22 Ky. Law Rep. 1007, 59 S. W. 519; Heilman v. Lebanon & A. St. R'y Co., 175 Pa. St. 188, 34 Atl. 647, 180 Pa. St. 627, 37 Atl. 119. In the New York Elevated Railroad cases the doctrine of laches, as distinguished from estoppel, is held inapplicable upon this principle: "It must be regarded as settled in this state that the doctrine of acquiescence or laches as a defense to an equity action is limited to actions of an equitable nature exclusively, or to those where the legal right has expired, or the party has lost his right of property by prescription or adverse possession; and that, where a legal right is involved, and upon grounds of equity jurisdiction the courts have been called upon to sustain the legal right, the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitute no defense": Syracuse Solar Salt Co. v. Rome, W. & O. R. Co., 67 Hun, 153, 22 N. Y. Supp. 321. See, also, Galway v. Metropolitan El. R. Co., 128 N. Y. 145, 13 L. R. A. 788, 28 N. E. 479; Brush v. Manhattan El. R. Co., 13 N. Y. Supp. 908. In the latter case relief was allowed ten years after the construction of the road. The same rule is applied in Wisconsin: Schuster v. Milwaukee Electric R'y & Light Co., 142 Wis. 578, 126 N. W. 26.

erected or is engaged in the erection of structures thereon, but has not complied with some condition precedent necessary to render its acts in all respects lawful (such, for instance, as a failure on its part to pay some person the damages necessarily incident to the maintenance of the structure), and such person appeals to a court of equity for an injunction to restrain the maintenance or to compel the removal of the structure, the court to which such appeal is made has the power to determine the amount of unpaid damages, and to withhold an injunction, and direct that the structure be permitted to remain and be operated, provided the assessed damages are paid. Courts of equity will, as it seems, the more readily pursue such a course when important public interests are at stake, and a contrary course would be productive of much public inconvenience and annoy-This rule applies with special force when the ance. ''36 complainant, by making no objection, acquiesces in the work. It finds frequent application in the New York Elevated Railroad cases, which are discussed elsewhere in this chapter.<sup>37</sup>

36 St. Paul, M. & M. R'y Co. v. Western Union Tel. Co., 118 Fed. 497, 55 C. C. A. 263, per Thayer, Cir. J. See, also, City of New York v. Pine, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. 592; McElroy v. Kansas City, 21 Fed. 257; Cowan v. Southern R'y Co., 118 Ala. 554, 23 South. 754; Benjamin v. Brooklyn Union El. R. Co., 120 Fed. 428. The issuance of an injunction was postponed in Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215; Myers v. Duluth T. R'y Co., 53 Minn. 335, 55 N. W. 140; Kendall v. Missisquoi & C. R. R. Co., 55 Vt. 438. See the following English cases: Wood v. Charing Cross R'y Co., 33 Beav. 290; Cozens v. Bognor R'y Co., 1 Ch. App. 594; Armstrong v. Waterford & L. R'y Co., 10 Ir. Eq. R. 60. Where the court refuses an injunction sought by the company, it will not retain the case to assess the damages: Western Union Tel. Co. v. Louisville & N. R. Co., 243 Fed. 687.

<sup>37</sup> See ante, § 470.

## CHAPTER XXI.

## INJUNCTIONS TO PREVENT OR RESTRAIN THE COMMISSION OF TORTS IN GENERAL; TO RESTRAIN CRIMINAL ACTS.

## ANALYSIS.

§ 474. The estates and interests generally legal.

§ 475. Kinds and classes of torts restrained.

§ 476. Criminal acts—In general.

§ 477. Applications of the principle.

§ 478. Same—Public nuisance—Suits by individuals.

§ 479. Same—Same—Suit by government.

§ 480. Same—Right of government to enjoin acts analogous to nuisance.

§ 481. Exception—Libel.

§ 1888. (§ 474.) The Estates and Interests Generally Legal.—"The estates, interests, and primary rights to be secured by injunctions of this kind are in most instances legal; and the injunctions themselves, as a class, are frequently described as those for the protection of legal rights and interests. So far as they do thus sustain and enforce legal rights, they are, of course, supplementary to or in lieu of the legal remedies which courts of common law originally gave, and perhaps now give, by action, under the same circumstances. For this reason, the general test as stated in a former paragraph applies with special force. The inadequacy of the legal remedies is the criterion which determines the exercise of this preventive jurisdiction; and the criterion is enforced, especially by the American courts, with great strictness."1

<sup>1</sup> Pom. Eq. Jur., § 1346.

Kinds and Classes of Torts Re-(§ 475.) strained.—"The legal remedy is ordinarily considered as adequate in cases of torts to the person, and to property held by a legal title, and equity does not interfere. There are, however, certain species of torts, in respect to each of which, as a class, it is settled that the legal remedy is generally inadequate, so that equity will generally interfere to prevent the wrong by injunction. There are other species of torts, in respect to each of which, as a class, the legal remedy is adequate, but may become inadequate, in individual instances, from their particular circumstances, so that in those instances an injunction will be granted. In the kind of torts for which the legal remedy is generally inadequate, so that an injunction is a proper remedy, the title of the injured party must be clear, the injury real, and not merely temporary or transient. They are waste, nuisance, including interference with easements, servitudes, and similar rights, infringements of patent rights, of copyrights, of trade-marks, and of other intangible property rights, the pecuniary value of which cannot be certainly estimated, such as literary property in manuscript writings and good-will. In ordinary trespasses the injured party is left to his remedy of damages, but the circumstances of a trespass to property—especially to real property-may be such that the compensatory remedy is inadequate, and a court of equity will prevent the wrong by injunction."2

§ 1890. (§ 476.) Criminal Acts—In General.—A court of equity is in no sense a court of criminal jurisdiction. Its primary province is the protection of property rights. Hence, an injunction will not be granted to restrain an

<sup>2</sup> Pom. Eq. Jur., § 1347. This section is cited, to the point that the plaintiff must show a clear title, in Perkins Lumber Co. v. Wilkinson, 117 Ga. 394, 43 S. E. 696.

act merely criminal, where no property right is directly endangered thereby.3 Thus, an act morally wrong, such as gambling, will not be enjoined at the suit of an individual;4 nor will a violation of a Sunday law;5 nor a violation of a statute, where no property rights are involved.6 But where property rights are endangered, the fact that the acts are criminal will not prevent the court from exercising its jurisdiction. The United States supreme court, in a leading case, has laid down the rule as follows: "Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."7

<sup>3</sup> Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106; Cope v. District Fair Ass'n, 99 Ill. 489, 39 Am. Rep. 30; Ocean City Ass'n v. Schurch, 57 N. J. Eq. 268, 41 Atl. 914; People ex rel. L'Abbe v. District Court of Lake Co., 26 Colo. 386, 46 L. R. A. 850, 58 Pac. 604; Tiede v. Schneidt, 99 Wis. 201, 74 N. W. 798; State ex rel. Gibson v. Chicago, B. & Q. R. Co. (Mo. App.), 191 S. W. 1051; Mercdith v. Triple Island Gunning Club, 113 Va. 80, Ann. Cas. 1913E, 531, 38 L. R. A. (N. S.) 286, 73 S. E. 721. Thus, the court will not, in a divorce decree, enjoin a party from remarrying, although such remarriage may be a crime: People v. Prouty, 262 Ill. 218, Ann. Cas. 1915B, 155, 51 L. R. A. (N. S.) 1140, 104 N. E. 387.

<sup>4</sup> Cope v. District Fair Ass'n, 99 Ill. 489, 39 Am. Rep. 30; People ex rel. L'Abbe v. District Court of Lake Co., 26 Colo. 382, 46 L. R. A. 850, 58 Pac. 604.

Ocean City Ass'n v. Schurch, 57 N. J. Eq. 268, 41 Atl. 914; York
 v. Yzaguairre, 31 Tex. Civ. App. 26, 71 S. W. 563.

<sup>6</sup> Tiede v. Schneidt, 99 Wis. 201, 74 N. W. 798.

 <sup>7</sup> In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900; State
 v. Woolfolk, 269 Mo. 389, 190 S. W. 877. Where criminal prosecu-

§ 1891. (§ 477.) Applications of the Principle.— The instances of the exercise of this jurisdiction are many and various. All that is necessary is a state of fact which ordinarily gives rise to a right for injunctive relief. Thus, an injunction has been granted to restrain a criminal trespass on oyster-beds;8 and to restrain socalled "ticket scalpers" from disposing of "round-trip" tickets in violation of a penal statute.9 Recently the courts have entertained many applications for injunctive relief against criminal acts by labor leaders and organizations; and the same principle has been applied. Thus, it is now clearly settled that a court of equity will enjoin the criminal intimidation of workingmen, in order to protect the property interests of their employers.<sup>10</sup> Similarly, the court will enjoin strikers from committing criminal acts of violence. 11 And likewise, it will

tion will effectually redress the wrong, a court of equity ordinarily will not interfere. And the mere fact that sworn officers refuse to enforce the law will not authorize the interposition of equity: Heber v. Portland Gold Min. Co. (Colo.), 172 Pac. 12, L. R. A. 1918D, 681; People v. District Court, 26 Colo. 386, 46 L. R. A. 850, 58 Pac. 604. And the mere fact that it is difficult to enforce the law is no ground for relief. Thus, an assay concern will not be enjoined from buying ore stolen from plaintiff: Heber v. Portland Gold Min. Co. (Colo.), 172 Pac. 12, L. R. A. 1918D, 681; Daniels v. Portland Gold Min. Co., 202 Fed. 637, 45 L. R. A. (N. S.) 827, 121 C. C A. 47. But see contra, Goldfield Consol. Mines Co. v. Richardson, 194 Fed. 198.

- <sup>8</sup> Jones v. Oemler, 110 Ga. 202, 35 S. E. 375. Misappropriation of water by a junior appropriator may be enjoined: Rogers v. Nevada Canal Co., 60 Colo. 59, Ann. Cas. 1917C, 669, 151 Pac. 923.
- 9 Nashville & St. L. R'y Co. v. McConnell, 82 Fed. 65 (dictum). See post, chapter XXIX.
- 10 Cons. Steel & Wire Co. v. Murray, 80 Fed. 811; Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 722, 44 N. E. 1077; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106; Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336, 127 Am. St. Rep. 235, 17 L. R. A. (N. S.) 848, 62 S. E. 236. See post, chapter XXVIII.
  - 11 Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n, 59

restrain a criminal conspiracy of any number of people to injure property.<sup>12</sup> These applications of the rule, while recent, are still in accordance with well-established equitable principles, and will be discussed fully and in detail in a later chapter.

§ 1892. (§ 478.) Same—Public Nuisance—Suits by Individuals.—One of the most frequent applications of the principle is to suits by individuals to restrain public nuisances. It is a familiar principle of law that an individual cannot maintain a suit to abate or to recover damages for a public nuisance unless he suffers some special damage different and other from that suffered by the rest of the community. Hence it follows that equity will not enjoin a public nuisance at the suit of an individual unless he has suffered or is likely to suffer such damage as would entitle him to maintain an action at law. "Where the injury resulting from the nuisance is, in its nature, irreparable, as when loss of health, loss of trade or destruction of the means of subsistence, or permanent ruin to property will ensue from the wrongful act or erection, courts of equity will interfere by injunction, in furtherance of justice and the violated rights of property." Thus, a party specially injured may enjoin the maintenance of a house of ill-fame,

- N. J. Eq. 49, 46 Atl. 208; Cœur d'Alene Cons. & Min. Co. v. Miners' Union of Wardner, 51 Fed. 260, 19 L. R. A. 382. See post, chapter XXVIII.
- 12 Arthur v. Oakes, 63 Fed. 310, 25 L. R. A. 414, 11 C. C. A. 209; Elder v. Whitesides, 72 Fed. 724; Davis v. Zimmerman, 91 Hun, 489, 36 N. Y. Supp. 303; Longshore Printing Co. v. Howell, 26 Or. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547.
- 13 Wahle v. Reinback, 76 Ill. 322; Barrett v. Mt. Greenwood Cemetery Ass'n, 159 Ill. 385, 50 Am. St. Rep. 168, 31 L. R. A. 109, 42 N. E. 891. See post, chapter XXIV. This section of the text is cited in Stoutemeyer v. Sharp, 89 Ark. 175, 21 L. R. A. (N. S.) 74, 116 S. W. 189.

although it be a crime to use property for such a purpose.<sup>14</sup> Likewise, a person who would suffer a special injury by an explosion may obtain an injunction to restrain the criminal storage of nitroglycerin within the limits of a city. 15 Again, an injunction will be granted to a person specially injured to prevent the removal of a wooden building from outside to within the fire limits of a town in violation of an ordinance,16 or to restrain the erection of such a building within the fire limits, 17 where the act if carried out would amount to a nuisance; but the mere violation of the ordinance is no ground for relief unless the acts themselves actually constitute a nuisance.18 Again, an individual may obtain an injunction to restrain the criminal sale of liquor when he is specially injured thereby. In such a case a clear injury to property greater than that suffered by the general public must be shown.19

While, independently of statute, a private individual cannot maintain an action to restrain a public nuisance unless he has suffered special, pecuniary or property injury, it seems that there is no objection to such an action without such injury when a statute authorizes it. "It is surely within the power of the legislature to designate the surely within the power of the legislature."

- 14 Cranford v. Tyrrel, 128 N. Y. 341, 28 N. E. 514. But see Neaf v. Palmer, 103 Ky. 496, 41 L. R. A. 219, 45 S. W. 506.
- 15 People's Gas Co. v. Tyner, 131 Ind. 277, 31 Am. St. Rep. 433,16 L. R. A. 443, 31 N. E. 59.
- 16 Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333.
  - 17 Village of St. John v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671.
- 18 Village of New Rochelle v. Lang, 75 Hun, 608, 27 N. Y. Supp. 600; Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446; Inc. Town of Rochester v. Walters, 27 Ind. App. 194, 60 N. E. 1101.
- 19 O'Brien v. Harris, 105 Ga. 732, 31 S. E. 745; Detroit Realty Co. v. Barnett, 156 Mich. 385, 21 L. R. A. (N. S.) 585, 120 N. W. 804. But not, in the absence of statute, when he is not specially injured: Campbell v. Jackman Bros., 140 Iowa, 475, 27 L. R. A. (N. S.) 288, 118 N. W. 755.

nate the persons at whose suit a nuisance may be enjoined and abated. The reason for the rule which formerly obtained, that a private action will not lie for a public nuisance without special damages, was that to authorize private actions would create a multiplicity of suits, one being as well entitled to bring an action as another. But because the enforcement of a statute may create a multiplicity of actions is no ground for declaring it unconstitutional.... There can be no doubt that it is within the power of the legislature to designate the person or class of persons who may maintain actions to restrain and abate public nuisances, and when that is done the action is for all purposes an action instituted in behalf of the public, the same as though brought by the attorney-general or public prosecutor."20 Under such a statute, the plaintiff in the case cited was granted an injunction to restrain defendant from criminally selling liquor, although the plaintiff could show no special damage.

§ 1893. (§ 479.) Same—Same—Suit by Government. As a public nuisance concerns the public generally, it is the duty of the government to take measures to abate or enjoin it. Hence it follows that the government can obtain an injunction to restrain a public nuisance, without showing any property right in itself. The duty of protecting the property rights of all its citizens is sufficient to warrant issuing the injunction. Therefore, wherever a public nuisance is shown, equity must enjoin it at the suit of the government. "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated, is a public

20 Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641. As to the right of the legislature to authorize such suits by individuals, see Ex parte Warfield, 40 Tex. Cr. R. 413, 76 Am. St. Rep. 724, 50 S. W. 933; Ex parte Allison, 48 Tex. Cr. App. 634, 13 Ann. Cas. 684, 3 L. R. A. (N. S.) 622, 90 S. W. 492.

nuisance."<sup>21</sup> This definition does not include all public nuisances, by any means; but it includes a class particularly covered by the principle under discussion. Injunctions obtained by the state to restrain the criminal sale of intoxicating liquors are among the most numerous of this class. Writs of this kind have been granted to restrain violations of prohibition laws,<sup>22</sup> and to re-

21 This section is cited with approval in State v. Lindsay, 85 Kan. 79, 35 L. R. A. (N. S.) 810, 116 Pac. 207. See State v. Crawford, 28 Kan. 726, 42 Am. Rep. 182; State ex rel. Gibson v. Chicago, B & Q. R. Co. (Mo. App.), 191 S. W. 1051. But see State v. Ehrlick, 65 W. Va. 700, 23 L. R. A. (N. S.) 691, 64 S. E. 935, where it is held that equity will not enjoin a public nuisance unless property or personal rights are involved.

22 State v. Crawford, 28 Kan. 726, 42 Am. Rep. 182; State v. Greenway, 92 Iowa, 472, 61 N. W. 239; State v. Marston, 64 N. H. 603, 15 Atl. 222. In State v. Chicago, B. & Q. R. Co., 88 Neb. 669, 34 L. R. A. (N. S.) 250, 130 N. W. 295, the state was granted an injunction to enforce an act prohibiting intoxication and the sale of intoxicating liquors on railroad trains. The case of Manor Casino v. State (Tex.), 34 S. W. 769, seems contra to the proposition laid down in the text. The court there held that in the absence of statute equity will not enjoin the criminal sale of liquor at the suit of the state, unless property rights are involved. It is possible that the cases may be reconciled on the theory that the sale of liquor is not of itself a nuisance. While the legislature cannot declare every act a nuisance (State v. Saunders, 66 N. H. 39, 18 L. R. A. 646, 25 Atl. 588), it can declare such an act as selling liquor to be a nuisance. When an act is a nuisance it prima facie affects property rights, and hence it can clearly be enjoined. Thus, where criminally selling liquor is a public nuisance, as it apparently is in Kansas, Iowa and New Hampshire, equity will interfere; where it is not, equity will not interfere: State v. Marshall, 100 Miss. 626; Ann. Cas. 1914A. 434, 56 South. 792. In Kentucky, it is held that in the absence of statute a court of equity will not, at the suit of the state, enjoin the use of a building for the illegal sale of intoxicating liquor on Sunday. The state should proceed in the criminal courts: Commonwealth v. Ruh, 173 Ky. 771, L. R. A. 1917D, 283, 191 S. W. 498. Missouri, an injunction against illegal shipment of liquor into prohibition territory has been refused: State ex rel. Gibson v. Chicago. strain the maintenance of gambling-houses.<sup>23</sup> Where prizefighting is regarded as a public nuisance, the state may enjoin individuals from taking any part in such contests, and from in any way aiding therein.<sup>24</sup> Of course, cases involving purprestures<sup>25</sup> or in which the

B. & Q. R. Co. (Mo. App.), 191 S. W. 1051. In Arkansas, an injunction will not issue to prevent a carrier from transporting intoxicating liquor, although such act may aid in the commission of a crime: United States Express Co. v. State, 99 Ark. 633, 35 L. R. A. (N. S.) 879, 139 S. W. 637. Contra, State v. Adams Express Co., 219 Fed. 794, L. R. A. 1916C, 291, 135 C. C. A. 464. Compare State v. Baltimore & Ohio R. Co., 78 W. Va. 526, L. R. A. 1916F, 1001, 89 S. E. 288.

Bawdy-houses.—State v. Ellis (Ala.), L. R. A. 1918D, 816 (and see cases cited in note), 78 South. 71; People v. Clark, 268 Ill. 156, Ann. Cas. 1916D, 785, 108 N. E. 994. Contra, Laymaster v. Goodin, 260 Mo. 613, Ann. Cas. 1916C, 452, 168 S. W. 754.

Sunday law.—In Arkansas, an injunction will not issue at the suit of the state to prevent the operation of a theater on Sunday in violation of law: Lyric Theater Co. v. State, 98 Ark. 437, 33 L. R. A. (N. S.) 325, 136 S. W. 174.

Bullfighting.—Injunction granted: State v. Canty, 207 Mo. 439, 123 Am. St. Rep. 393, 13 Ann. Cas. 787, 15 L. R. A. (N. S.) 747, 105 S. W. 1078.

23 State v. Noyes, 30 N. H. 279; Jones v. State, 38 Okl. 218, Ann. Cas. 1915C, 1031, 44 L. R. A. (N. S.) 161, 132 Pac. 319. The case of State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478, which seems contra, may be supported on the theory that gambling is not a public nuisance in Texas.

Pool-rooms.—Respass v. Commonwealth, 131 Ky. 807, 21 L. R. A.(N. S.) 836, 115 S. W. 1131.

24 Columbian Athletic Club v. State, 143 Ind. 98, 52 Am. St. Rep. 407, 28 L. R. A. 727, 40 N. E. 914.

25 Attorney-General v. Cohoes Co., 6 Paige Ch. 133, 29 Am. Dec. 755.

Obstruction of stream.—State v. Columbia Water Power Co., 82 S. C. 181, 129 Am. St. Rep. 876, 17 Ann. Cas. 343, 22 L. R. A. (N. S.) 435, 63 S. E. 884.

defendant is emptying refuse into a public stream,<sup>26</sup> are clearly within the general principle.

§ 1894. (§ 480.) Same — Right of Government to Enjoin Act Analogous to Nuisance.—While the right of the government to obtain an injunction to restrain criminal acts is not confined strictly to cases of nuisance, it would seem that it should be limited to cases closely analogous. Such relief, if applied to criminal acts in general, would supersede the criminal law and deprive parties of the right to a jury trial. Where the property rights of many citizens are involved, it is proper for the government, on their behalf, to invoke the powers of equity; and it would seem that only in such a case should the jurisdiction be assumed.<sup>27</sup> By statute, it is

26 People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374; Commonwealth v. Kennedy, 240 Pa. 214, 47 L. R. A. (N. S.) 673, 87 Atl. 605.

27 This section is cited with approval in State v. Lindsay, 85 Kan. 79, 35 L. R. A. (N. S.) 810, 116 Pac. 207. In the case of In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900, the court said: "Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." While this language is broad, it will be observed upon examination of the case that property rights both of the government and of many of its citizens were involved. It is believed that the jurisdiction will not be extended to crimes which, while injurious to society, do not directly affect any property right. In Higgins v. Lacroix, 119 Minn. 145, 41 L. R. A. (N. S.) 737, 137 N. W. 417, a village attempted to enjoin violations of an ordinance requiring licenses for moving picture shows. It was contended that the justices of the peace, before whom prosecutions would be had, had declared the ordinance unconstitutional, provided that violations of the interstate commerce act may be restrained at suit of the United States.<sup>28</sup>

§ 1895. (§ 481.) Exception — Libel.—An exception to the general rule that equity will restrain a crime at suit of an individual when property rights are involved, exists in cases of libel. The early English cases laid down the rule as stated, and held that equity has no jurisdiction to restrain libels.<sup>29</sup> It will be noticed, however, that in most cases of libel property rights are only indirectly, if at all, involved. But in cases where a man is directly libeled in his business, there is a question of property right. Realizing this, the later English cases, aided somewhat by statute, have receded from their former view, and will now restrain a libel when it directly affects business.<sup>30</sup> The American states, however, have generally refused to adopt the later rule. The rule was established in cases in which no property right was directly involved,31 and is now so firmly settled, that it has been expressly held that libels will not be enjoined even for the protection of property.<sup>32</sup> This

and that the village had no adequate remedy at law. But the court held that this conferred no jurisdiction upon equity courts.

- <sup>28</sup> See United States v. Elliott, 62 Fed. 801; Toledo, A. A. & N. M. R. Co. v. Penn. Co., 54 Fed. 730, 19 L. R. A. 387; and see post, chapter XXVIII.
  - <sup>29</sup> Prudential Assur. Co. v. Knott, L. R. 10 Ch. App. 142.
- 30 Thorley's Cattle-food Co. v. Massam, 14 Ch. D. 763; Thomas v. Williams, 14 Ch. D. 864; Loog v. Bean, 26 Ch. D. 306.
- 31 Brandreth v. Lance, 8 Paige Ch. 24, 34 Am. Dec. 368; Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310. Publication of political matter will not be enjoined: Howell v. Bee Publishing Co., 100 Neb. 39, Ann. Cas. 1917D, 655, L. R. A. 1917A, 160, 158 N. W. 358.
- 32 De Wick v. Dobson, 18 App. Div. 399, 46 N. Y. Supp. 390; Kidd v. Horry, 28 Fed. 773; Finnish Temperance Soc. etc. v. Raivaaja Pub. Co., 219 Mass. 28, Ann. Cas. 1916D, 1087, 106 N. E. 561. A compromise between the English and the American views was reached in Beck v. Railway Teamsters' Protective Union, 118

outcome is in part the result of a desire not to place any more restrictions upon the exercise of free speech than are absolutely necessary.

Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13. It was there held that a court of equity will restrain the publication of a libel consisting of a boycotting circular, when the acts are accompanied by threats, express or covert, or intimidation and coercion, and the accomplishment of the purpose will result in irreparable injury to property. See, further, on this subject, post, chapter XXIX.

# CHAPTER XXII. INJUNCTION AGAINST WASTE.

### ANALYSIS.

§ 482. Origin and nature of the jurisdiction.

§§ 483-490. Extent of equity jurisdiction.

§ 483. Legal waste.

§ 484. Waste must be threatened.

§ 485. Legal waste which is not subject to injunction.

§ 486. Must the injury be irreparable?

§ 487. Plaintiff's title.

§ 488. Title in dispute.

§ 489. Equitable waste—Definition.

§ 490. Extent of jurisdiction.

§ 491. Relief against waste in equity.

§ 492. Parties for and against whom injunction will issue.

§ 1896. (§ 482.) Origin and Nature of the Jurisdiction.—"Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate,—as, for example, a tenant for life or for years. The rightful possession of the wrong-doer is essential, and constitutes a material distinction between waste and trespass." The jurisdiction of the common law over waste was curiously defective. Originally an action at common law for waste lay only against a defendant whose estate was created by law, on the theory

1 4 Pom. Eq. Jur., § 1348. This language is quoted in Hayman v. Rownd, 82 Neb. 598, 45 L. R. A. (N. S.) 623, 118 N. W. 328. For the substance of this and the four succeeding chapters the author is indebted to Mr. J. T. Burcham, formerly instructor in Equity in Stanford University.

that as to estates created by the owner of the fee, provision against waste should be made against it by himself or else it was his own default. This narrow jurisdiction was early enlarged by statutes,2 which, however, gave a remedy only in favor of one having an immediate estate of inheritance, so that a person holding any estate less than a fee, or one whose estate in fee was preceded by a smaller estate, had still no remedy at law.3 It is evident that in such a situation there was a twofold reason for the interposition of equity to prevent waste. In the first place, from its very nature waste was a wrong such that the legal remedy of damages was inadequate. It involved as its chief characteristic a serious injury to real property, and, on this ground alone, a preventive remedy was necessary. It is true that the writ of estrepement was a preventive remedy, but at best it was only an auxiliary to real actions to preserve property pendente lite,4 and hence had no application to the ordinary case of waste in which no question was made as to the tenant's right to possession. In the second place, the fact that there was in a large class of cases no remedy at all at law, furnished a sufficient ground for the jurisdiction of equity—at least in those cases.<sup>5</sup> Of the two reasons, the first was the controlling one, however, and the second was apparently often regarded as requiring some explanation to prove that it was not an obstacle to, rather than a ground of, equity jurisdiction.6

<sup>&</sup>lt;sup>2</sup> Statutes of Marlebridge (52 Hen. III, c. 23) and Gloucester (6 Edw. I, c. 5).

<sup>3 2</sup> Black. Com. 282, 283; 3 Id. 227.

<sup>4 3</sup> Black. Com. 225-227.

<sup>5</sup> See suggestion of counsel in Castlemain v. Craven, 22 Vin. Abr.523; Skelton v. Skelton, 2 Swanst. 170.

<sup>6</sup> Farrant v. Lovell, 3 Atk. 723; Perrot v. Perrot, 3 Atk. 94; Kane v. Vanderburgh, 1 Johns. Ch. 11. The explanation of this attitude of the chancery courts doubtless lay in the fact that equity jurisdiction over torts was primarily to furnish a better remedy for

The fact that waste is nearly always an irreparable injury has resulted in the full establishment of the remedy by injunction, whether in a case where there is or is not a legal remedy; and because prevention is of greater efficacy than damages after the event, the equitable remedy has not only virtually superseded the old common-law "action of waste," but has to a great extent taken the place of the "action on the case" for damages, which might have supplied the lack of a remedy at law to those remainder-men who could not comply with the strict requisite of the statute of Gloucester.

§ 1897. (§ 483.) Extent of Equity Jurisdiction—Legal Waste.—In entering upon a fuller discussion of the jurisdiction of equity over waste it will be convenient to follow the lines of old and familiar classification, and treat, first of Legal Waste, which is the waste that courts of law always recognized (though they did not in all cases give a remedy for it), and, next, of Equitable Waste, which is the waste that, by the rules of the common law, is permitted to a tenant in possession, but which courts of equity nevertheless do not allow. It has already been pointed out that from its very definition waste generally falls within that class of injuries which courts of equity deem irreparable and therefore not to

a legal wrong. Hence in determining the existence of the wrong, and from that inferring the right to a remedy, the equity judges were accustomed to follow the rule of law. Consequently they felt the need of explaining why they gave a remedy where the courts of law did not. So, Lord Hardwicke, in Perrot v. Perrot, supra, said it was an "accident" that there was no legal remedy in the class of cases under discussion, and Lord Nottingham, in Skelton v. Skelton, 2 Swanst. 170, took the distinction that the tenant who committed waste in such cases had "only impunitatem" and not "a right in the thing itself."

<sup>7 4</sup> Pom. Eg. Jur., § 1348.

<sup>8</sup> See cases collected in 1 Ames, Cases in Eq. Juris., 467, note 1, 468, note 1.

be adequately remedied at law.<sup>9</sup> Hence injunctions against legal waste have always been common, and the jurisdiction extensive. Illustrations are injunctions against cutting timber, <sup>10</sup> changing, destroying or removing buildings, or the erection of new buildings, <sup>11</sup> taking minerals, gas or stone, <sup>12</sup> changing the character of

9 In Vandemark v. Schoonmaker, 9 Hun, 11, the court used the following language: "Waste has always been a subject of chancery jurisdiction. It is generally irreparable in its results, and hence especially within the restraining power of that court. And it has been well remarked that courts of equity will exercise a liberal jurisdiction in respect to waste, and in its restrain."

10 Duvall v. Waters, 1 Bland (Md.), 569, 18 Am. Dec. 350; Sarles v. Sarles, 3 Sand. Ch. 601; Kerlin v. West, 4 N. J. Eq. 449; Kane v. Vanderburgh, 1 Johns. Ch. 11; Hawley v. Clowes, 2 Johns. Ch. 122; Kyle v. Rhodes, 71 Miss. 487, 15 South. 40; State v. Judge, 52 La. Ann. 1037, 26 South. 769; Jones v. Britton, 102 N. C. 166, 4 L. R. A. 178, 9 S. E. 554; Elliott v. Boyd, 40 Or. 326, 67 Pac. 202; Duke of Marlborough v. St. John, 5 De Gex & S. 174. In the early case of Abrahall v. Bubb, 2 Swanst. 172, it was said that "where he in reversion might have a trover for the trees when felled, there the court ought to grant an injunction to stay the felling." In Derham v. Hovey, 195 Mich. 243, 161 N. W. 883, parents deeded property to a child, with reservation of life estate in themselves. The grantee sought to enjoin the grantors from selling about seventy elm trees from a wood lot, but the court refused to interfere.

11 Jungerman v. Bovee, 19 Cal. 354; Palmer v. Young, 108 Ill. App. 252; Maddox v. White, 4 Md. 72, 59 Am. Dec. 67; Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367; Woods v. Early, 95 Va. 307, 28 S. E. 374; Tate v. Field, 57 N. J. Eq. 53, 40 Atl. 206; Brock v. Dole, 66 Wis. 142, 28 N. W. 334; Davenport v. Magoon, 13 Or. 1, 57 Am. Rep. 1.

12 Whitfield v. Bewit, 2 P. Wms. 240; Holden v. Weeks, 1 J. & H. 278; Gerkins v. Kentucky Salt Co., 100 Ky. 734, 66 Am. St. Rep. 370, 39 S. W. 444; Smith v. City Council of Rome, 19 Ga. 89, 83 Am. Dec. 298; Chambers v. Alabama Iron Co., 67 Ala. 353; Binswanger v. Henninger, 1 Alaska, 509; Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891, 38 L. R. A. 694, 27 S. E. 411; Big Six Development Co. v. Mitchell, 138 Fed. 279, 1 L. R. A. (N. S.) 332, 70 C. C. A. 569. An injunction was denied in Clavering v. Clavering, 2 P. Wms. 388; Neel v. Neel, 19 Pa. St. 323 (mine already opened).

land,13 taking away crops, or manure,14 and improper modes of tillage. 15 It should be noted in this connection, however, that American courts frequently refuse to enjoin acts which the English courts would enjoin almost as a matter of course, not because the jurisdiction of equity is narrower in scope in this country, but because the substantive law of waste is different and more liberal. Courts of equity in denying injunctions have often had occasion to point out the differences. As said by the court in one case: "The law of waste, as understood in England, would have made it impossible for tenants to cultivate the wild lands of this country";16 and in another: "To apply the ancient doctrines of waste to modern tenancies, even for short terms, would in some of our cities and villages put an entire stop to the progress of improvement, and would deprive the tenant of those benefits which both parties contemplated at the time of the demise, without any possible advantage to the owner of the reversion."17 In the spirit of

<sup>13</sup> Pulteney v. Shelton, 5 Ves. 259, note; Onslow v. —, 16 Ves. 173; Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367.

<sup>14</sup> Pulteney v. Shelton, 5 Ves. 259, note; Onslow v. —, 16 Ves. 173; Manning v. Ogden, 70 Hun, 399, 24 N. Y. Supp. 70; Baker v. National Biscuit Co., 96 Ill. App. 228; Ashby v. Ashby (N. J.), 40 Atl. 118.

<sup>15</sup> Wilds v. Layton, 1 Del. Ch. 226, 12 Am. Dec. 91. Miscellaneous cases which may be added to those given above are, Bathurst v. Burden, 2 Bro. C. C. 84 (damaging fish-ponds); Pratt v. Brett, 2 Madd. 62 (sowing mustard seed, and other waste of common character); West Ham etc. Board v. East London Water Works Co., 69 L. J. Ch. 257, [1900] 1 Ch. 624, 84 L. T., N. S., 85, 48 Week. Rep. 284 (covering land with rubbish); Clagon v. Veasey, 7 Ired. Eq. 173 (removal of a slave to parts unknown); Lehman v. Logan, 7 Ired. Eq. 296 (same as preceding case); Du Pre v. Williams, 5 Jones Eq. 96 (same as preceding case). Additional cases of the same kinds as given above are collected in 1 Ames, Cases in Eq. Juris., 461, note.

<sup>16</sup> Crowe v. Wilson, 65 Md. 479, 57 Am. Rep. 343, 5 Atl. 427. See, also, 4 Pom. Eq. Jur., § 1348, note 1.

<sup>17</sup> Winship v. Pitts, 3 Paige, 259.

this language, knowing that conditions in this country often made acts really beneficial which, according to the strict definition of waste, fell easily within its scope, American judges have refused to enjoin the cutting of timber according to the rules of good husbandry, 18 or the erection of new 19 or the destruction of old buildings. 20

§ 1898. (§ 484.) Waste must be Threatened.—The purpose of this jurisdiction is, to prevent future acts of waste, and also, though rarely, to restore things to their former condition.<sup>21</sup> Hence, in general, an injunction will not be granted after the acts complained of are finished,<sup>22</sup> nor to prevent the removal of the personalty produced by acts of waste, such as timber cut.<sup>23</sup> In determining the propriety of granting its preventive remedy, equity requires a plaintiff to show a need of its protection. He must establish that the defendant has been guilty of acts or words which justify a reasonable apprehension on his part of future waste. "The court never grants injunctions on the principle that they will do no harm to the defendant, if he does not intend to

<sup>18</sup> Board of Supervisors of Warren Co. v. Gans, 80 Miss. 76, 31 South. 539; McLeod v. Dial, 63 Ark. 10, 37 S. W. 306; McCullough v. Irvine's Ex'rs, 13 Pa. St. 438; Lynn's Appeal, 31 Pa. St. 44, 72 Am. Dec. 721; Morris v. Knight, 14 Pa. Super. Ct. 324; Kidd v. Dennison, 6 Barb. 10; Alexander v. Fisher, 7 Ala. 514; Shine v. Wilcox, 1 Dev. & B. Eq. 631; Crowley v. Timberlake, 2 Ired. Eq. 460. See Disher v. Disher, 45 Neb. 100, 63 N. W. 368.

<sup>19</sup> Winship v. Pitts, 3 Paige, 259.

<sup>&</sup>lt;sup>20</sup> Crowe v. Wilson, 65 Md. 479, 57 Am. Rep. 343, 5 Atl. 427; Melms v. Pabst Brewing Co., 104 Wis. 7, 46 L. R. A. 478, 79 N. W. 738.

<sup>21</sup> See infra, § 491.

<sup>22</sup> Owen v. Ford, 49 Mo. 436; Southard v. Morris Canal Co., 1 N. J. Eq. 519.

<sup>23</sup> Bishop of London v. Webb, 1 P. Wms. 527; Watson v. Hunter,5 Johns. Ch. 169, 9 Am. Dec. 295.

commit the act in question—but if there be no ground for the injunction, it will not support it."24 And a plaintiff who does not show a sufficient case of threatened waste will have his bill dismissed with costs.25 This is not saying that the courts make a plaintiff's way hard or impose on him a heavy burden. For a single act of waste is considered a sufficient threat of further acts of the same kind; 26 or mere uttered threats, or acts which, though not themselves waste, yet signify an intention to commit waste, will support an injunction.<sup>27</sup> And it is no defense to a bill for an injunction for a defendant who has been guilty of waste to say that he does not intend to do so again,28 or that he has committed no waste since the filing of the bill,29 or for one who has threatened waste to say that he does not mean to carry out his threat.30 Such declarations do not, under the circumstances, overturn the case which the plaintiff has made, and the injunction will issue in spite of them.

§ 1899. (§ 485.) Legal Waste Which is not Subject to Injunction.—In view of the extensive jurisdiction of equity over waste it is sometimes said that, in general, an injunction may be obtained to stay waste in all cases

<sup>24</sup> Lord Eldon in Coffin v. Coffin, Jacob, 70.

<sup>25</sup> Clement v. Wheeler, 25 N. H. 361.

<sup>26</sup> Barry v. Barry, 1 Jacob & W. 651; Sarles v. Sarles, 3 Sand. Ch. 601.

<sup>27</sup> Jackson v. Cator, 5 Ves. 688; Coffin v. Coffin, Jacob, 70; London v. Warfield, 5 J. J. Marsh. (Ky.) 196; Sheridan v. McMullen, 12 Or. 150, 6 Pac. 497; Duvall v. Waters, 1 Bland Ch. (Md.) 569, 18 Am. Dec. 350, 357; Palmer v. Young, 108 Ill. App. 252, citing Pom. Eq. Jur., §§ 237, 1348.

<sup>28</sup> Packington v. Packington, Dick. 101; Sowerby v. Fryer, L. R. 8 Eq. 417.

<sup>29</sup> Attorney-General v. Burrows, Dick. 128.

<sup>30</sup> Packington v. Packington, supra.

where an action of waste would lie at common law.31 The qualifications to this statement of the scope of equity's jurisdiction over waste should be made at this point. They are three in number: First, equity will not enjoin permissive waste.32 The reason for this holding is not made clear in the cases. In one of them<sup>33</sup> counsel argued, that to grant such injunctions "would tend to harass tenants for life, and jointresses, and suits of this kind would be attended with great expense in depositions about the repairs." A more satisfactory reason would seem to be the same one which leads to the refusal to decree specific performance of contracts to make repairs, viz., the practical difficulty of giving adequate supervision to the performance of the decree. Second, equity will not enjoin ameliorating waste, which is any act that though technically waste, yet in fact improves the inheritance.34 The reason for refusing the injunction in such cases is obvious. And, third, equity will not enjoin trivial acts of waste, but will require that substantial damage be shown.35

§ 1900. (§ 486.) Must the Injury be Irreparable?— The last preceding statement immediately suggests the inquiry whether a showing of even substantial damage

<sup>31</sup> Duvall v. Waters, 1 Bland Ch. (Md.) 569, 18 Am. Dec. 350, 357; Hayman v. Rownd, 82 Neb. 598, 45 L. R. A. (N. S.) 623, 118 N. W. 328.

<sup>32</sup> Castlemain v. Craven, 22 Vin. Abr. 523; Powys v. Blagrave, 4 De Gex, M. & G. 448, 458; Re Cartwright, 41 Ch. D. 532, 536; Wood v. Gaynon, Amb. 395; Cannon v. Barry, 59 Miss. 289, 303. But see Bathurst v. Burden, 2 Bro. C. C. 64; Caldwall v. Baylis, 2 Mer. 408; Williams v. Peabody, 8 Hun, 271; 2 Story, Eq. Jur., § 917.

<sup>33</sup> Wood v. Gaynon, supra.

<sup>34</sup> Doherty v. Allman, L. R. 3 App. Cas. 709; Meux v. Cobley, [1892] 2 Ch. 253; Mollineux v. Powell, 3 P. Wms. 268n (F).

<sup>35</sup> Mollineux v. Powell, 3 P. Wms. 268n (F); Barry v. Barry, 1 Jacob & W. 651; Doherty v. Allman, L. R. 3 App. Cas. 709; Birch-Wolfe v. Birch, L. R. 9 Eq. 683.

is enough to justify an injunction against waste. Does not the usual rule that a legal wrong will be enjoined only when the legal remedy is inadequate apply here, and must not the injury therefore be irreparable? would seem that in assuming jurisdiction over waste the courts have not always had this fundamental inquiry in mind; or else have considered it not the test of jurisdiction. Hence injunctions have been granted when, tested by the above rule, it would seem they should have been denied, as when the waste consisted in carrying away personal property not possessing any peculiar qualities or special value. 36 And in such cases some American courts have taken the contrary view.37 If prohibited by a covenant in a lease, it seems that the fair weight of authority holds in favor of granting the injunction against any waste, whether causing irreparable injury or not.38

36 Pulteney v. Shelton, 5 Ves. 259, note; Onslow v. ——, 16 Ves. 173; Georges Creek etc. Co. v. Detmold, 1 Md. Ch. 371. Compare Sheppard v. Sheppard, 3 N. C. (2 Hayw.) 382.

In Georgia, injunctions to stay or prevent waste have been held proper regardless of the question as to whether the damages threatened would be irreparable, and without reference to the solvency or insolvency of the party sought to be enjoined: Brigham v. Overstreet, 128 Ga. 447, 11 Ann. Cas. 75, 10 L. R. A. (N. S.) 452, 57 S. E. 484.

37 Gregory v. Hay, 3 Cal. 332; Greathouse v. Greathouse, 46 W. Va. 21, 32 S. E. 994. The question does not seem to have arisen often, doubtless because of the fact (already suggested) that waste is generally, from its very nature, a serious injury to realty, and hence obviously within the class of acts called irreparable. It is interesting to note in this connection and in view of the difference of holdings of modern courts on the point in trespass cases, that so long ago as 1792 Lord Thurlow, in Smallman v. Onions, 3 Brown Ch. 621, held the insolvency of the defendant a sufficient ground for enjoining waste.

38 Tipping v. Eckersley, 2 Kay & J. 264; Steward v. Winters, 4 Sand. Ch. 587; Frank & Co. v. Bounneman, 8 W. Va. 462; Barret

§ 1901. (§ 487.) Plaintiff's Title.—A great deal has always been said in the cases about the title which a plaintiff who is seeking an injunction against waste must show, and of the effect on plaintiff's right to the injunction of a dispute as to title between him and the defendant. It is to be noted that there are here two distinct questions, which have not always been kept clearly apart. The first is as to the showing of title which a plaintiff must make in his bill to entitle him to relief, assuming his allegations of title to be admitted; it is the question of title which is raised by a demurrer to the bill as being insufficient in the allegations of title. The second is raised when the plaintiff's allegations of title, sufficient in themselves, are disputed by the defendant. In answer to the first question it can be said that the courts require the plaintiff to set out his chain of title fully and to support it by positive evidence.39 Hence Lord Thurlow in an early case refused to grant a temporary injunction because the plaintiff made affidavit generally that he was entitled to a fee simple and did not set out a particular title. And shortly afterwards Lord Eldon refused a motion for injunction because, though the plaintiff alleged his title sufficiently, yet his affidavits supported it only as a matter of belief on plaintiff's part, the court saying there ought to be "positive evi-

v. Blagrave, 5 Ves. 555; and see note to Maddox v. White, 4 Md. 72, in 59 Am. Dec. 67, 70. The ground of the jurisdiction in such cases is probably to avoid multiplicity of suits for a continuing breach of covenant. This reason may reconcile Gregory v. Hay, 3 Cal. 332, in which case an injunction against violation of a lease was refused.

39 Whitelegg v. Whitelegg, 1 Bro. C. C. 57, by Lord Thurlow; Davis v. Leo, 6 Ves. 784, by Lord Eldon; Wearin v. Munson, 62 Iowa, 466, 17 N. W. 746; Denning v. Corwin, 4 Wend. 208. In the last case cited a part of the reason for refusing a temporary injunction was that it was consistent with plaintiff's allegation of title that the defendants were tenants in common with him and therefore not wrong-doers. See, also, Field v. Jackson, Dick. 599.

dence of an actual title." The reason for this rule is stated in a recent American case as follows: "This rule is a simple recognition of the general principle that one is not entitled to invoke the extraordinary powers of a court of equity unless he can establish in a manner satisfactory to the law the fact that he will<sup>40</sup> suffer an irreparable injury in his estate. Unless the estate be his, he can suffer no injury, and unless the title be in him there is no estate."41 In other words, for a plaintiff to obtain standing in a court of equity to enjoin waste, he must make a prima facie showing of title in himself. It is sometimes said that a plaintiff must show a "clear title" upon "unquestionable evidence"42 -a requirement which seems more strict than is demanded either on principle or on authority, and the application of which would prevent the granting of an injunction in any case whenever there is a substantial dispute as to title between plaintiff and defendant.

- § 1902. (§ 488.) Title in Dispute.—And this is the state of facts which raises the second question above mentioned. In the definition of waste at the beginning of this chapter it is pointed out that the material distinction between waste and trespass in equity lies in the fact that waste is committed by one rightfully in possession, trespass, by one wrongfully in possession or not in possession at all. This is a purely technical dis-
  - 40 The word "may," it is submitted, would be a better one here.
- 41 Flannery v. Hightower, 97 Ga. 592, 25 S. E. 371. It should be said that the language quoted was used in support of the holding that a mere dispute as to title between plaintiff and defendant per se precludes the granting of a temporary injunction—a proposition which, it will be shown, is not supported by the sound weight of authority.
- 42 See Flannery v. Hightower, supra, and cases collected in notes to Whitelegg v. Whitelegg, supra, and Davis v. Leo, supra; High on Injunctions, § 651.

tinction, and hence identical acts will in one case be waste, in another, trespass. Influenced by this identity of substance, it has been an inveterate habit of equity judges and lawvers since the time of Lord Eldon<sup>43</sup> to speak of acts as "waste" when with strict observance of the technical distinction they would have called them It is clear that in cases of waste, strictly, since it involves privity of title and rightful possession of defendant, disputes as to title will not often be present. And a scrutiny of the cases shows this to be true, most of those in which there have been a decision or dictum as to the effect of a dispute concerning title on the granting of an injunction to stav "waste" being really cases of trespass. A fuller discussion of the subiect is therefore reserved for the chapter on Trespass. It may be sufficient to point out here that, if there is really a substantial dispute as to title, the injunction prayed, and the only one proper to grant, generally, is a temporary injunction pending the settlement of the dispute; that a stronger case of apprehended injury must be shown to entitle a plaintiff to a temporary than to a permanent injunction, because of the injury which the injunction will have done the defendant if he eventually prove title in himself:44 and, finally, that if the above conditions are complied with, though the authorities are not uniform, the injunction will issue.45

<sup>43</sup> Pillsworth v. Hopton, 6 Ves. 51.

<sup>44</sup> See Lusting v. Conn, 1 Ir. Ch. 273.

<sup>45</sup> Case cited in Mogg v. Mogg, Dick. 670; Duvall v. Waters, 1 Bland (Md.), 569, 18 Am. Dec. 350; Woods v. Riley, 72 Miss. 73, 18 South. 384; Baker v. National Biscuit Co., 96 Ill. App. 228; Meadow Valley Mining Co. v. Dodds, 6 Nev. 261; Littlejohn v. Leffingwell, 40 App. Div. 13, 57 N. Y. Supp. 839; Dooley v. Stringham, 4 Utah, 107, 7 Pac. 405 (a case of real waste, dispute being as to extent of plaintiff's estate), citing 2 Pom. Eq. Jur., §§ 917, 919; 4 Pom. Eq. Jur., § 1348. Contra, Nevitt v. Gillespie, 1 How. (Miss.) 108, 26 Am. Dec. 696; Poindexter v. Henderson, 1 Miss. (Walk.) 176,

Equitable waste arose out of the different effect given in law and in equity to the phrase "without impeachment of waste," or equivalent words, in a lease, or the settlement or devise creating an estate less than a fee. Courts of law held that such a phrase gave to the tenant the same absolute power of changing or destroying the inheritance that a tenant in fee would have. Courts of equity early "set up a superior equity" and began to restrain acts by the tenant that were really destructive, and after more or less diversity of opinion finally adopted as the equitable waste which would not be allowed even to a tenant without impeachment of waste, "that which a prudent man would not do in the management of his own property." This definition makes the phrase

12 Am. Dec. 550; Lewis v. Christian, 40 Ga. 187; Flannery v. Hightower, 97 Ga. 592, 25 S. E. 371; Blackwood v. Van Vleet, 11 Mich. 252. See further cases cited *infra* under same subject in chapter on Trespass. It should be added that the holding of an early case (Lathropp v. Marsh, 5 Ves. 259) that a landlord cannot enjoin waste by a tenant unless he has brought ejectment is discredited: Note 2 to the case, 5 Ves. 261; Kane v. Vanderburgh, 1 Johns. Ch. 11; Eden on Injunctions, 237, note (b).

46 Per Lord Hardwicke, in Rolt v. Lord Somerville, 2 Eq. Cas. Abr. 759. See, also, opinion of Lord Turner in Micklethwait v. Micklethwait, 1 De Gex & J. 504, 524.

47 See opinion of Lord Nottingham in Skelton v. Skelton, 2 Swanst. 170; of Lord Parker in Bishop of London v. Web, 1 P. Wms. 527; of Lord Hardwicke in Aston v. Aston, 1 Ves. Sr. 264; and of Lord Eldon in Smythe v. Smythe, 2 Swanst. 251.

48 Per Lord Campbell in Turner v. Wright, 3 De Gex, F. & J. 234, 243. For substantially similar descriptions of equitable waste, see Baker v. Sebright, L. R. 13 Ch. D. 179, 186; Stevens v. Rose, 69 Mich. 259, 37 N. W. 205, 210; Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004, 1006. In this last case the defendants had conveyed land, taking back a lease for life which contained the following clause: "And it is expressly understood that the second parties are to have as full and complete control of said premises . . . as though such conveyance had not been made." Yet they were enjoined from

"without impeachment of waste" nothing more than a corrective of the close restrictions which the common law put on the rights of a tenant who held impeachable of waste, and is strikingly similar to the definitions of legal waste often given by American courts.<sup>49</sup>

§ 1904. (§ 490.) Extent of Jurisdiction.—The cases of equitable waste are almost, if not exclusively, confined to destruction or removal of buildings, 50 carrying away of the soil, 51 cutting ornamental or sheltering trees or shrubs, 52 cutting saplings, 53 and stripping the land of timber. 54 Of these various classes the first two need no special mention, the cases in them being very few and founded on obvious reasons. "Ornamental" as applied to trees and shrubs in matters of equitable waste is a technical term. "The question is not, whether the

stripping the land of timber. Lord Campbell also pointed out in Turner v. Wright, *supra*, that no sensible distinction in waste can be based upon the malice of the defendant, though it is often said that equity will enjoin a tenant from committing malicious waste.

- 49 See cases cited, ante, § 483.
- 50 Vane v. Barnard, 2 Vern. 738; Rolt v. Somerville, 2 Eq. Cas. Abr. 759; Anonymous, Mos. 237; Williams v. Day, 2 Cas. in Ch. 32; Stevens v. Rose, 69 Mich. 259, 37 N. W. 205 (action on the case for damages under statute [How. St. Mich., c. 271, § 1], but decided according to principles of equitable waste).
  - 51 Bishop of London v. Web, 1 P. Wms. 527.
- 52 Packington's Case, 3 Atk. 215; Coffin v. Coffin, Jacob, 70; Wombwell v. Belasyse, 6 Ves. (2d ed.) 110a, note; Morris v. Morris, 15 Sim. 505 (injunction granted, though house about which the trees had formerly stood had been removed; cf. Micklethwait v. Micklethwait, 1 De Gex & J. 504); Wellesley v. Wellesley, 6 Sim. 497; Stevens v. Rose, 69 Mich. 259, 37 N. W. 205. And see other cases collected in 1 Ames, Cases in Eq. Juris., 469, note 2.
- 53 Aston v. Aston, 1 Ves. Sr. 264; O'Brien v. O'Brien, Amb. 107; Chamberlayn v. Dummer, 1 Bro. C. C. 166; Strathmore v. Bowes, 2 Bro. C. C. 88; Allard v. Jones, 15 Ves. 605.
- 54 Bishop of Winchester's Case, 1 Rolle Abr. 380 (J, 3); Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004.

timber is or is not ornamental; but the fact to be determined is that it was planted for ornament; or, if not originally planted for ornament, was, as we express it, left standing for ornament by some person having the absolute power of disposition."55 It is also held that cutting trees planted to exclude certain objects from view will be enjoined, on the same principle;56 and that the owner of the fee may change ornamental timber into non-ornamental timber.<sup>57</sup> The principle would, therefore, seem to be, that whatever trees or shrubbery the last owner of the fee manifests an intention to have left standing, is within the rule as to equitable waste. cutting of saplings is enjoined on the ground that as they are not fit for timber it is despoiling the estate as a prudent owner would not do.58 Stripping the land of timber is likewise enjoined because fair husbandry forbids it.59

§ 1905. (§ 491.) Relief Against Waste in Equity.—The only relief against legal waste for which one is entitled to come into equity is an injunction. This injunction is almost always prohibitive, but in a proper case it may be mandatory for the restoration of the thing destroyed. But though one can secure standing in equity with reference to legal waste only because of his

<sup>&</sup>lt;sup>55</sup> Per Lord Eldon in Wombwell v. Belasyse, 6 Ves. (2d ed.) 110a, note. See, also, Downshire v. Sandys, 6 Ves. 107; Burges v. Lamb, 16 Ves. 174, 185.

<sup>56</sup> Day v. Merry, 16 Ves. 375.

<sup>57</sup> Micklethwait v. Micklethwait, 1 De Gex & J. 504.

<sup>&</sup>lt;sup>58</sup> This was admitted to be equitable waste by Lord Eldon, who was inclined to restrict cases of equitable waste more than later judges: Smythe v. Smythe, 2 Swanst. 251.

<sup>59</sup> Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004.

<sup>60</sup> Vane v. Lord Barnard, 2 Vern. 738, Prec. Ch. 454; Rolt v. Lord Somerville, 2 Eq. Cas. Abr. 759; Bass v. Metropolitan etc. Co., 82 Fed. 857, 39 L. R. A. 711, 27 C. C. A. 147; Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. 469.

right to an injunction, he is also in addition given an accounting for the waste already done. This further relief is given on the broad general principle of equity that when once it has acquired jurisdiction of a case it will give complete relief, even though part of such relief be purely legal in its nature, rather than to compel a plaintiff to bring another suit at law in order to obtain the full remedy to which he is entitled.61 This accounting is given only as an incident to the injunction, which is the basis of plaintiff's right in equity, and therefore it cannot be prayed alone; and if the injunction is refused the right to the accounting falls with it.62 The proceeds of such waste to go to the remainder-man in fee. though there be intermediate remainder-men for life or years, following the legal rule that the person in whom is the fee has title to, and may bring trover for, the personalty which results from acts of waste. 63 The accounting for equitable waste differs from that given for legal waste in one particular. Since equitable waste is wholly a creation of the courts of equity, there is no legal remedy for it whether it is past or future. one may file his bill for an accounting for equitable waste without praying, or being entitled to, an injunc-

<sup>61</sup> Jesus College v. Bloom, Amb. 54, 3 Atk. 262; Story v. Windsor, 2 Atk. 630; Parrott v. Palmer, 3 M. & K. 632 (semble); Wright v. Pitt, 12 Eq. 408, 416 (semble); Castlemain v. Craven, 22 Vin. Abr. 523; Jungerman v. Vovee, 19 Cal. 354; Anstays v. Anderson, 194 Mich. 1, 160 N. W. 475; Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891, 38 L. R. A. 694, 27 S. E. 411.

<sup>62</sup> Jesus College v. Bloom, Amb. 54, 3 Atk. 262; Smith v. Cooke, 3 Atk. 378; Watson v. Hunter, 5 Johns. Ch. 169, 9 Am Dec. 295; Lippincott v. Barton, 42 N. J. Eq. 272, 10 Atl. 884; Dennett v. Dennett, 43 N. H. 499, 503. A bill for an account for waste by a decedent against his administrator was denied in Higginbotham v. Hawkins, 7 Ch. Ap. 676.

<sup>63</sup> Whitfield v. Bewit, 2 P. Wms. 240; Rolt v. Somerville, 2 Eq. Cas. Abr. 759; Castlemain v. Craven, 22 Vin. Abr. 523; Gent v. Harrison, Johns. 517; Birchwolfe v. Birch, L. R. 9 Eq. 683.

tion.<sup>64</sup> The accounting which equity gives for waste, both legal and equitable, differs from the damages a court of law gives for the former in that it is estimated according to the profits which the wrong-doer has received, and not according to the damage done to the estate nor the value of the personalty produced by the acts of waste;<sup>65</sup> and no allowance is made for the defendant's labor or expense.<sup>66</sup>

§ 1906. (§ 492.) Parties for and Against Whom Injunction will Issue.—It remains to note the estates of parties for and against whom injunctions to prevent waste will issue. No citations will be needed to show that a reversioner or remainder-man in fee may enjoin waste. So may a contingent remainder-man,<sup>67</sup> a trustee

- 64 Whitfield v. Bewit, 2 P. Wms. 240; Lansdowne v. Lansdowne, 1 Madd. 116; Lushington v. Boldero, 15 Beav. 1; Gent v. Harrison, Johns. 517.
- 65 Lee v. Alton, 1 Ves. 78, 82; Morris v. Morris, 2 De Gex & J. 323; Tate v. Field, 57 N. J. Eq. 53, 40 Atl. 206.
  - 66 Sweeney v. Hanley, 126 Fed. 97.
- 67 Brashear v. Macey, 3 J. J. Marsh. 89; University v. Tucker, 31 W. Va. 621, 8 S. E. 410; Cannon v. Barry, 59 Miss. 289; Peterson v. Ferrell, 127 N. C. 169, 37 S. E. 189; Kallock v. Webb, 113 Ga. 762, 39 S. E. 339; Ohio Oil Co. v. Daughetee, 240 Ill. 361, 36 L. R. A. (N. S.) 1108, 88 N. E. 818. But see Robertson v. Guenther, 241 Ill. 511, 25 L. R. A. (N. S.) 887, 89 N. E. 689.

As to legal rights where there is an intervening estate, see Tracy v. Tracy, 1 Vern. 23; Robinson v. Litton, 3 Atk. 209; Udal v. Udal, Al. 81, 82; Seegram v. Knight, 2 Ch. Ap. 628, 632. "If a lease be made to A for life, the remainder to B for life, the remainder to C in fee, in this case where it is said in the Register and in F. N. B. that an action of waste doth lie, it is to be understood after the death or surrender of B in the mesne remainder, for during his life no action of waste doth lie": Co. Litt. 54, a. Relief was allowed at law in Short v. Piper, 4 Harr. (Del.) 181; Van Deusen v. Young, 29 N. Y. 9. Compare Dozier v. Gregory, 46 N. C. (1 Jones) 100, 106. But relief was awarded in equity: Anonymous, Moore, 554, Placitum, 748; Dennett v. Dennett, 43 N. H. 499. The holder of a mere ex-

to preserve contingent remainders, <sup>68</sup> or a tenant for life whether with or without impeachment of waste. <sup>69</sup> A mortgagee or a purchaser at a foreclosure sale may also enjoin waste by a mortgagor in possession who threatens to do acts which impair his security. <sup>70</sup> The injunction will not issue, however, unless the sufficiency of

pectancy cannot enjoin waste: Gwaltney v. Gwaltney, 119 Ind. 144, 21 N. E. 552.

- 68 Garth v. Cotton, 1 Ves. 524, 556, Dick. 183, 1 Lead. Cas. Eq. (4th Am. ed.) 955; Perrot v. Perrot, 3 Atk. 94.
- 69 Perrot v. Perrot, 3 Atk. 94; Rolt v. Somerville, 2 Eq. Cas. Abr.
  759; Davis v. Leo, 6 Ves. 784; Halstead v. Coen, 31 Ind. App. 302, 67
  N. E. 757.

70 Parsons v. Hughes, 12 Md. 1; Bunker v. Locke, 15 Wis. 635; Humphreys v. Harrison, 1 Jacob & W. 581; Usborne v. Usborne, Dick. 75; Brady v. Waldron, 2 Johns. Ch. 148; Phoenix v. Clark, 6 N. J. Eq. 447; Taylor v. Collins, 51 Wis. 123, 8 N. W. 22; Moses v. Johnson, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146; Robinson v. Russell, 24 Cal. 467; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. 246; Lavenson v. Standard Soap Co., 80 Cal. 245, 13 Am. St. Rep. 147, 22 Pac. 184; Minneapolis Trust Co. v. Veshulst, 74 Ill. App. 350; Life Ins. Co. v. Bigler, 79 N. Y. 568; Beaver Lumber Co. v. Eccles, 43 Or. 400, 99 Am. St. Rep. 759, 73 Pac. 201; Terry v. Robbins, 122 Fed. 725. In general, see McKelvey v. Creevey, 72 Conn. 464, 470, 77 Am. St. Rep. 321, 45 Atl. 4; Thompson v. Lynam, 1 Del. Ch. 64, 67; Pasco v. Gamble, 15 Fla. 562, 566; Nelson v. Pinegar, 30 Ill. 473; Matzon v. Griffin, 78 Ill. 477, 479; Dorr v. Dudderar, 88 Ill. 107, 108; Williams v. Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Thompson v. Heywood, 129 Mass. 401; Adams v. Corriston, 7 Minn. 456, 464; Emmons v. Hinderer, 24 N. J. Eq. 39; Verner v. Betz (Betz v. Verner), 46 N. J. Eq. 256, 268, 19 Am. St. Rep. 387, 7 L. R. A. 630, 19 Atl. 206; Stewart v. Munger & Bennett, 174 N. C. 402, 93 S. E. 927; Martin's Appeal (Pa.), 9 Atl. 490; Waterman v. Matteson, 4 R. I. 539, 545. As to the right to an injunction to prevent removal of timber already severed, see Watson v. Hunter, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295; Ensign v. Colburn, 11 Paige (N. Y.) 503; Chenango Bank v. Cox, 26 N. J. Eq. 452. In Lancaster County v. Fitzgerald, 74 Neb. 433, 13 Ann. Cas. 88, 104 N. W. 875, a county having a lien for unpaid taxes was allowed to enjoin waste.

the security is threatened.<sup>71</sup> But in determining this point, the courts aim to protect the mortgaged property up to "the value which was the basis of the contract between the parties at the time it was entered into."<sup>72</sup> Equity jurisdiction over mortgaged property rests on a broader ground than in most cases of waste, since courts of equity have very fully taken the entire subject of mortgages into their hands. Hence mortgages of personal property are given the same protection as those of realty.<sup>73</sup> On the same principle of protecting a security, a vendor of land who retains title-may enjoin waste by a vendee in possession,<sup>74</sup> and a vendee, because of his equitable estate, may enjoin a vendor in possession.<sup>75</sup> So, also, the security of an attachment creditor<sup>76</sup> or judgment creditor,<sup>77</sup> or the lien which a landlord has

- 71 Fairbank v. Cudworth, 33 Wis. 358; Smith v. Frio County (Tex. Civ. App.), 50 S. W. 958; Moriarty v. Ashworth, 43 Minn. 1, 19 Am. St. Rep. 203, 44 N. W. 531; Beaver etc. Co. v. Eccles, 43 Or. 400, 99 Am. St. Rep. 759, 73 Pac. 201; Robinson v. Russell, 24 Cal. 467.
- 72 King v. Smith, 2 Hare, 239, 243; Moriarty v. Ashworth, 43 Minn. 1, 19 Am. St. Rep. 203, 44 N. W. 531.
- 73 McCormick v. Hartley, 107 Ind. 248, 6 N. E. 357; Brown v. Stewart, 1 Md. Ch. Dec. 87; Clagett v. Salmon, 5 Gill & J. 314; Bagnall v. Villar, L. R. 12 Ch. D. 812; Parsons v. Hughes, 12 Md. 1; State v. Northern Cent. R'y Co., 18 Md. 193; Walker v. Radford, 67 Ala. 446.
- 74 Moses Brothers v. Johnson, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146; Taylor v. Collins, 51 Wis. 123, 8 N. W. 22; May v. Williams, 22 Ky. Law Rep. 1328, 60 S. W. 525; Shickell v. Berryville etc. Co., 3 Va. Sup. Ct. 45; Miller v. Waddingham, 91 Cal. 377, 13 L. R. A. 680, 27 Pac. 750. And see cases collected in 1 Ames, Cases in Eq. Juris., 222, note 2, 483, note 1.
- 75 Smith & Fleek's Appeal, 69 Pa. St. 474; Chambers v. Alabama, Iron Co., 67 Ala. 353.
- 76 Camp v. Bates, 11 Conn. 51, 27 Am. Dec. 707; People v. Van Buren, 136 N. Y. 252, 20 L. R. A. 446, 32 N. E. 775, 33 N. E. 743; Moritz v. Kaliske, 31 Abb. N. C. 49, 28 N. Y. Supp. 380.
  - 77 Jones v. Britton, 102 N. C. 166, 4 L. R. A. 178, 9 S. E. 554;

for rent<sup>78</sup> will be protected by injunction. It was formerly thought that, because of the nature of their legal rights, an injunction would not issue between tenants in common for any ordinary acts of waste either legal or equitable, but that acts of waste so destructive as to go beyond the requisites of either of these might be enjoined.<sup>79</sup> But the cases show that the exercise of equity jurisdiction is now more liberal, and any acts of waste by one tenant in common that are inconsistent with prudent management of the estate or that jeopardize the interest of his co-tenants will be enjoined.<sup>80</sup> An underlessee will be enjoined from waste at suit of the ground landlord.<sup>81</sup> A tenant in tail will not be restrained from waste, because he may at any time bar the entail and give himself a fee;<sup>82</sup> but tenant in tail after possibility

Hughlett v. Harris, 1 Del. Ch. 349, 12 Am. Dec. 104; Vandemark v. Schoonmaker, 9 Hun, 16; Tessier v. Wyse, 3 Bland Ch. (Md.) 28.

- 78 Garner v. Cutting, 32 Iowa, 547; Carson v. Electric etc. Co., 85 Iowa, 44, 51 N. W. 1144.
- 79 Smallman v. Onions, 3 Bro. C. C. 621; Hale v. Thomas, 7 Ves. 589; Twort v. Twort, 16 Ves. 128. Compare Hihn v. Peck, 18 Cal. 640; Blood v. Blood, 110 Mass. 545.
- 80 Hole v. Thomas, 7 Ves. 589; Hawley v. Clowes, 2 Johns. Ch. 122; Woods v. Early, 95 Va. 307, 28 S. E. 374; Arthur v. Lamb, 2 Drew. & S. 430; Southworth v. Smith, 27 Conn. 355, 71 Am. Dec. 72; Connole v. Boston etc. Co., 20 Mont. 523, 52 Pac. 263; Morrison v. Morrison, 122 N. C. 598, 29 S. E. 901; Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891, 38 L. R. A. 694, 27 S. E. 411; State v. Judge, 52 La. Ann. 103, 26 South. 769; Mott v. Underwood, 148 N. Y. 463 51 Am. St. Rep. 711, 42 N. E. 1048; Ashby v. Ashby (N. J.), 40 Atl. 118; Binswanger v. Henninger, 1 Alaska, 509.
- 81 Farrant v. Lovel, 3 Atk. 723; Maddox v. White, 4 Md. 72, 59 Am. Dec. 67. See, also, Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N. E. 219; Downey v. Gooch, 240 Fed. 527; Lindlay v. Raydure, 239 Fed. 928; Smith v. Root, 66 W. Va. 633, 30 L. R. A. (N. S.) 176, 66 S. E. 1005, wherein lessees under oil and gas leases were allowed to enjoin taking of oil and gas by subsequent lessees.
- 82 Turner v. Wright, 2 De Gex, F. & J. 234; Savile's Case, Cases temp. Talbot, 16 (cited); Attorney-General v. Marlborough, 3 Madd.

of issue extinct is subject to be restrained from committing equitable waste.<sup>83</sup> And the owner in fee of an estate subject to an executory devise will also be enjoined from committing equitable waste.<sup>84</sup> Tenant by the curtesy is subject to injunction against all waste.<sup>85</sup> The injunction against waste may include anyone who is colluding with the tenant in committing it.<sup>86</sup>

- 498. Contra, Wallington v. Taylor, 1 N. J. Eq. 314, 318. As to the legal right, see Williams v. Williams, 2 East, 209.
- 83 Williams v. Day, 2 Cas. in Ch. 32; Attorney-General v. Marlborough, 3 Madd. 498.
- 84 Turner v. Wright, 2 De Gex, F. & J. 234; Wallington v. Taylor, 1 N. J. Eq. 314, 318; Gannon v. Peterson, 193 Ill. 372, 55 L. R. A. 701, 62 N. E. 210. Contra, Matthews v. Hudson, 81 Ga. 120, 12 Am. St. Rep. 305, 7 S. E. 286.
  - 85 Ware v. Ware, 6 N. J. Eq. 117.
  - 86 Rodgers v. Rodgers, 11 Barb. 595.

## CHAPTER XXIII.

## INJUNCTIONS AGAINST TRESPASS.

#### ANALYSIS.

§ 493. Nature of the jurisdiction.

§§ 494-499. Extent of the jurisdiction.

§ 495. Irreparable injury.

§ 496. Continuous or repeated trespasses.

§ 497. Insolvency of defendant.

§ 498. Miscellaneous cases.

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§ 501. Threatened trespass.

§§ 502-506. Dispute as to title.

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§ 503. Defendant in possession enjoined from destructive acts.

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§ 507. Possession, when given by injunction.

§ 508. The balance of injury.

§ 509. Personal remedy open to plaintiff.

§ 510. Relief given.

§ 511. Estoppel, laches, acquiescence.

§ 1907. (§ 493.) Nature of the Jurisdiction.—The term "trespass" as used in equity differs from waste in respect to the privity of title between the plaintiff and the defendant, and in respect to the rightfulness of the defendant's possession of the land, which two facts constitute the technical requisites of waste. It differs from trespass in law in that it does not require that plaintiff be either entitled to, or actually in, possession, but includes also cases in which plaintiff's action at law would be on the case or in ejectment. At an early day the

court of chancery refused to interfere and restrain any trespasser. Lord Thurlow broke through this rule, and began to use the preventive relief against such wrongs. He was followed by Lord Eldon, and the jurisdiction is now firmly established in its principles, although there is no little disagreement among the courts—and especially the American courts—in applying these principles.2 The ultimate criterion by which the jurisdiction is determined is the inadequacy of the legal remedy, but this the cases prove to be a somewhat flexible standard. The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed.3 Tried by this test all legal remedies are inadequate, and if "adequacy of legal remedy" were used in this sense by courts of equity they would enjoin any and all threatened trespasses, however trivial, whether to realty or to personalty—a length, it is hardly necessary to say, to which they have never gone.

- § 1908. (§ 494.) Extent of the Jurisdiction.—Instead, the equity courts have marked the limits of their jurisdiction far short of this. Trespasses to personalty are not enjoined at all, in general, on the ground that for a trespass, even one so serious as to amount to complete destruction, the damages which a jury will award
- 1 Hamilton v. Worsefold, 10 Ves. 290, note (3). See opinions of Lord Eldon in Hanson v. Gardiner, 7 Ves. 305; Thomas v. Oakley, 18 Ves. 184; Mitchell v. Dors, 6 Ves. 147. See, also, Stevens v. Beekman, 1 Johns. Ch. (N. Y.) 318.
- 2 4 Pom. Eq. Jur., § 1356. The subject of injunctions against trespass is treated in the monographic note to Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801.
- 3 Pom. Eq. Jur., § 1357. This section of Pom. Eq. Jur. is quoted to this effect in Xenia Real Estate Co. v. Macy, 147 Ind. 568, 47 N. E. 147.

are an adequate remedy.<sup>4</sup> And the same thing is true of trespasses to realty when they consist of single acts or of occasional acts which are temporary in their nature and effect, and which are of such nature that damages as estimated by a jury will be adequate reparation.<sup>5</sup>

4 This familiar rule does not require extensive citation of cases to support it; see, however, Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478; Ganow v. Denny, 68 Neb. 706, 94 N. W. 951. It is subject to an exception in the case of chattels of unique or peculiar qualities such that damages for their injury or destruction would be an inadequate remedy: Arundell v. Phipps, 10 Ves. 139. This was held in regard to slaves: Huntington v. Bell, 2 Port. (Ala.) 51; Sanders v. Sanders, 20 Ark. 610; Kelly v. Scott, 5 Gratt. (Va.) 479; Henderson v. Vaulx, 10 Yerg. (Tenn.) 30. But see Young's Ex'r v. Young, 9 B. Mon. (Ky.) 66; Watkins v. Logan, 3 T. B. Mon. (Ky.) 20. See cases collected in 1 Ames, Eq. Juris., 532, note 2. It is subject to the further exception that a cestui que trust of a chattel may enjoin its sale under an execution against the trustee: Smith v. Smith, 57 N. C. (4 Jones Eq.) 303.

Generally, equity will not enjoin a sale of chattels under an execution against another: Beatty v. Smith, 10 Miss. 567, 570; Markley v. Rand, 12 Cal. 275; Frazier v. White, 49 Md. 1 (although levy would entail great loss and destruction of business); Bowyer v. Creigh, 3 Rand. (Va.) 25; White v. Stender, 24 W. Va. 615, 49 Am. Rep. 283; Garstin v. Asplin, 1 Madd. 150.

Miscellaneous.—Ford v. Rigby, 10 Cal. 449 (furniture leased; levied on as property of another; injunction granted); Rohrer v. Babcock, 114 Cal. 124, 45 Pac. 1054; Wood v. Stanberry, 21 Ohio St. 142 (subsequent attaching creditors allowed injunction against sale under void execution); Cooper v. Newell, 36 Miss. 316 (injunction to protect property in custody of the law).

<sup>5</sup> Indian Land & Trust Co. v. Shoenfelt (C. C. A.), 135 Fed. 484; Kredo v. Phelps, 145 Cal. 526, 78 Pac. 1044; Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427; Smith v. Pettingill, 15 Vt. 82, 40 Am. Dec. 667; Hunting v. Hartford St. R'y Co., 73 Conn. 179, 46 Atl. 824; Peterson v. Orr, 12 Ga. 466, 58 Am. Dec. 484; Putney v. Bright, 106 Ga. 199, 32 S. E. 107; Fort Clark etc. Co. v. Anderson, 108 Ill. 643, 48 Am. Rep. 545; Bridges v. Sargent, 1 Kan. App. 442, 40 Pac. 823; Jones v. Gray, 78 Ill. App. 309; Sims v. City of Frankfort, 79 Ind. 446; Miller v. Burket, 132 Ind. 470, 32 N. E. 309; Cross v. Morristown,

On the other side, speaking now affirmatively of the many cases in which trespasses to realty are enjoined, they can be divided into the following four classes:

1. The legal remedy is inadequate because the injury is irreparable in its nature.

2. The legal remedy is inadequate because the trespass is continuous, or because repeated acts of wrong are done or threatened, although each of these acts, taken by itself, is not destructive.

3. The legal remedy is inadequate because the defendant is insolvent.

4. The legal remedy is inadequate in a miscellaneous class of cases because the courts of law for one reason or another cannot give any or, at best, not accurately estimated or sufficient damages, though damages would be a perfectly adequate kind of remedy. The four classes will be discussed in order.

§ 1909. (§ 495.) Irreparable Injury.—The term "irreparable" has been often defined by the courts in varying language. It is believed that the characteristics

18 N. J. Eq. 305; Worthington v. Moon, 53 N. J. Eq. 46, 30 Atl. 251; Hart & Hoy v. Mayor etc. Albany, 9 Wend. 571, 24 Am. Dec. 165; Gates v. Johnstown Lumber Co., 172 Mass. 495, 52 N. E. 736; Weigel v. Walsh, 45 Mo. 560; Bond v. Wool, 107 N. C. 139, 12 S. E. 281; Garrett v. Bishop, 27 Or. 349, 41 Pac. 10; Clark's Appeal, 62 Pa. St. 447; Cresap v. Kemble, 26 W. Va. 603; Le Roy v. Wright, 4 Sawy. 530, Fed. Cas. No. 8273; Kennedy v. Elliott, 85 Fed. 832; Thorn v. Sweency, 12 Nev. 251; Birmingham etc. Co. v. Birmingham etc. Co., 119 Ala. 137, 43 L. R. A. 233, 24 South. 502; Washington etc. Co. v. Corr d'Alene etc. Co., 2 Idaho, 580, 21 Pac. 562; Moore v. Halliday. 43 Or. 243, 97 Am. St. Rep. 724, 72 Pac. 801; O'Neil v. City of McKeesport, 201 Pa. St. 386, 50 Atl. 920.

6 The following are examples of the more carefully worded definitions: "Irreparable, as being beyond any method of pecuniary estimation": Per Van Fleet, J., in Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166. "An injury is irreparable when it is of such nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard": Per Lyon, J., in Wilson v. City of Mineral Point, 39 Wis. 160. "The

which the courts should seek as certainly marking an injury as irreparable, and which the majority of the decisions show to be its essential features, are: (1) That the injury is an act which is a serious change of, or is destructive to, the property it affects either physically or in the character in which it has been held and enjoyed. (2) That the property must have some peculiar quality or use such that its pecuniary value, as estimated by a jury, will not fairly recompense the owner for the loss of it.<sup>7</sup> In the application of this test, however,

word 'irreparable' means that which cannot be repaired, restored or adequately compensated for in money, or where the compensation cannot be safely measured': Per Brannon, J., in Bettman v. Horness, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271.

"In the application of this restriction much difficulty occurs in defining what injury is irreparable. The word means that which cannot be repaired, put back again, atoned for. The most absolute and positive instance of it is the cutting down 'ornamental trees,' such as the noble oaks in our State-House grove. 'A tree that is cut down cannot be made to grow again.' But the meaning of the word 'irreparable' pointed out by this example, is not that which has been adopted by the courts either in England or in this state. Grass that is cut down cannot be made to grow again, but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: The injury must be of a peculiar nature, so that compensation in money cannot atone for it; where from its nature it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be irreparable'': Per Pearson, J., in Gause v. Perkins, 56 N. C. (3 Jones Eq.) 177, 69 Am. Dec. 728, 730. In the leading case of Jerome v. Ross, 7-Johns. Ch. 315, 332, 11 Am. Dec. 484, 487, 488, Chancellor Kent defined "irreparable" as the "great and irremediable mischief, which damages could not compensate, because the mischief reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed." But that this definition of Chancellor Kent is far too narrow, in the light of modern decisions, see 4 Pom. Eq. Jur., § 1357, and note 1. See, also, Indian R. Steamboat Co. v. East Coast Transp. Co., 28 Fla. 387, 29 Am. St. Rep. 258, 10 South. 480.

7 It will be observed that this definition is largely drawn from those of Chancellor Kent in Jerome v. Ross, and Pearson, Ch. J., in

there are many conflicting decisions. Thus, some courts treat land as per se property of peculiar value and will enjoin destructive trespasses to its substance without regard to the question whether, in the particular case, it really does have any peculiar value or not. By-these courts it is made a subject for protection by injunction, just as in cases of contract it is a subject for specific performance without reference to its quality, use or value.<sup>8</sup>

Gause v. Perkins, quoted in the previous note. It attempts to describe those trespasses which are from their nature beyond reparation in money payment, such as a jury would give, and to exclude other eases for which the legal remedy may, indeed, be inadequate, but for other reasons than this. There is sometimes a tendency to make the term "irreparable" virtually extensive enough to include all cases for which the legal remedy is inadequate, as, for example, the statement of Pearson, Ch. J., supra, that the insolvency of the defendant will make trespass irreparable. See, also, Camp v. Dixon, 112 Ga. 872, 876–877, 52 L. R. A. 755, 38 S. E. 71. Cf. Elliott on Roads and Streets (2d ed.), § 665, and Wood on Nuisance (3d ed.), § 778. The meaning of "irreparable" does not preclude all possibility of money compensation, such, for instance, as the plaintiff himself might fix. See this point discussed in Dent v. Auction Mart Co., L. R. 2 Eq. 238.

8 See Thomas v. Oakley, 18 Ves. 184; Hexo v. Gill, L. R. 7 Ch. App. 699; Richards v. Dower, 64 Cal. 62, 28 Pac. 113. And see, also, Walker v. Emerson, 89 Cal. 456, 26 Pac. 968, in which the court enjoined the taking of water from plaintiff's land by a ditch which defendant dug on plaintiff's land for the purpose, saying: "Such an act is an injury to the right, and if threatened to be continued should be enjoined, whatever opinion persons other than the owner may have about the extent of the damage that may result." In Richards v. Dower, supra, the bill was to enjoin the digging of a tunnel through the plaintiff's land. The lower court found that the tunnel would not cause irreparable injury, and refused the injunction. On appeal this holding was reversed, the court, per Sharpstein, J., saying: "The finding that the injury is not irreparable is inconsistent with the findings which describe the character of the work which it is sought to have enjoined."

Trespass in Another State.—An injunction will not issue to restrain a trespass on land in another state. The effect of such an

Other courts, however, in similar cases, have taken the attitude that the question, whether an injury is irreparable or not, is an open matter of fact to be inquired into in every case, and have refused injunctions against destructive trespasses because the value of the land injured was small, and it had no peculiar use or quality for the owner. So, too, in the case of mining, the courts have sometimes applied the test of irreparability to the particular case, and finding that the owner had no use for the land beyond getting its value from it in the shape of minerals, have refused to grant the injunction when the defendant was solvent, and thus was able to give the legal relief of damages, of although in England, and gen-

injunction might be to determine title to the land, and that is a matter for the courts of the jurisdiction in which the land is situated. This is a case where the general maxim that equity acts in personam does not apply: Columbia National Sand Dredging Co. v. Morton, 28 App. D. C. 288, 7 L. R. A. (N. S.) 114. See, also, cases cited in note, 7 L. R. A. (N. S.) 114.

9 Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484; Bassett v. Salisbury etc. Mills, 47 N. H. 426; Ocean City R. Co. v. Bray, 55 N. J. Eq. 101, 35 Atl. 839; Crescent Min. Co. v. Silver King Min. Co., 17 Utah, 444, 17 Am. St. Rep. 810, 54 Pac. 244; Schuster v. Myers, 148 Mo. 422, 50 S. W. 103; King v. Mullins, 27 Mont. 364, 71 Pac. 155; Harley v. Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407. These cases are not to be reconciled with those cited in the previous note. In Crescent Min. Co. v. Silver King Min. Co., supra, the trespass complained of was the laying and keeping of water pipes in land of the plaintiff. Because the land was barren and rocky, and of small value, the court held that the injury was not irreparable, and refused the injunction, McCarty, J., dissenting, and citing Richards v. Dower, supra, as indistinguishable. In King v. Mullins, supra, the trespass complained of was the sinking of a shaft in a mining claim. In both of these cases stress is laid on the fact that the worthless soil dug up was not carried away, but left on the owner's premises. But in Jerome v. Ross, supra, the thing complained of was the digging and carrying away of stone from the plaintiff's land.

<sup>10</sup> Rice v. Looney, 81 Ill. App. 537; Erskine v. Forest Oil Co., 80 Fed. 583; Deep River Co. v. Fox, 4 Ired. Eq. (39 N. C.) 61; Kellar

erally in America, mining is a form of trespass that is generally considered as irreparable, and, as such, is enjoined.<sup>11</sup> And the same thing may be said of the cutting of or destruction of timber.<sup>12</sup> These conflicts in

v. Bullington, 101 Ala. 267, 14 South. 466. Compare Thornton v. Roll, 118 Ill. 350, 8 N. E. 145. No English court has acted on this view, though in a comparatively early case (Haight v. Jaggar, 2 Coll. 231, decided in 1845), Bruce, V. C., said: "The defendants... are, it is true, by working the coal, taking away the very substance of the property; which may, in a sense, be perhaps called in this case, and might in others most certainly be, waste or destruction; but, on the other hand, it is the only mode in which the property in question can be usefully enjoyed or made available, and may therefore, in a sense, perhaps, be deemed not more than taking the ordinary usufruct of the thing in dispute."

11 Mitchell v. Dors, 6 Ves. 147; Earl of Cowper v. Baker, 17 Ves. 128 (injunction against taking stones of peculiar value from the bed of the sea on the shore within plaintiff's estate); Anderson v. Harvey's Heirs, 10 Gratt. 386; Merced Mining etc. Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262; Hammond v. Winchester, 82 Ala. 470, 2 South. 892; Derry v. Ross, 5 Colo. 295; Althen v. Kelly, 32 Minn. 280, 20 N. W. 188; Bettman v. Harness, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271; Moore v. Jennings, 47 W. Va. 181, 34 S. E. 793; Erhardt v. Boaro, 113 U. S. 537, 28 L. Ed. 1116, 5 Sup. Ct. 565. Erhardt v. Boaro, supra, there was an application for a temporary injunction pending the settlement of a dispute over a mining claim, the bill alleging that about one hundred and fifty tons of ore containing gold and silver to the value of \$25,000 had been extracted, and that about one hundred tons of it were still on the premises. In granting a temporary injunction against further digging or removing the ore already dug, the court, per Field, J., said: "It is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation."

12 The text is cited to this effect in Tidwell v. H. H. Hitt Lumber Co. (Ala.), 73 South. 486. In Musch v. Burkhart, 83 Iowa, 301, 32 Am. St. Rep. 305, 12 L. R. A. 484, 48 N. W. 1025, plaintiff sought to enjoin the setting of boundary trees, alleging he would be damaged to the extent of \$200. In commenting on this allegation as to dam-

the cases thus result, not so much from different views of what constitues an irreparable injury, as an original question, as from a different practice with reference to distributing certain cases of the same general char-

ages, the court said: "But it does not follow that the damages would not be irreparable within the meaning of the law. The trees cannot be replaced, nor can their benefit to plaintiff and the comfort and satisfaction which he derives from them be accurately measured by a pecuniary standard. . . . A person is not obliged to suffer his property to be destroyed at the will of another, even though he may be able to recover ample pecuniary compensation therefor. especially true of property like trees, planted for and adapted to a certain use, and serving a special purpose. Their owner has an interest in them which he may protect, and to be deprived of it, without his consent would be to suffer irreparable injury, within the meaning of the law." Injunctions against cutting timber were granted in the following cases: Courthope v. Mapplesden, 10 Ves. 290; Kinder v. Jones, 17 Ves. 110; Neale v. Cripps, 4 Kay & J. 472; Lowndes v. Bettle, 3 New Rep. 409, 33 L. J. Ch. 451, 10 Jur., N. S., 226; Stanford v. Hurlestone, L. R. 9 Ch. App. 116; United States v. Guylard, 79 Fed. 21; King v. Stuart, 84 Fed. 546; King v. Campbell, 85 Fed. 814; Shipley v. Ritter, 7 Md. 408, 61 Am. Dec. 371; Smith v. Rock, 59 Vt. 232, 9 Atl. 551; Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427; Crane v. Davis (Miss.), 21 South. 17; Daubenspeck v. Grear, 18 Cal. 443; Sapp v. Roberts, 18 Neb. 299, 25 N. W. 96; Markham v. Howell, 33 Ga. 508; Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572; Fluharty v. Mills, 49 W. Va. 446, 38 S. E. 521; Camp v. Dixon, 112 Ga. 872, 52 L. R. A. 757, 38 S. E. 71, citing 4 Pom. Eq. Jur., § 1357; Ramey v. Counts, 102 Va. 902, 47 S. E. 1006; Newton v. Brown, 134 N. C. 439, 46 S. E. 994; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Louisville etc. Co. v. Gibson, 43 Fla. 315, 31 South. 230 (statutory); Houck v. Patty, 100 Mo. App. 389, 73 S. W. 389. See, also, Sullivan v. Rabb, 86 Ala. 433, 5 South. 746; Strother v. American Cooperage Co., 116 Mo. App. 518, 92 S. W. 758; McPike v. West, 71 Mo. 199; Mathews v. Chambers Power Co., 81 Or. 251, 159 Pac. 564; Crawford v. Atlantic Coast Lumber Corp., 77 S. C. 81, 57 S. E. 670; Whitehouse v. Jones, 60 W. Va. 680, 12 L. R. A. (N. S.) 49, 55 S. E. 730 (as incident to removal of cloud on title); Pardee v. Camden Lumber Co., 70 W. Va. 68, 43 L. R. A. (N. S.) 262, 73 S. E. 82, citing this section of the text. Injunctions. against cutting timber were refused in the following cases: Wilcox acter in subject-matter, into fixed groups that shall be considered as *per se* cases of irreparable injury. As a further source of conflict, there are a number of cases which, when dealing with trespasses to real property,

Lumber Co. v. Bullock, 109 Ga. 532, 35 S. E. 52; Schoonover v. Bright, 24 W. Va. 698; Watson v. Ferrell, 34 W. Va. 406, 12 S. E. 724; Curtin v. Stout, 57 W. Va. 271, 50 S. E. 810; Stephenson etc. v. Burdett, 56 W. Va. 109, 10 L. R. A. (N. S.) 748, 48 S. E. 846; Gause v. Perkins, 56 N. C. (3 Jones Eq.) 177, 69 Am. Dec. 728; Sharpe v. Loane, 124 N. C. 1, 32 S. E. 318; Myers v. Hawkins, 67 Ark. 413, 56 S. W. 640; Woodford v. Alexander, 35 Fla. 333, 17 South. 658 (disapproved in Brown v. Solary, 37 Fla. 102, 19 South. 161); Carney v. Hadley, 32 Fla. 344, 37 Am. St. Rep. 101, 22 L. R. A. 233, 14 South. 4; Cowan v. Skinner, 52 Fla. 486, 11 Ann. Cas. 452, 453, 42 South. 730; Thatcher v. Humble, 67 Ind. 444. Observe that Georgia and West Virginia have some decisions in which the injunctions were granted and others in which they were refused, the special circumstances of the cases distinguishing them. In Gause v. Perkins, supra, Pearson, J., said: "In the present condition of our country, does the cultivation of pine trees for turpentine, or the cutting down of oak trees for staves, or cypress trees for shingles, cause an irreparable injury-one which cannot be compensated for in damages? The very purpose for which these trees are used by the owners of land is to get from them turpentine, staves and shingles for sale. It follows, therefore, as a matter of course, that if the owner of the land recovers from a trespasser the value of the trees that are used for those purposes, he thereby receives compensation for the injury, and it cannot in any sense of the word be deemed irreparable." In Camp v. Dixon, supra, the plaintiffs owned large bodies of timber and had invested large sums of money in mills and other equipment. The defendants threatened to denude the land of its timber, and as this would be the ruin of the plaintiff's business, the court held that the facts of the case showed irreparable injury, stronger than the ordinary one of cutting timber. The case was also rested on the ground of preventing multiplicity of suits, and on the fact that a jury's estimate of damages would be conjectural. In Fluharty v. Mills, supra, the bill alleged that the timber which the defendant was threatening to destroy was especially valuable to the land, and that the taking away of the timber would permanently injure the land; this the court thought was a sufficient showing of irreparable injury. But the same court, in Watson v.

tend to give to the term "irreparable" an enlarged signification, and make it virtually synonymous with "serious injury." There are, of course, no particular

Ferrell, supra, refused an injunction against cutting timber, on . the ground that irreparable injury was not shown, saying as to this: "When we look further at the allegations of the bill we find that he alleges that the greater portion of the land is in a state of nature, and covered by a valuable growing timber, etc., which timber is very valuable, and makes such land much more valuable than it would be without said growing timber, non constat, that the land is not filled with coal, iron, and other minerals, or that the timber constitutes its chief value; and there are no facts stated on the face of the bill that would show that the plaintiff would suffer irreparable injury by the cutting and removal of seventy-five or any number of trees from said land when it is not alleged that the defendants are insolvent." In Brown v. Solary, 37 Fla. 102, 19 South. 161, the court, per Mabry, C. J., said: "When the value of land consists chiefly, if not entirely, in the timber thereon, its destruction amounts to irreparable injury, within the rule on the subject." It has been said that the court should not enjoin the removal of timber after it has been cut: Atlantic Coast Lumber Corporation v. E. P. Burton Lumber Co., 89 S. C. 143, 71 S. E. 820.

13 In a recent case the court, after quoting the definition of Pearson, J., in Gause v. Perkins, which has been given ante, note 6, said: "This definition is fairly deducible from the earlier cases, but it is entirely too narrow to meet the decisions of more modern times. . . . In the light of modern decisions, an irreparable injury may be said to be one which, either from its nature, or from the circumstances surrounding the person injured, or the financial condition of the person committing the injury, cannot be readily, adequately, and completely compensated with money": Per Cobb. J., in Camp v. Dixon, 112 Ga. 872, 52 L. R. A. 757, 38 S. E. 71, 73. See, also, Champ v. Kendrick, 130 Ind. 549, 30 N. E. 787, citing Pom. Eq. Jur., § 1357, and Lemmon v. Guthrie Center, 113 Iowa, 36, 86 Am. St. Rep. 361, 84 N. W. 986. In this last case the court enjoined town authorities from moving a building of the plaintiff, saying: "An examination of all the cases indicates a strong tendency to grant equitable relief whenever the trespass permanently diminishes the substance of the estate in that which constitutes its chief value. without reference to the fact that the value may be measured in money, on the ground that the plaintiff is entitled to have the identity and integrity of his estate preserved."

classes of cases to which irreparable injuries are confined. Other illustrations are collected in the note.<sup>14</sup>

14 Injury to or removal of buildings: Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789; De Veney v. Gallagher, 20 N. J. Eq. 33; Echelkamp v. Schroder, 45 Mo. 505; Everett v. City of Marquette, 53 Mich. 450, 19 N. W. 140; Lemmon v. Town of Guthrie Center, 113 Iowa, 36, 86 Am. St. Rep. 361, 84 N. W. 986; Auckland v. Westminster Board, L. R. 7 Ch. App. 597; District Tp. of Lodomillo v. Dist. Tp. of Cass, 54 Iowa, 115, 6 N. W. 163; Lewis v. Town of North Kingstown, 16 R. I. 15, 27 Am. St. Rep. 724, 11 Atl. 173; Glasco v. School Dist. No. 22, McClain County, 24 Okl. 236, 103 Pac. 687. Laying out public roads over plaintiff's land: Erwin v. Fulk, 94 Ind. 235, citing 4 Pom. Eq. Jur., § 1357; Grigsby v. Burtnett, 31 Cal. 406 (cf. Leach v. Day, 27 Cal. 643); Ballentine v. Town of Harrison, 37 N. J. Eq. (10 Stew.) 560, 45 Am. Rep. 667. Grazing sheep on plaintiff's land: Northern Pac. R. R. Co. v. Cunningham, 89 Fed. 594; Martin v. Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093; Strawberry etc. Co. v. Chipman, 13 Utah, 454, 45 Pac. 348; Dastervignes v. United States, 122 Fed. 30. Interference with graves: First Evangelical Church v. Walsh, 57 Ill. 363, 11 Am. Rep. 21; Choppin v. Dauplin, 48 La. Ann. 1217, 55 Am. St. Rep. 313, 33 L. R. A. 133, 20 South. 681; Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521; Wormley v. Wormley, 207 Ill. 411, 3 L. R. A. (N. S.) 481, 69 N. E. 865; Davidson v. Reed, 111 Ill. 167, 53 Am. Rep. 613; Roundtree v. Hutchinson, 57 Wash, 414, 27 L. R. A. (N. S.) 875, 107 Pac. 345; Ritter v. Couch, 71 W. Va. 221, 42 L. R. A. (N. S.) 1216, 76 S. E. 428. Removal and defacing of landmarks; Preston v. Preston, 85 Ky. 16, 2 S. W. 501. Removal of a fence: Bolton v. McShane, 67 Iowa, 207, 25 N. W. 135; Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646; Wolf etc. Co. v. Lonyo, 132 Mich. 162, 102 Am. St. Rep. 412, 93 N. W. 251; Winslow v. Nayson, 113 Mass. 411. But see Jones v. Gray, 78 Ill. App. 309. Removal of fixtures: Jenney v. Jackson, 6 Ill. App. 32. Beatty v. Kurtz, supra, is an excellent example of one of the clearest kinds of irreparable injury. The bill was to enjoin the defendants from removing tombstones and graves and dispossessing the plaintiffs of the buryingground. In granting the injunction, Story, J., said: "This is not a case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement, is to be taken from them, the sepulchres of the dead are to be violated, the feelings of religion, and the sentiments of natural affection of the kindred and friends of the deceased are to be

§ 1910. (§ 496.) Continuous or Repeated Trespasses. The jurisdiction of equity to restrain continuous or repeated trespasses rests on the ground of avoiding a repetition of similar actions. 15 It is a basis of jurisdiction that is frequently found in cases where the injury is also irreparable. Very often, indeed, the injury is irreparable only because it is continuous or repeated, when it would not be if temporary, and in such cases the injunction will issue as a matter of course. 16 For the further discussion of this subject, it will be convenient to consider, first, the cases in which the injury is the result of a single act, or set of acts, of the defendant, which afterwards operate by virtue of natural laws to produce the injury; and, second, the cases in which there are several or many acts of the defendant or defendants which give rise to as many different causes of The distinction is roughly that between conactions. tinuing and repeated trespasses, and is based on the distinctions made in the cases themselves. If a trespass is of the first class and produces substantial damage to the plaintiff, the authorities are well agreed that

wounded; and the memorials erected by piety or love, to the memory of the good are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations." An injury falling far short of this may, of course, be irreparable. Where taking possession will break up plaintiff's business, the injury is said to be irreparable: Cook County Brick Co. v. Labahn Brick Co., 92 Ill. App. 526.

15 4 Pom. Eq. Jur., § 1357. This section of the text is cited with approval in Coombs v. Lenox Realty Co., 111 Me. 178, 47 L. R. A. (N. S.) 1085, 88 Atl. 477. Pom. Eq. Jur., section 1357, is quoted to the same effect in Cragg v. Levinson, 238 Ill. 69, 15 Ann. Cas. 1229, 21 L. R. A. (N. S.) 417, 87 N. E. 121. This entire class of cases is comprehended in the broader jurisdiction of equity to prevent multiplicity of suits, for a consideration of which see 1 Pom. Eq. Jur., § \$ 243-275.

16 See, e. g., Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427; Kellogg
v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166; Ellis v. Blue
Mountain Forest Ass'n, 69 N. H. 385, 42 L. R. A. 570, 41 Atl. 856.

a proper case for an injunction is presented.<sup>17</sup> If, however, the injury is little or nothing more than the technical invasion of plaintiff's legal right without substantial damage, there is a division among the courts, though a majority of the decisions show that the foundation principle of this branch of the jurisdiction fairly includes all such cases, whether the damage is substantial or not.<sup>18</sup> If plaintiff's legal remedy may be

17 Fitzgerald v. Urton, 5 Cal. 308; Mohawk etc. Co. v. Artcher, 6 Paige, 83; Henderson v. New York Cent. R. R. Co., 78 N. Y. 423; Birmingham Traction Co. v. Southern Bell etc. Co., 119 Ala. 144, 24 South. 731; Davis v. Frankenlust Tp., 118 Mich. 494, 76 N. W. 1045; Calmelet v. Sichl, 48 Neb. 505, 58 Am. St. Rep. 700, 67 N. W. 467; Gobeille v. Meunier, 21 R. I. 103, 41 Atl. 1001; Barbee v. Shannon, 1 Ind. Ter. 199, 40 S. W. 584; McCloskey v. Doherty, 97 Ky. 200, 30 S. W. 649; Watson v. French, 112 Me. 371, L. R. A. 1915C, 355, 92 Atl. 290.

18 That an injunction should issue in such a case: Goodson v. Richardson, L. R. 9 Ch. App. 221; Powell v. Aiken, 4 Kay & J. 343; Allen v. Martin, L. R. 20 Eq. 462; Delaware etc. Co. v. Breckenridge, 57 N. J. Eq. 154, 41 Atl. 966, affirmed in 58 N. J. Eq. 581, 43 Atl. 1097; and the language of the courts in most of the cases in which in fact there is substantial damage shown, indicates that this question is of no moment. Injunctions were refused in McCullough v. Denver, 39 Fed. 307; Nicodemus v. Nicodemus, 41 Md. 529; Hoy v. Sweetman, 19 Nev. 376, 12 Pac. 504; Fisher v. Carpenter, 67 N. H. 569, 39 Atl. 1018; Crescent etc. Co. v. Silver etc. Co., 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; Savannah etc. Co. v. Suburban etc. Co., 93 Ga. 240, 18 S. E. 824; Whitlock v. Consumers' etc. Co., 127 Ind. 62, 26 N. E. 570; Christman v. Howe, 163 Ind. 330, 70 N. E. 809. If the plaintiff is a reversioner, however, it is proper to require that he show substantial damage, because otherwise he shows no legal cause of action in himself: Cooper v. Crabtree, L. R. 20 Ch. D. 589; Coney v. Brunswick etc. Co., 116 Ga. 222, 42 S. E. 498. The following are additional cases in which continuing trespasses were enjoined: Dosoris Pond Co. v. Campbell, 164 N. Y. 596, 58 N. E. 1087, affirming 25 App. Div. 179, 50 N. Y. Supp. 819; Cobb v. Mass. Chem. Co., 179 Mass. 423, 60 N. E. 790; Rhoades v. McNamara, 135 Mich. 644, 98 N. W. 392; Simpson v. Moorhead, 65 N. J. Eq. 623, 56 Atl. 887; Mc-Clellan v. Taylor, 54 S. C. 430, 32 S. E. 527; Hall v. Nester, 122 Mich. 141, 80 N. W. 982; Ragsdale v. Southern R'y Co., 60 S. C. 381, vexatious, harassing, and hence inadequate when he recovers substantial damages, still more would it seem to be so when his recovery is only nominal.<sup>19</sup> When the trespasses complained of are caused by the separate acts of individuals, a multiplicity of suits may be caused to plaintiff either because the defendants are numerous or because a single defendant does the same or similar acts repeatedly. The principle involved in all such cases is the same, and injunctions should issue. And when the basis of the multiplicity of suits which plaintiff fears is that the defendants are numerous, all authorities agree in granting the injunctions.<sup>20</sup> But when it is the case of a single defendant who, by repeating his acts of

38 S. E. 609; Olivella v. New York etc. Co., 31 Misc. Rep. 203, 64 N. Y. Supp. 1086; Hahl v. Sugo, 46 App. Div. 632, 61 N. Y. Supp. 770, affirming 27 Misc. Rep. 1, 57 N. Y. Supp. 920; Providence etc. Co. v. City of Fall River, 183 Mass. 535, 67 N. E. 647; Miller v. Hoeschler, 121 Wis. 558, 99 N. W. 228 (citing 4 Pom. Eq. Jur., § 1347).

19 It is often given as an additional reason for enjoining repeated or continuing trespasses to land that otherwise there is danger lest they "ripen into an easement." Apart from the remoteness of any such danger, which alone would seem enough to defeat the injunction, the reason would appear to be unsound because of the fact that plaintiff, by bringing suit, or interfering with the trespasses once in every period necessary for the ripening of an easement, would prevent that danger: See McGregor v. Silver King Min. Co., 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091; Hart v. Hilderbrandt, 30 Ind. App. 415, 66 N. E. 173.

20 This statement is, of course, subject to the qualifications which the questions of "community of interest" or "identity of issues" have made in the decisions with reference to the proper joinder of the defendants in one suit. For a full discussion of this point and collection of the authorities, see 1 Pom. Eq. Jur., §§ 243-275. Typical cases illustrating this group are, Smith v. Bivens, 56 Fed. 352; United States Freehold Land etc. Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470; New York Cent. etc. Co. v. Warren, 31 Misc. Rep. 571, 64 N. Y. Supp. 781; Boston etc. Co. v. Sullivan, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; Palmer v. Israel, 13 Mont. 209, 33 Pac. 134; McIntyre v. Storey, 80 Ill. 127 (tearing down fences).

trespass, makes it necessary for plaintiff to pursue his legal remedy only by a succession of actions, the decisions are curiously diverse. It is held, in a small group of cases, that this is not the kind of multiplicity of suits which equity enjoins, but that instead an injunction is proper only when different persons assail plaintiff's right.<sup>21</sup> The other view, and the one sustained alike by the weight of authority and by principle, is that if a defendant manifests a purpose to persist in perpetrating his unlawful acts, the vexation, expense and trouble of prosecuting the actions at law make the legal remedy inadequate, and justify a plaintiff in coming into equity for an injunction.<sup>22</sup> None of the cases show

21 Best v. Drake, 11 Hare, 369; Smith v. Gardner, 12 Or. 221, 53
Am. Rep. 342, 6 Pac. 771; Jerome v. Ross, 7 Johns. Ch. 315, 11 Am.
Dec. 484; Carney v. Hadley, 32 Fla. 344, 37 Am. St. Rep. 101, 22
L. R. A. 233, 14 South. 4; Roebling Sons' Co. v. First Nat. Bank, 30
Fed. 744; Deegan v. Neville, 127 Ala. 471, 85 Am. St. Rep. 137, 29
South. 173; Taylor v. Pearce, 71 Ill. App. 525. See, also, Hatcher v. Hampton, 7 Ga. 49; Chicago Public Stock Exchange v. McClaughry, 148 Ill. 372, 36 N. E. 88; Commissioners of Highways v. Green, 156 Ill. 504, 41 N. E. 154; Cowan v. Skinner, 52 Fla. 486, 11
Ann. Cas. 452, 453, 42 South. 730, citing this section of the text.

<sup>22</sup> Musselman v. Marquis, 1 Bush (Ky.), 463, 89 Am. Dec. 637; Ladd v. Osborne, 79 Iowa, 93, 44 N. W. 235; Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164, quoting Pom. Eq. Jur., § 1357; Mendelson v. McCabe, 144 Cal. 230, 103 Am. St. Rep. 78, 77 Pac. 915; Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. 612; Heman v. Wade, 74 Mo. App. 339, citing 4 Pom. Eq. Jur., § 1357; McClellan v. Taylor, 54 S. C. 430, 32 S. E. 527; Allen v. Martin, L. R. 20 Eq. 462; Lembeck v. Nye, 47 Ohio St. 336, 21 Am. St. Rep. 828, 8 L. R. A. 578, 24 N. E. 686; New York etc. Co. v. Scovill, 71 Conn. 136, 71 Am. St. Rep. 159, 42 L. R. A. 157, 41 Atl. 246; Owens v. Crossett, 105 Ill. 354; Bolsa Land Co. v. Burdick, 151 Cal. 254, 12 L. R. A. (N. S.) 275, 90 Pac. 532; Valentine v. Schreiber, 3 App. Div. 235, 38 N. Y. Supp. 417; Sills v. Goodyear, 80 Mo. App. 128; Pohlman v. Lohmeyer, 60 Neb. 364, 83 N. W. 201; Garrett v. Bishop, 27 Or. 349, 41 Pac. 10; Barbee v. Shannon, 1 Ind. Ter. 199, 40 S. W. 584, citing 1 Pom. Eq. Jur., § 264; Lynch v. Egan, 67 Neb. 541, 93 N. W. 775; Atchison etc. Co. v. Spaulding, 69 Kan. 431, 77 Pac. 106; Blondell v. Consolidated Gas any tendency to make the seriousness of the damage

Co., 89 Md. 732, 46 L. R. A. 187, 43 Atl. 817; Thomas v. Robinson (Iowa), 92 N. W. 70; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. 944; Lake Shore etc. Co. v. Felton, 103 Fed. 227, 43 C. C. A. 189; Gulf, C. & S. F. R'y Co. v. Puckett (Tex. Civ. App.), 82 S. W. 662 (using railway velocipede on railroad track repeatedly). See, also, Central Iron & Coal Co. v. Vandenheuk, 147 Ala. 546, 119 Am. St. Rep. 102, 11 Ann. Cas. 346, 6 L. R. A. (N. S.) 570, 41 South. 145 (injunction against casting debris on land by blasting); Mackenzie v. Minis, 132 Ga. 323, 16 Ann. Cas. 723, 23 L. R. A. (N. S.) 1003, 63 S. E. 900; Keil v. Wright, 135 Iowa, 383, 124 Am. St. Rep. 282, 14 Ann. Cas. 549, 13 L. R. A. (N. S.) 184, 112 N. W. 633 (continued trespass by chickens); Pohlman v. Evangelical Lutheran Trinity Church, 60 Neb. 364, 83 N. W. 201; Hornung v. Herring, 74 Neb. 637, 13 L. R. A. (N. S.) 182, 104 N. W. 1071; Mitchell v. Lea Lumber Co., 43 Wash. 195, 10 Ann. Cas. 231, 9 L. R. A. (N. S.) 900, 86 Pac. 405; Miller v. Hoeschler, 121 Wis. 558, 7 L. R. A. (N. S.) 49, 99 N. W. 228 (injunction against repeated acts of trespass for purpose of erecting and maintaining a fence; citing Pom. Eq. Jur., § 1357). Pauw v. Oxley, 122 Wis. 656, 13 L. R. A. (N. S.) 173, 100 N. W. 1028. In Musselman v. Marquis, supra, the bill was to enjoin the defendant from throwing down and removing fencing. The facts were that the defendant had already repeatedly thrown down the fencing, and had declared his intention of continuing the commission of similar trespasses. In allowing the injunction the court, per Hardin, J., said: "Indeed, without regard to the alleged insolvency of the defendant, as the other facts alleged disclose a determined purpose on his part to persist in perpetrating the unlawful acts complained of, thus rendering redress at law only obtainable by a multiplicity of suits, and probably without any sufficient compensation for the vexation, expense, and trouble attending their prosecution, we are of the opinion that the chancellor had power to enjoin the mischief, in order to prevent oppressive litigation, the principle of equitable jurisdiction being, that where there is no adequate remedy at law, the chancellor must take jurisdiction, or otherwise the damage is irreparable."

Trespass by chickens.—Injunction was granted in Keil v. Wright, 135 Iowa, 383, 124 Am. St. Rep. 282, 14 Ann. Cas. 549, 13 L. R. A. (N. S.) 184, 112 N. W. 633; but denied in Kimple v. Schafer, 161 Iowa, 659, Ann. Cas. 1916A, 244, 48 L. R. A. (N. S.) 179, 143 N. W. 505, on the ground that the common-law rule compelling one to keep chickens on his own premises is not in force in Iowa. For a collection of authorities, see 48 L. R. A. (N. S.) 179, note.

the criterion,<sup>23</sup> and the jurisdiction attaches as well to trespasses to personalty as to realty.<sup>24</sup>

§ 1911. (§ 497.) Insolvency of Defendant.—The inadequacy of legal remedies, ordinarily, against an insolvent trespasser is obvious, and the reason for equity's intervention in such cases is clear. The number of cases in which the defendant's insolvency is made a material part of the court's reason for granting an injunction is very great.<sup>25</sup> The number of cases in which the question has arisen whether insolvency alone is enough to support an injunction is not so large, but is sufficient to show the general recognition by the courts of the glaring insufficiency of a judgment for damages against an insolvent.<sup>26</sup> When, however, the legal rem-

Trespass on railroad right of way.—Injunctions granted: Gulf, C. & S. F. R'y Co. v. Puckett (Tex. Civ. App.), 80 S. W. 662; Atchison, T. & S. F. R. Co. v. Spaulding, 69 Kan. 431, 105 Am St. Rep. 175, 2 Ann. Gas. 546, 66 L. R. A. 587, 77 Pac. 106.

Shooting across land.—Injunction granted: Whittaker v. Stangvick, 100 Minn. 386, 117 Am. St. Rep. 703, 10 Ann. Cas. 528, 10 L. R. A. (N. S.) 921, 111 N. W. 295; Lamprey v. Danz, 86 Minn. 317, 90 N. W. 578.

23 See Ellis v. Wren, 84 Ky. 254, 1 S. W. 440. The text is quoted in Tidwell v. H. H. Hitt Lumber Co. (Ala.), 73 South. 486.

24 Warren Mills v. New Orleans Seed Co., 65 Miss. 391, 7 Am. St. Rep. 671, 4 South. 298.

25 See e. g., Musselman v. Marquis, 1 Bush (64 Ky.), 463, 89 Am.
Dec. 637; Milan Steam Mills v. Hickey, 59 N. H. 241; Bensley v. Mountain etc. Co., 13 Cal. 306, 73 Am. Dec. 575; Owens v. Crossett, 105 Ill. 354; McKay v. Chapin, 120 N. C. 159, 26 S. E. 701; Clark v. Wall, 32 Mont. 219, 79 Pac. 1052; Mackenzie v. Minis, 132 Ga. 323, 16 Ann. Cas. 723, 23 L. R. A. (N. S.) 1003, 63 S. E. 900.

26 The text is cited to this effect in Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21. See, also, West v. Walker, 3 N. J. Eq. 279, note B; Wilson v. Hill, 46 N. J. Eq. 369, 19 Atl. 1097; Paige v. Akins, 112 Cal. 401, 44 Pac. 666; Harms v. Jacobs, 158 Ill. 505, 41 N. E. 1071; Ryan v. Fulghum, 96 Ga. 234, 22 S. E. 940; Champ v. Kendrick, 130 Ind. 549, 30 N. E. 787; Leach v. Harbaugh, 3 Neb. (Unof.) 346, 91 N. W. 521; Hanley v. Waterson, 39 W. Va. 214, 19

edy is not rendered inadequate because of the defendant's insolvency, as when the desired relief is possession of the land which may be procured by the ordinary possessory action at law, the injunction will be refused.<sup>27</sup>

§ 1912. (§ 498.) Miscellaneous Cases.—Besides the three classes of cases just discussed, there are other cases which permit of no definite classification, but which, largely for that reason, show most clearly the comprehensive nature of equity jurisdiction to restrain trespasses. In one of the leading cases of this kind the supreme court of the United States quoted as the criterion of the jurisdiction: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." Cases which illustrate this broad rule are collected in the note.<sup>29</sup>

S. E. 536. And see further cases collected in 1 Ames, Cases in Eq. Juris., 524, note 2. Contra, Pensacola etc. Co. v. Spratt, 12 Fla. 26, 91 Am. Dec. 747; Parker v. Furlong, 37 Or. 248, 62 Pac. 490; Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801; Loyd v. Blackburn, 57 W. Va. 217, 50 S. E. 741; Heilman v. Union Canal Co., 37 Pa. St. 100; Puryear v. Sanford, 124 N. C. 276, 32 S. E. 685. 27 Warlier v. Williams, 53 Neb. 143, 73 N. W. 539. The fact that a defendant is solvent is immaterial where the injury is otherwise irreparable: Tidwell v. H. H. Hitt Lumber Co. (Ala.), 73 South. 486; Moore & Co. v. Daugherty, Allen & Co., 146 Ga. 176, 91 S. E. 14; Keil v. Wright, 135 Iowa, 383, 124 Am. St. Rep. 282, 14 Ann. Cas. 549, 13 L. R. A. (N. S.) 184, 112 N. W. 633; Hornung v. Herring, 74 Neb. 637, 13 L. R. A. (N. S.) 182, 104 N. W. 1071.

28 Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580.

29 Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580 (seizure of stock of goods on execution enjoined because law of damages would allow plaintiff to recover only value of the goods and not the loss to his business); North v. Peters, 138 U. S. 271, 34 L. Ed. 936 (same as preceding case). Other cases of the same sort are collected in 1 Ames, Cases in Eq. Juris., 532, note 3. But see Tomlinson v. Rubio, 16 Cal. 202, disapproved by Currey, J., in Tevis v. Ellis, 25 Cal. 518; Thomas v. James, 32 Ala. 723 (bill by a cestui que

§ 1913. (§ 499.) Eminent Domain. — There is one class of cases in which an injunction will issue against a trespass without regard to the character of the act, viz., when property is taken or used by a de-

trust, who would maintain no action at law); and see Lytle v. James, 98 Mo. App. 337, 73 S. W. 287 (licensee plaintiff); Payne v. Kansas etc. Co., 46 Fed. 546 (damagés would be conjectural); London etc. Co. v. Lancashire etc. Co., L. R. 4 Eq. 174 (same); Westmoreland etc. Gas Co. v. De Witt, 130 Pa. St. 235, 5 L. R. A. 731, 18 Atl. 724 (same); Poughkeepsie Gas Co. v. Citizens' Gas Co., 89 N. Y. 493 (same); Phillips v. Winslow, 57 Ky. (18 B. Mon.) 431, 68 Am. Dec. 729 (seizure and sale of cars under wrongful execution enjoined because it would stop business of a railroad); Barbee v. Shannon, 1 Ind. Ter. 199, 40 S. W. 584 (damages which plaintiff, a lessor, could recover, might be less than he would be liable for to his lessee for breach of covenant); Miller v. Wills, 95 Va. 337, 28 S. E. 337 (nonresidence of defendant of weight in determining propriety of granting an injunction); Morgan v. Baxter, 113 Ga. 144, 38 S. E. 411 (same, but non-residence alone not enough). See Pokegama etc. Co. v. Klamath River etc. Co., 96 Fed. 34; Allen Coal Co. v. Challis, 103 Ill. App. 52; City of Los Angeles v. Los Angeles etc. Co., 124 Cal. 368, 5 Pac. 210. In general, see Kibbie Telephone Co. v. Landphere, 151 Mich. 309, 16 L. R. A. (N. S.) 689, 115 N. W. 244.

Trespass upon church property:-In Christian Church v. Sommer, 149 Ala. 145, 123 Am. St. Rep. 27, 8 L. R. A. (N. S.) 1031, 43 South. 8, the defendants were enjoined from forcibly entering the church, changing locks, etc. The court said: "Church edifices are a different class of property from that usually sought to be protected against trespassers. There are two distinguishing characteristics: The use to which the church building is devoted; and the want of commercial purpose in the possession thereof by the church. The church building is acquired and maintained for the worship of God. It is obvious that a trespass against such property—a trespass the natural result of which is to interfere with and disturb, if not defeat, such worship in the church building—involves the use resting upon the property right, and, if committed, would work irreparable injury; the reason being that a violation of the right and privilege to peaceably worship in the place therefor is wholly incapable of compensation in damages." In Ashinsky v. Levenson, 256 Pa. 14, L. R. A. 1917D, 994, 100 Atl. 491, an injunction was issued to prevent a defendant from entering a synagogue and calling the rabbi vile names, as he had done several times.

fendant under the right of eminent domain without first complying with the prescribed formalities for ascertaining and making compensation. In such cases, the courts do not stop to inquire whether the value of the property to be taken was little or great, whether the injury to the complainant was great or small, but grant the injunction first, on the ground that the constitutional provision makes the payment of a properly ascertained compensation a condition precedent to the right to take, and that injunction is the only way to enforce this provision.<sup>30</sup> The injunction granted in such cases may be an absolute one which forbids defendant further to trespass till after proper condemnation proceedings,<sup>31</sup> or it may be so

30 McElroy v. Kansas City, 21 Fed. 257; Searle v. City of Lead, 10 S. D. 405, 73 N. W. 913; Donovan v. Allert, 11 N. D. 289, 95 Am. St. Rep. 720, 58 L. R. A. 775, 91 N. W. 441; Birmingham Traction Co. v. Birmingham R'y etc. Co., 119 Ala. 129, 24 South. 368; Village of Itasca v. Schroeder, 182 Ill. 192, 55 N. E. 50; Yates v. Milwaukee, 10 Wall. 479, 19 L. Ed. 984; Thompson v. Manhattan R'y Co., 130 N. Y. 360, 29 N. E. 264. See, also, Ft. Worth Improv. Dist. v. City of Ft. Worth, 106 Tex. 148, 48 L. R. A. (N. S.) 994, 158 S. W. 164. This subject is treated at length, ante, chapter XX. See the following cases for instances of relief granted when no attempt has been made to condemn the property: Baya v. Town of Lake City, 44 Fla. 491, 33 South. 400; Shipley v. Western Md. Tidewater R. Co., 99 Md. 115, 56 Atl. 968; Freud v. Detroit & P. R'y Co., 133 Mich. 413, 95 N. W. 559. See, also, Atlantic & B. R. Co. v. Seaboard Air Line R'y, 116 Ga. 412, 42 S. E. 761. In Winslow v. City of Vallejo, 148 Cal. 723, 113 Am. St. Rep. 349, 7 Ann. Cas. 851, 5 L. R. A. (N. S.) 851, 84 Pac. 191, an entry upon land for the purpose of laying waterpipes was enjoined. In Le Blond v. Town of Peshtigo, 140 Wis. 604, 25 L. R. A. (N. S.) 511, 123 N. W. 157, an injunction to prevent maintenance of highway illegally opened was denied on the ground that plaintiff had an adequate remedy at law.

31 Gilman v. Sheboygan etc. Co., 40 Wis. 653; Rosenberger v. Miller, 1 Mo. App. 640, 61 Mo. App. 422; Bensley v. Mountain etc. Co., 13 Cal. 306, 73 Am. Dec. 575; Central etc. Co. v. Philadelphia etc. Co., 95 Md. 428, 52 Atl. 752; Folley v. City of Passaic, 26 N. J. Eq. 216; Peck v. Schenectady R'y Co., 170 N. Y. 298, 63 N. E. 357, modifying 67 App. Div. 359, 73 N. Y. Supp. 794.

framed as to reach the same end as such proceedings would, and thus save a second legal action.<sup>32</sup>

§ 1914. (§ 500.) What Plaintiff must Allege.—A plaintiff who asks for the aid of equity against trespass, must, of course, show a case to justify the extraordinary relief he seeks. Hence, he must show in his bill not only a legal wrong,<sup>33</sup> but, further, why the legal remedy is not adequate.<sup>34</sup> And it is not sufficient for this purpose that he merely allege an "irreparable" or a "continuing" trespass. He must set forth the facts from which the court may draw the inference that the legal remedy

32 Henderson v. New York Cent. etc. Co., 78 N. Y. 423; Pappenheim v. Metropolitan etc. Co., 128 N. Y. 436, 26 Am. St. Rep. 486, 13 L. R. A. 401, 28 N. E. 518. Where a railroad has completed or nearly completed its road on land taken possession of by mistake, and the only question is one of value, an injunction may be refused: Wood v. Charing Cross R'y Co., 33 Beav. 290. In Armstrong v. Waterford R'y Co., 10 Ir. Eq. R. 60, the company had commenced work without paying or depositing the compensation in court. An injunction was refused upon the company undertaking to pay into court and give the required bond. The issue of the injunction may be suspended to give the defendant an opportunity to obtain compensation: Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215. See ante, §§ 473, 470.

33 State v. Rost, 59 La. Ann. 995, 23 South. 978; Flannery v. Hightower, 97 Ga. 592, 25 S. E. 371; Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166. And so if a plaintiff's bill fails to show he has title to the property in question, he will be refused relief: Amos v. Norcross, 58 N. J. Eq. 256, 43 Atl. 195; Perkins v. Mason, 105 Mo. App. 315, 79 S. W. 987; Powell v. Brinson, 120 Ga. 36, 47 S. E. 499; Tiernan v. Miller, etc., 69 Neb. 764, 96 N. W. 661.

34 Collins v. Sutton, 94 Va. 127, 26 S. E. 415; Smith v. Schlink, 15 Colo. App. 325, 62 Pac. 1044. See, also, Chicago Public Stock Exchange v. McClaughry, 148 Ill. 372, 36 N. E. 88. Contra, Kaufman v. Wiener, 169 Ill. 596, 48 N. E. 479, affirming 68 Ill. App. 250; Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418. Insolvency need not be alleged where irreparable injury is otherwise shown: Edwards v. Haeger, 180 Ill. 99, 54 N. E. 176; Cook County Brick Co. v. Labahn Brick Co., 92 Ill. App. 526.

is not sufficient.<sup>35</sup> Nor is it necessary that he should allege that the injury will be irreparable;<sup>36</sup> the same reason which makes it necessary for him to set out the facts, makes it unnecessary for him to do more.

§ 1915. (§ 501.) Threatened Trespass.—In the subject of trespass as elsewhere the main function of an injunction is to preserve property from future injury. Courts will not, however, enjoin against a mere speculative or possible injury. Instead, a reasonable probability of the injury resulting must be shown.<sup>37</sup> Hence, if defendant has neither done nor threatened any wrongful acts, and denies his intention to do the acts against which an injunction is sought, it will be refused.<sup>38</sup> On the other hand, if plaintiff shows that defendant has threatened to do acts of the kind which equity enjoins, that is enough to rest his case upon.<sup>39</sup> And threats may be purely verbal without any acts,<sup>40</sup> or they may con-

- 35 Waldron v. Marsh, 5 Cal. 119; Carlisle v. Stevenson, 3 Md. Ch. 504; Kesner v. Miesch, 90 Ill. App. 437; Thorn v. Sweeney, 12 Nev. 251; Wiggins v. Middleton, 117 Ga. 162, 43 S. E. 433.
- 36 Boston etc. R. R. v. Sullivan, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; Kaufman v. Wiener, 169 Ill. 596, 48 N. E. 479, reversing, 68 Ill. App. 250; Chappell v. Jasper County etc. Co., 31 Ind. App. 170, 66 N. E. 515. The defendant must raise the defense that there is an adequate remedy at law by demurrer or answer. If he fails to do so, the defense is waived: McCloskey v. Pacific Coast Co., 160 Fed. 794, 22 L. R. A. (N. S.) 673, 87 C. C. A. 568.
- 37 Haupt v. Independent etc. Co., 25 Mont. 122, 63 Pac. 1033; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54; Montana Ore etc. Co. v. Boston & M. etc. Co., 22 Mont. 159, 56 Pac. 120.
- 38 Hagemeyer v. Village of St. Michael, 70 Minn. 482, 73 N. W. 412; Chicago etc. Co. v. Brandan, 81 Mo. App. 1; Kerlin v. West, 4 N. J. Eq. 449.
- 39 New York etc. Co. v. Scovill, 71 Conn. 136, 71 Am. St. Rep. 159, 42 L. R. A. 157, 41 Atl. 246; Union Mill etc. Co. v. Warren, 82 Fed. 522; Negaunee Iron Co. v. Ironcliffs Co., 134 Mich. 264, 96 N. W. 468; More v. Massini, 32 Cal. 590.
- 40 Union Mill etc. Co. v. Warren, 82 Fed. 522; Lyon v. Hunt, 11 Ala. 295, 46 Am. Dec. 216.

sist of acts from which the inference as to defendant's intention may be made.<sup>41</sup> If, however, the wrongful act is done, and it is not accompanied by threats of repetition, and does not itself constitute a threat, the injunction will not issue, since, in such case, it is needless.<sup>42</sup>

§ 1916. (§ 502.) Dispute as to Title; General Principles.—The effect of a dispute as to title on the propriety of granting an injunction to a plaintiff who seeks to enjoin destructive acts of a defendant who, in turn, justifies on the ground that he is the owner of the land affected, has been much discussed by the courts, and a considerable difference of judicial opinion has resulted. The source of the difficulty was a dictum<sup>43</sup> and a decision<sup>44</sup> of Lord Eldon that when a plaintiff stated that the defendant claimed by an adverse title, he stated himself out of court,—a statement of the law which, when taken absolutely, Lord Eldon himself disapproved, and which, after repeated expressions of disapproval, 45 the English courts finally modified a half century later.46 As will appear below, the great weight of American authority is also opposed to the rule thus unqualifiedly formulated. The reason that a dispute as to title should preclude the granting of an injunction permanently is that under such circumstances "it is possible that title

<sup>41</sup> Bonaparte v. Camden etc. Co., Baldw. (C. C.) 205, 231, 232, Fed. Cas. No. 1617; McMinn v. Karter, 123 Ala. 502, 26 South. 649.

<sup>42</sup> Ocmulgee Lumber Co. v. Mitchell, 112 Ga. 528, 37 S. E. 749; Ketchum v. Depew, 81 Hun, 278, 30 N. Y. Supp. 794. See, also, Flood v. E. L. Goldstein Co., 158 Cal. 247, 110 Pac. 916.

<sup>43</sup> Pillsworth v. Hopton, [1801] 6 Ves. 51.

<sup>44</sup> Smith v. Collyer, [1803] 8 Ves. 89.

<sup>45</sup> See Jones v. Jones, 3 Mer. 160; Haigh v. Jaggar, 2 Coll. C. C. 231; Davenport v. Davenport, 7 Hare, 217.

<sup>46</sup> Commissioners v. Blackett, [1848] 12 Jur. 151; Neale v. Cripps, 4 Kay & J. 472; Lowndes v. Bettle, 3 New Rep. 409, 33 L. J. Ch. 451, 10 Jur., N. S., 226. The point is now covered by statute in England (36 & 37 Vict., c. 66, § 25, subsec. 8).

may be in the defendant. . . . If he has the title, then he has a right to possession, and ought not to be precluded from acquiring it. But if the injunction stands, he is under a permanent judicial inhibition from in 'any wise' meddling with the property. His right to litigate the title in an action at law should be preserved to him."47 In brief, one should not be finally enjoined from acts which may be wholly rightful and lawful. But on the other hand, it does not follow from this that the injunction should be wholly refused. There being a substantial dispute over the title, it is clear that the plaintiff may prove to be the owner, and his possible interest should be protected at once, because otherwise "the injury may be committed before trial."48 a true regard for the interests of both parties requires that a temporary injunction should issue to preserve the property in its present condition till the ownership is decided. Such temporary injunction is of course subject to the usual governing principles of temporary injunctions, which are discussed elsewhere. Some of the more important of these principles in this connection are that, since the action of the court may wrong one party, whether it grant or refuse the injunction,—the defendant is wronged by granting the injunction if he is the rightful owner, the plaintiff is wronged by refusing it if he proves title,—the courts are largely guided in forming their conclusion by balancing these possible wrongs against each other, and acting unfavorably toward whichever party will be least injured by unfavorable action: 49 a small degree of laches will lose plaintiff

<sup>47</sup> Echelkamp v. Schrader, 45 Mo. 505. See, also, Shreve v. Black, 4 N. J. Eq. 177; Gamble v. Kennedy, 80 W. Va. 694, 93 S. E. 807. After title at law is established, equity may grant injunctions freely: Slater v. Gunn, 170 Mass. 509, 41 L. R. A. 268, 49 N. E. 1017.

<sup>48</sup> Gause v. Perkins, 3 Jones Eq. 177, 69 Am. Dec. 728.

<sup>49</sup> Mabel Mining Co. v. Pearson etc. Co., 121 Ala. 567, 25 South. 754; Hicks v. Compton, 18 Cal. 206; City of Terre Haute v. Farm-

his right to it;<sup>50</sup> its purpose is almost always to preserve the status quo;<sup>51</sup> the prospective injury on which plaintiff must rest his case is that which will occur before he can have time to establish his right, not the full and entire injury on which his right to a permanent injunction may rest, and the injury to occur in this interval must be sufficient to support an injunction;<sup>52</sup> and, finally, its continuance or dissolution is dependent upon the outcome of the dispute as to title.<sup>53</sup> It follows that when the sole basis of equity's jurisdiction is to prevent a multiplicity of suits caused by a continuing trespass or by repeated trespasses of a single individual, a temporary injunction will rarely, if ever, be appropriate.<sup>54</sup>

ers' etc. Co., 99 Fed. 838, 40 C. C. A. 117; Brower v. Williams, 44 App. Div. 337, 60 N. Y. Supp. 716; Ehrenreich v. Froment, 54 App. Div. 196, 66 N. Y. Supp. 597; Rogers v. Ashbridge, 23 Pa. Co. Ct. 492, 9 Pa. Dist. 195; McGregor v. Silver King etc. Co., 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091; Crescent etc. Co. v. Silver King etc. Co., 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; New York etc. Establishment v. Fitch, 1 Paige, 97; Lownsdale v. Grays Harbor, 117 Fed. 983; New Jersey etc. Co. v. Gardner etc. Co., 113 Fed. 395.

- 50 Field v. Beaumont, 1 Swanst. 204; Jones v. Jones, 3 Mer. 163; Real Del Monte etc. Co. v. Pond Co., 23 Cal. 82; Higgins v. Woodward, Hopk. 342; remark of Bruce, L. J., in Attorney-General v. Sheffield etc. Co., 3 De Gex, M. & G. 304, 328.
- 51 Blakemore v. Glamorganshire etc. Co., 1 Mylne & K. 154; Mammoth etc. Co.'s Appeal, 54 Pa. St. 183.
  - 52 New York etc. Establishment v. Fitch, 1 Paige, 97.
  - 52 Hill v. Bowie, 1 Bland (Md.), 593.
- 54 New York etc. Establishment v. Fitch, 1 Paige, 97. In this case the plaintiff sought an injunction against the defendant using its dock from day to day for landing and taking on freight and passengers. A preliminary injunction having been granted, a motion to dissolve was made on the matter of the bill only. In granting the motion, Walworth, C., said: "Whether the facts stated by the counsel on the argument, in relation to the controversy in this cause, would be sufficient to sustain the jurisdiction of this court on the principle of quieting them in the enjoyment of their property, and preventing the necessity of a perpetual litigation, it is not necessary to decide at this time.

For it is the plaintiff's own fault if, during the interval while he is establishing his right, he brings a number of suits. He can afford to wait till the right is determined in his favor at least better than the defendant can afford to give up even temporarily the right to use the property, if it be his.

§ 1917. (§ 503.) Defendant in Possession Enjoined from Destructive Acts.—In the leading English case which discusses the effect of a dispute as to title on the granting of an injunction against trespass, the court, after an exhaustive review of the cases, made the following distinction: "Where a defendant is in possession, and a plaintiff claiming possession seeks to restrain him from committing acts similar to those here complained of [cutting timber, ornamental trees and shrubs, and sods], the court will not interfere unless, indeed (as in Neale v. Cripps), the acts amount to such flagrant instances of spoliation as to justify the court in departing from the general principle. . . . But where the person in possession seeks to restrain one who claims by an adverse title, the tendency of the court will be to grant the injunction, at least when the acts either do or may tend to the destruction of the estate."55

"It is sufficient for the decision of the question immediately before the court, that it does not appear that any serious damage or irreparable injury will take place, if the defendants continue to run their boat and land their passengers, as they have heretofore done, until the complainants' rights are admitted by the answer or settled on the hearing. On the other hand, I can readily see that retaining the preliminary injunction may produce great injury to the defendants, and for which they would be entirely without remedy, if it should finally appear that they were only in the exercise of their legal rights." And see, also, to the same effect, Carney v. Hadley, 32 Fla. 344, 37 Am. St. Rep. 101, 22 L. R. A. 233, 14 South. 4; Nevitt v. Gillespie, 2 Miss. (1 How.) 108, 26 Am. Dec. 696; Delaware etc. Co. v. Breckinridge, 55 N. J. Eq. 141, 35 Atl. 756; Smith v. Gardner, 12 Or. 221, 53 Am. Rep. 346, 6 Pac. 771.

55 Lowndes v. Bettle, 33 L. J. Ch. 451, 457, 3 New Rep. 409, 10 Jur., N. S., 226.

close analysis of the above passage may perhaps lead to the conclusion that the class of acts which will lead to an injunction in the one case usually will have the same effect in the other. Nevertheless the distinction is one which cannot be disregarded in view of the state of authority, nor is it without reason. That reason, as given in the same case, is as follows: "If a man claims to be owner of an estate of which he either is in possession, or in a position tantamount to that, the court will be very slow to interfere to restrain such an apparent owner from doing those acts which an owner so situated may properly do. There is a wide difference between such a case and that of a person claiming to be owner (whatever the ground of his claim), not taking proceedings at law to recover, but coming on the owner's estate, and doing acts injurious to it."56 In other words, the fact of possession in the defendant is regarded as strong evidence of title in him, and the plaintiff must therefore make a stronger case to justify an interference with him. The logical effect of this reasoning is, that the plaintiff should be granted an injunction either if he produce stronger evidence of title than would otherwise be required of him, in order to offset the inference of title which defendant's possession raises, or if (as is suggested in the passage above cited), he show that defendant is committing "flagrant instances of spoliation"—that is, more than ordinarily destructive acts. The actual effect is that some courts either grant the injunction only in the latter case, or else lay down the hard-and-fast rule that no injunction will issue when the defendant is in possession under claim of title, till the plaintiff has established his ownership in an action brought for that purpose.<sup>57</sup> The weight of au-

<sup>56 33</sup> L. J. Ch. 451, 453; Leininger's Appeal, 106 Pa. St. 398; see for another reason, Talbot v. Scott, 4 Kay & J. 96.

<sup>57</sup> Storm v. Mann, 4 Johns. Ch. (N. Y.) 21; Perry v. Parker, 1 Wood. & M. 280, Fed. Cas. No. 11,010; Leininger's Appeal, 106 Pa.

thority, however, has now come to be that even in this case a temporary injunction will issue if, pending litigation, there will otherwise be such serious acts of trespass that damages will not be an adequate remedy.<sup>58</sup> The reason which sustains this holding has never been more forcibly and clearly stated than in Duvall v. Waters,<sup>59</sup> one of the earliest American cases in which the question was considered, in which Chancellor Bland said: "Should it turn out that the defendant had an unquestionable title, then the granting of such an in-

St. 398; Schoonover v. Bright, 24 W. Va. 698; Munyos v. Filmore, 4 Ind. Ter. 619, 76 S. W. 257; Cresap v. Kemble, 26 W. Va. 603; Carpenter v. Gwynn, 35 Barb. 395; Nevitt v. Gillespie, 2 Miss. (1 How.) 108, 26 Am. Dec. 696 (overruled in Woods v. Riley, 72 Miss. 73, 18 South. 384); Taylor v. Clark, 89 Fed. 7; Graham v. Womack, 82 Mo. App. 618; Gildersleeve v. Overstolz, 97 Mo. App. 303, 71 S. W. 371. See, also, Felton v. Justice, 51 Cal. 529; Hillman v. Hurley, 82 Ky. 626; Shreve v. Black, 4 N. J. Eq. 177.

58 Shubrick v. Guerard, 2 Desaus, 616; Neale v. Cripps, 4 Kay & J. 472; Duvall v. Waters, 1 Bland Ch. 569, 18 Am. Dec. 350; Harris v. Thomas, 1 Hen. & M. (Va.) 18; Erhardt v. Boaro, 113 U. S. 537, 28 L. Ed. 1116, 5 Sup. Ct. 565, affirming 8 Fed. 692, 2 McCrary, 141; Buskirk v. King, 25 U. S. App. 607, 72 Fed. 22, 18 C. C. A. 418; Hicks v. Michael, 15 Cal. 107; Williams v. Long, 129 Cal. 229, 61 Pac. 1087; Heman v. Wade, 74 Mo. App. 339; Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367; Hamilton v. Brent Lumber Co., 127 Ala. 78, 28 South. 698; Bettman v. Harness, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271; Gaines v. Leslie, 1 Ind. Ter. 546, 37 S. W. 947; Woods v. Riley, 72 Miss. 73, 18 South. 384 (overruling earlier Mississippi cases, contra); Lanier v. Alison, 31 Fed. 100; Waterloo Co. v. Doe, 82 Fed. 45, 27 C. C. A. 50; King v. Campbell, 85 Fed. 814; Northern Pac. Co. v. Soderberg, 86 Fed. 49; Wadsworth v. Goree, 96 Ala. 227, 10 South. 848; Heinze v. Butte etc. Co., 20 Mont. 528, 52 Pac. 273; McBrayer v. Hardin, 7 Ired. Eq. 1, 53 Am. Dec. 389; Bishop v. Baislev. 28 Or. 120, 41 Pac. 936. The United States may maintain a suit to enjoin a trespass upon public lands to which it has clear title, although defendants are in possession, where the bill alleges that defendants are wrongfully extracting and removing the mineral contents, thus destroying the very substance of the estate: United States v. Midway Northern Oil Co., 232 Fed. 619.

59 Duvall v. Waters, 1 Bland Ch. (Md.) 569, 18 Am. Dec. 350, 361.

junction could only operate temporarily and partially to the prejudice of the free exercise of his right of property. But on the other hand, if it should be eventually shown that the plaintiff had the title, then, as the injunction turns no one out of possession nor displaces anything, it must necessarily leave to the defendant the advantage of fighting the plaintiff with his own property. Upon which, had not the injunction been granted, the most irretrievable destruction might have been perpetrated; acts of waste might have been committed which would deprive the plaintiff of the very substance of his inheritance, mischief might have been done which it would require years to repair; and things might have been torn away or destroyed which it would be difficult or impossible to restore in kind, such as the building, fixtures, trees, or other peculiarities about the estate, which a multitude of associated recollections had rendered precious to their owner; but as compensation for the loss of which, a jury would not give one cent beyond their mere value."

§ 1918. (§ 504.) Defendant not Enjoined from Mere Use.—It is not to be inferred from the above that the courts which have gone thus far are at all hasty, or even ready, to enjoin one in possession claiming title. It has already been pointed out that the injunction granted is a temporary one, subject to all the restraints which the courts always throw about this exercise of "the strong arm of equity." It is only acts for which there is no adequate legal remedy that will be thus enjoined. Hence, the courts never enjoin a defendant in possession from mere use of the premises. 60 "Pending an

60 Bodwell v. Crawford, 26 Kan. 292, 40 Am. Rep. 306; Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367; Booher v. Browning, 169 Pa. St. 18, 32 Atl. 85; Waddingham v. Robledo, 6 N. M. 347, 28 Pac. 663; Duvall v. Waters, 1 Bland Ch. (Md.) 569, 18 Am. Dec. 350; Gause v. Perkins, 3 Jones Eq. (56 N. C.) 177, 59 Am. Dec. 728; Carney v. Hadley, 32 Fla. 344, 37 Am. St. Rep. 101, 22 L. R. A. 233, 14 South. 4.

action for the possession, while the title is disputed and undetermined by a judgment at law, equity ought not to interfere to restrain the defendant from continuing the possession, from the ordinary and natural use of the premises, and the enjoyment of all benefits which flow from possession. If the premises be a farm, the defendant should not be restrained from cultivating the land and enjoying all the benefits which flow from the natural and ordinary use of a farm as a farm. To this end he should be permitted to sow and gather any ordinary crop upon the cultivated ground. He should be permitted to put up any temporary sheds or other buildings necessary for the protection of his stock or the preservation of his crops. He should be permitted to use all the usual agricultural implements in the cultivation of the broken land, not merely in the harvesting of crops as seems to be indicated by the restraining order, but also in planting and cultivation. He should be at liberty to pasture his stock on the grass lands, providing, at least, he has no more stock than is ordinarily raised and kept on such a farm. In short, he should be permitted to use the farm in any ordinary way, as such a farm is used, with the single limitation that he commit no waste, and make no substantial and injurious change in its condition."61 And in the determination of what is such use, the courts of a particular jurisdiction will, of course, act consistently with their own holding as to what constitutes irreparable injury; hence, acts may in one jurisdiction be permitted as mere ordinary use which, in others, would be enjoined as destruction. 62

§ 1919. (§ 505.) Plaintiff in Possession.—In view of what has been said above, and of the state of authority on the question of granting a temporary injunction

<sup>61</sup> Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367, per Brewer, J.

<sup>. 62</sup> See Gause v. Perkins, 3 Jones Eq. (56 N. C.) 177, 69 Am. Dec. 728; Sharpe v. Loane, 124 N. C. 1, 32 S. E. 318.

against a defendant in possession claiming title, no argument or discussion will be necessary to show that when the plaintiff is in possession claiming title, he should be granted a temporary injunction, pending the litigation over title, against all trespasses, such that, from their nature or the surrounding circumstances (as, for example, the defendant's insolvency) he cannot have an adequate legal remedy for them. And this is the almost unanimous holding of the courts, 63 though there is an occasional intimation that the mere existence of a dispute as to title is of itself, regardless of the state of possession, enough to preclude the granting of any injunction, temporary or permanent. 64

63 Santee etc. Co. v. James, 50 Fed. 360; Chapman v. Toy Long, 4 Sawy. 28, Fed. Cas. No. 2610; Thomas v. Nantahala etc. Co., 8 U. S. App. 429, 58 Fed. 485, 7 C. C. A. 330; Pittsburg etc. Co. v. Fiske, 123 Fed. 760; Lyon v. Hunt, 11 Ala. 295, 46 Am. Dec. 216; More v. Massini, 32 Cal. 590; Merced Min. Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262; Thigpen v. Aldridge, 92 Ga. 563, 17 S. E. 860; English v. James, 108 Ga. 123, 34 S. E. 122; Edwards v. Haeger, 180 Ill. 99, 54 N. E. 176; Jenney v. Jackson, 6 Ill. App. 32; Winslow v. Nayson, 113 Mass. 411; McPike v. West, 71 Mo. 199; Staples v. Rossi, 7 Idaho, 618, 65 Pac. 67; Long v. Casebeer, 28 Kan. 226; Peak v. Hayden, 3 Bush (Ky.), 125; Scully v. Rose, 61 Md. 408; Clayton v. Shoemaker, 67 Md. 216, 9 Atl. 635; Butman v. James, 34 Minn. 547, 27 N. W. 66; Kyle v. Rhodes, 71 Miss. 487, 15 South. 40; Echelkamp v. Schrader, 45 Mo. 505; Lee v. Watson, 15 Mont. 228, 38 Pac. 1077; Southmayd v. McLaughlin, 24 N. J. Eq. 181; Piper v. Piper, 38 N. J. Eq. 81; Manning v. Ogden, 70 Hun, 399, 24 N. Y. Supp. 70; Mendenhall v. Harrisburgh etc. Co., 27 Or. 38, 39 Pac. 399; Allen v. Dunlap, 24 Or. 229, 33 Pac. 675; Westmoreland etc. Co. v. De Witt, 130 Pa. St. 235, 5 L. R. A. 731, 18 Atl. 724. But a mere scrambling possession is not sufficient: Williamson v. Wayland Oil & Gas Co., 79 W. Va. 754, 92 S. E. 424.

64 Wilson v. City of Mineral Point, 39 Wis. 160; Woodford v. Alexander, 35 Fla. 333, 17 South. 658; Brown v. Solary, 37 Fla. 102, 19 South. 161; Citizens' etc. Co. v. Camden etc. Co., 29 N. J. Eq. (2 Stew.) 299; National etc. Co. v. Central etc. Co. of N. J., 32 N. J. Eq. 755, 767; Hacker v. Barton, 84 Ill. 313. It should be noticed in this connection that the question here presented is different from that involved in cases in which the sole basis of equity's intervention

(8 506.) Establishment of Title.—The following language of the court in a leading American case<sup>65</sup> is often quoted: "Two conditions must concur to give [equity] jurisdiction [over trespasses]—the plaintiff's title must be admitted, or be established by a legal adjudication, and the threatened injury must be of such a nature as will cause irreparable damage." This language was used by the court in speaking of the granting of a permanent injunction (a fact not always noticed in quoting it) and from what has been said it follows that in this connection only is it true, and that it is to be so confined in its application.66 The suggestion of the court that the establishment of plaintiff's title must take place at law is not necessarily true, however. The general principle of equity, that having taken jurisdiction of a cause for one purpose it will retain it and give complete relief, makes it a proper proceeding for courts of equity, if they see fit, to investigate the title themselves at the hearing of the same suit in which the temporary injunction is granted, and then make permanent or dissolve the temporary injunction according to the result of the inquiry.67 Courts of equity, however,

is the prevention of multiplicity of suits caused by one defendant's repeated or continuing trespass. In such cases, as has been already pointed out (ante, § 496, at note 54), a temporary injunction should not be granted; what plaintiff seeks, and all he is entitled to, is a permanent injunction to save him the annoyance and expense of frequent suits at law. Hence it is very proper, if his title is in doubt, to require that he establish it before he is given an injunction, although it would seem, on principle, to be a matter of discretion, even in that class of cases, whether to require that the disputed title be settled at law or by the court of equity itself. See 1 Pom. Eq. Jur., § 252; Wheelock v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67, affirming 53 N. Y. Super. Ct. (21 Jones & S.) 286.

<sup>65</sup> Gause v. Perkins, 3 Jones Eq. (56 N. C.) 177, 69 Am. Dec. 728, per Pearson, J.

<sup>66</sup> For a statement which makes this limitation see Norton v. Elwert, 29 Or. 583, 41 Pac. 926.

<sup>67 &</sup>quot;When there is irreparable damage, injunction lies, though

more usually send the question to be tried at law, but this is from reasons of policy rather than of jurisdiction. If the plaintiff's title is clear, though denied by the defendant, a permanent injunction may issue at once. If the court decides to have the question tried at law it may procure diligence in the prosecution of the ejectment suit by framing an issue as an incident to its own proceedings and sending the parties to law with it; or by granting the temporary injunction to a plaintiff out of possession on terms that the injunction shall continue only if he begins and prosecutes his action of ejectment with diligence; or, if the defendant is the

there be conflicting title. . . . And equity, having once taken jurisdiction, will go on to do complete justice, though in so doing it have to try title, and administer remedies which properly pertain to courts of law": Bettman v. Harness, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271. Other cases to the same effect are, City of Peoria v. Johnston, 56 Ill. 45; Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427; Stetson v. Stevens, 64 Vt. 649, 25 Atl. 429; Coppage v. Griffith, 19 Ky. Law Rep. 459, 40 S. W. 908; Shirley v. Hicks, 110 Ga. 516, 35 S. E. 782; West etc. Co. v. Reymert, 45 N. Y. 703; Broiestedt v. South. Side Co., 55 N. Y. 220; McLaughlin v. Kelly, 22 Cal. 212; Jennings etc. Co. v. Beale, 158 Pa. St. 283, 27 Atl. 948; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533. Contra, Freer v. Davis, 52 W. Va. 1, 94 Am. St. Rep. 895, 59 L. R. A. 556, 43 S. E. 164. Where defendant, by demurring to the bill, admits title, it is not necessary that it be established at law: Cragg v. Levinson, 238 Ill. 69, 15 Ann. Cas. 1229, 21 L. R. A. (N. S.) 417, 87 N. E. 121. For an analytical note with further cases, see 1 Ames, Cases in Eq. Juris., 515.

- 68 Pom. Eq. Jur., § 252. These reasons seem to be two: 1. The desire to preserve to the parties the right to a jury trial; 2. The traditional reluctance of equity courts to extend their jurisdiction over the field already occupied by the law courts.
- 69 Carpenter v. Grisham, 59 Mo. 247; Miller v. Lynch, 149 Pa. St. 460, 24 Atl. 80. Where defendant's only claim is traced through a defendant in an ejectment suit, the injunction may issue: Williams v. Richardson, 66 Fla. 234, Ann. Cas. 1916D, 245, 63 South. 446.
- 70 Harris v. Thomas, 1 Hen. & M. (Va.) 18; Santee etc. Co. v. James, 50 Fed. 360.
  - 71 Johnson v. Hughes, 58 N. J. Eq. 406, 43 Atl. 901.

party out of possession, and therefore the proper person to bring ejectment, by a provision that the injunction shall be made permanent if he fail to do this within a reasonable time.<sup>72</sup>

(§ 507.) Possession, When Given by Injunction.—The question has not infrequently come before the courts just how much relief, if any, is to be given a plaintiff out of possession against a defendant in pos-It has been shown that if the defendant is session. engaged in acts of a kind proper to invoke equity's preventive power against, he will be enjoined even when he claims title; a fortiori it is clear that the same thing should be true if he is admittedly a trespasser, and such is the law.<sup>73</sup> But in general this is the only relief that equity will give in such a case. The further relief which the plaintiff may desire is usually possession of the land. If this is asked for as part of the prayer of a bill for an injunction, it would be consistent with the general equitable rule of giving complete relief to award possession to the plaintiff in such a case. This course seems to be almost never followed.74 but instead the plaintiff must bring his action of ejectment at law. possession alone is what plaintiff desires, he can get no relief in equity, because the legal remedy afforded by an action of ejectment or of forcible entry and detainer is adequate for the specific relief desired.<sup>75</sup> And this is

<sup>72</sup> Echelkamp v. Schrader, 45 Mo. 505.

<sup>73</sup> Brown v. Solary, 37 Fla. 102, 19 South. 161; Hall v. Nester, 122 Mich. 141, 80 N. W. 982; Webster v. Cooke, 23 Kan. 637; Turner v. Stewart, 78 Mo. 480.

<sup>74</sup> It was adopted in Bussier v. Weekey, 11 Pa. Super. Ct. 463, citing McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec. 584, and Nutbrown v. Thornton, 10 Ves. 159. See Lattin v. McCarty, 41 N. Y. 107, in which possession was awarded in the same suit in which a deed was vacated.

<sup>75</sup> Tawas B. etc. R. R. Co. v. Tosco Cir. Judge, 44 Mich. 479, 7 N. W. 65; Calvert v. State, 34 Ncb. 616, 52 N. W. 687; Coalter v. Hunter, 4 Rand. (Va.) 58, 15 Am. Dec. 726; Brocken v. Preston, 1 Pinn.

no less true, though the defendant is insolvent, 76 or though plaintiff, if he had brought his bill sooner, might have secured an injunction against the destructive acts which accompanied the taking of possession by the defendant. 77 Beyond the fact that the legal remedy is adequate, a further reason against transferring possession by injunction, when that is the only relief given, in this country is that it deprives the defendant of jury trial, and so is unconstitutional; 78 and if the transfer is sought by a temporary injunction, an additional reason against it is that this is an attempt to use a temporary injunction for the purpose of changing the status quo, whereas its more usual and proper function is to preserve the status quo. 79

But though the rule is general that possession will not be granted by injunction, it is subject to exceptions which exist because legal remedies in the particular cases fail or become insufficient. So, if the plaintiff's estate is purely equitable, and thus legal remedies are not open to him, he may be put in possession by a mandatory injunction.<sup>80</sup> It has also been frequently held that one

<sup>(</sup>Wis.) 584, 44 Am. Dec. 412; Fredericks v. Huber, 180 Pa. St. 572, 37 Atl. 90; Lowenthal v. New Music Hall Co., 100 Ill. App. 274; Lockhart v. Leeds, 10 N. M. 568, 63 Pac. 48; In re Black Point Syndicate, 79 L. T., N. S., 658; Catholic etc. Co. v. Ferguson, 7 S. D. 503, 64 N. W. 539; Wehmer v. Fokenga, 57 Neb. 510, 78 N. W. 28.

<sup>·76</sup> Warlier v. Williams, 53 Neb. 143, 73 N. W. 539; Gillick v. Williams, 53 Neb. 146, 73 N. W. 540.

<sup>77</sup> Deere v. Guest, 1 Mylne & C. 516.

<sup>78</sup> Trustees etc. of Florida v. Gleason, 39 Fla. 771, 23 South. 539; State ex rel. Reynolds v. Graves, 66 Neb. 17, 92 N. W. 144; Forman v. Healey, 11 N. D. 563, 93 N. W. 866.

<sup>79</sup> Dickson v. Dows, 11 N. D. 404, 92 N. W. 797; San Antonio etc. Co. v. Dodenhamer etc. Co., 133 Cal. 248, 65 Pac. 471. This reason is not conclusive, however, as shown by the fact that mandatory temporary injunctions are not at all unknown to the law. See "Temporary Injunctions," infra, in chapters on Nuisance and Easements.

<sup>80</sup> Pokegama etc. Co. v. Klamath River etc. Co., 86 Fed. 528; s. c., 96 Fed. 34, 55, 56; Richter v. Kabat, 114 Mich. 575, 72 N. W. 600.

who has begun the process of acquiring title to public land according to the prescribed rules, but who has not vet acquired a title such that he can adequately enforce and protect his right to possession by legal remedies, may procure the possession to which he is entitled by injunction;81 but his right to get an injunction ceases as soon as he has progressed far enough in acquiring title so that he can maintain ejectment.82 Another class of cases which has frequently led to a restoration of possession by injunction is that in which the defendant has erected a building which encroaches on the plaintiff's land. In such a case, three remedies are open to him. First, he may remove the building as far as it encroaches over the line, and then sue the defendant for the expense incurred, a remedy which is inadequate because it compels him to undo the wrong of another, because it compels him to advance the cost of men and machinery to effect the removal and take the risk of securing reimbursement from the defendant,83 and because it burdens him with the risk of injury to other portions of defendant's building not included within the encroaching part.84 Second, he may submit to the trespass and seek relief by actions for damages at intervals of time, a remedy the inadequacy of which is attested by the whole doctrine of injunction to prevent multiplicity of suits.

<sup>81</sup> Sproat v. Durland, 2 Okl. 24, 35 Pac. 682, 886; Woodruff v. Wallace, 3 Okl. 355, 41 Pac. 357; Laughlin v. Fariss, 7 Okl. 1, 50 Pac. 254, 256; West Coast Imp. Co. v. Winsor, 8 Wash. 490, 36 Pac. 441; Lee v. Watson, 15 Mont. 228, 38 Pac. 1077; Jackson v. Jackson, 17 Or. 110, 19 Pac. 847.

<sup>82</sup> Laughlin v. Fariss, 7 Okl. 1, 50 Pac. 254; Black v. Jackson, 177 U. S. 349, 44 L. Ed. 801, 20 Sup. Ct. 648, reversing 6 Okl. 751, 52 Pac. 406; Potts v. Hollen, 177 U. S. 365, 44 L. Ed. 808, 20 Sup. Ct. 654, reversing 6 Okl. 696, 52 Pac. 917; Harris v. McClung, 10 Okl. 701, 64 Pac. 4.

<sup>83</sup> Wheelock v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67, affirming 53 N. Y. Super. Ct. (21 Jones & S.) 286.

<sup>84</sup> See Baron v. Korn, 127 N. Y. 224, 27 N. E. 804.

may bring an action of ejectment, the judgment in which puts upon the sheriff in executing it the risk of injuring more of the building than is trespassing, so that this remedy, too, is an impracticable one.<sup>85</sup> On the other hand, the remedy by injunction places the obligation to remove directly on the one who caused the structure to be erected. Hence, equity usually grants an injunction in such cases, and thus as a part of its relief restores possession of land to the owner.<sup>86</sup>

§ 1922. (§ 508.) The Balance of Injury.—The state of facts which has just been considered often occurs in such form as to raise another question which courts of equity have had some difficulty in answering. If a defendant's building encroaches slightly on the plaintiff's land and the plaintiff's damage is small, while the cost to the defendant of removing it is great, should a court of equity disregard wholly the injury which granting relief to the plaintiff will cause the defendant, and issue the injunction? Or, should it balance the injury which its course will cause in granting or in withholding relief, and be influenced by this consideration in its decison? A further element is sometimes introduced into the case by the fact that the defendant is engaged in a business which serves public convenience, and thus can plead not only the injury to himself, but also to the public, as a reason for not granting the injunction. It should be premised in the beginning that the question cannot arise

<sup>85</sup> Hahl v. Sugo, 27 Misc. Rep. 1, 57 N. Y. Supp. 920, affirmed in 46 App. Div. 632, 61 N. Y. Supp. 770.

<sup>86</sup> Baron v. Korn, 127 N. Y. 224; Norton v. Elwert, 29 Or. 583, 41 Pac. 926; Long v. Ragan, 94 Md. 462, 51 Atl. 181; Pile v. Pedrick, 167 Pa. St. 296, 46 Am. St. Rep. 677, 31 Atl. 646, 36 Wkly. Not. Cas. 224; Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278; Proprietors etc. Wharf v. Proprietors etc. Wharf, 85 Me. 175, 27 Atl. 93; Ryan v. Schwartz, 94 Wis. 403, 69 N. W. 178. Contra, Botsford v. Wallace, 72 Conn. 195, 44 Atl. 10; Coast Co. v. Mayor etc. Spring Lake, 56 N. J. Eq. 615, 51 L. R. A. 657, 36 Atl. 21; Schuster v. Myers, 148 Mo. 422, 50 S. W. 103.

except in a case in which some sufficient reason for equity jurisdiction, such as irreparable injury or the prevention of a multiplicity of suits, exists; in other cases, the injunction will be refused on the simple ground that the legal remedy is adequate. It is believed, too, that the question of the convenience of the public should be treated as immaterial, though it must be said that courts have sometimes allowed their decision to be influenced by this consideration.87 In answer to the suggestion that the convenience of the public should be taken account of in determining the propriety of granting an injunction, Lord Selborne, L. C., replied: "It is said that the objection of the plaintiff to the laying of these pipes is an unneighborly thing, and that his right is one of little or no value, and one which Parliament, if it were to deal with the question, might possibly disregard. What Parliament might do if it were to deal with the question, is, I apprehend, not a matter for our consideration now, as Parliament has not dealt with the question. Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private interests and public interests than this court can take." 188 In other words, so far as the utility to the public is made the basis of an argument, it would seem to be simply urging the propriety of taking private property for public use without the requisite condemnation proceedings89 —the unwise policy of which cannot be doubted.

<sup>87</sup> McElroy v. Kansas City, 21 Fed. 261; Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463; Fogarty v. City of Cincinnati, 7 Ohio N. P. 100, 9 Ohio St. & C. P. Dec. 753. That this is not a proper consideration in such cases, see Goodson v. Richardson, L. R. 9 Ch. App. 221; Attorney-General v. Council etc. of Birmingham, 4 Kay & J. 528, 538, 539; Hinchman v. Horse R. R. Co., 2 C. E. Green (N. J.), 75, 86 Am. Dec. 252; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Sammons v. City of Gloversville, 17 N. Y. Supp. 284, 286 (citing authorities).

<sup>88</sup> Goodson v. Richardson, L. R. 9 Ch. App. 221.

<sup>89</sup> Hinchman v. Horse R. R. Co., 2 C. E. Green (N. J.), 75, 86 Am. Dec. 252.

Assuming, then, that the only question before the court is the propriety of balancing the injury that may be caused to the parties by the decree, and remembering that the question does not arise except when equity has jurisdiction of the case because the plaintiff's legal remedy is inadequate, it should be noted that to deny the injunction is (1) "to allow the wrong-doer to compel innocent persons to sell their right at a valuation,"90 and (2) to refuse him altogether any equitable relief in a case where, on the ground of avoiding multiplicity of suits at least, he is clearly within one of the most frequently given reasons for assuming jurisdiction, and where, also, his injury may be irreparable. In view of this situation it is clear that the plaintiff's prayer will not readily be denied, and it can safely be said that the argument based on the balance of injury to the defendant will be availing only in a limited class of cases. the other hand, it is a general rule of equity not to exercise its extraordinary jurisdiction when it will operate inequitably and oppressively.91 The problem presented is, therefore, to strike a medium rule between these principles that, as fairly as may be, will do justice. The courts of Massachusetts and New York have considered the question, upon various states of facts, oftener than the courts of any other jurisdiction; and acting independently, have arrived at substantially the same result. That result, in the words of the Massachusetts court, is as follows:92 "Where, by an innocent mistake, erections

<sup>90</sup> Tucker v. Howard, 128 Mass. 361.

<sup>91</sup> Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770.

<sup>92</sup> Lynch v. Union Institution for Savings, 159 Mass. 306, 20 L. R. A. 842, 34 N. E. 364. Other Massachusetts cases which show the development and working of the rule are Tucker v. Howard, 128 Mass. 361; Brande v. Grace, 154 Mass. 210, 31 N. E. 633; Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770; Lynch v. Union Institution for Savings, 158 Mass. 394, 33 N. E. 603; Boland v. St. John's Schools, 163 Mass. 129, 39 N. E. 1035; Methodist etc. Society v. Akers, 167 Mass. 560, 46 N. E. 381; Harrington v. McCarthy, 169

have been placed a little upon the plaintiff's land, and the damage caused to the defendant by the removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order their removal, but will leave the plaintiff to his remedy at law." The language of the New York court is:93 "It must be remembered that a willful trespasser cannot in this way acquire an inch of land, because the mandatory injunction must issue as to him; that in other cases where the injury to the plaintiff is irreparable the man-. datory injunction will issue, and permanent damages will not be awarded; that where the granting of an injunction would work greater damage to an innocent defendant than the injury from which the plaintiff prays relief, the injunction could be refused absolutely, and the plaintiff compelled to seek his remedy at law." practice these rules are probably almost the same, 94 and

Mass. 492, 48 N. E. 278; Cobb v. Massachusetts Chem. Co., 179 Mass. 423, 60 N. E. 790. See, also, to the same effect, Coombs v. Lenox Realty Co., 111 Me. 178, 47 L. R. A. (N. S.) 1085, 88 Atl. 477.

93 Goldbacher v. Eggers, 38 Misc. Rep. 36, 76 N. Y. Supp. 881, 886, affirmed in 84 N. Y. Supp. 1127. See, also, Crocker v. Manhattan Life Ins. Co., 61 App. Div. 226, 70 N. Y. Supp. 492, modifying 31 Misc. Rep. 687, 66 N. Y. Supp. 84; Proskey v. Cumberland Realty Co., 35 Misc. Rep. 50, 70 N. Y. Supp. 1125.

94 The difference between the two rules, if any, is in the amount of damage to the plaintiff which the court will balance against the greater damage to the defendant. From the language of the Massachusetts court, "erections have been placed a little upon the plaintiff's land," it would seem a fair inference that the rule would not be applied against a plaintiff whose damage was at all serious, and the cases that so far have arisen bear out the inference. The New York rule has no such limitations short of "irreparable" injury to the plaintiff; and in the two principal New York cases above cited the permanent damages awarded to the plaintiff were \$600 and \$5,000 respectively. The explanation of this difference, if it exists, lies in the fact that the Massachusetts courts seem to adopt the traditional view of equity courts that land is per se within the protection of equity, and therefore any trespass on it which amounts to a confiscation of ever so small a portion of it is "irreparable"

they perhaps represent as nearly a fair resultant of the arguments on the side of both parties as can be arrived at. Both rules protect the plaintiff from very serious injury, both deny any protection to a willful wrong-doer, and both, as far as possible, refuse to apply the remedy of mandatory injunction when to do so would be oppressive to the defendant. Doubtless they will be followed, though cases can be found which, not including the elements making necessary carefully qualified state-. ments, contain broad dicta that the balance of injury will or will not be considered.95 It should be added by way of caution that the foregoing discussion applies only to the granting of permanent injunctions; it has already been pointed out that on an application for a temporary injunction, when the rights of the parties are undecided, the balance of injury is a controlling consideration. 96

injury; hence the rule under discussion is to be confined within the narrowest compass. On the other hand, it is evident not only from the statement of the rule above quoted but also from other portions of the opinion, and from the opinion in Crocker v. Manhattan Life Ins. Co., supra, that the New York courts do not regard the plaintiff as entitled to come into equity in this class of cases on the ground of irreparable injury at all, but solely on the ground of preventing multiplicity of suits; hence even when his damages are large it does not follow that he is "irreparably" injured, and therefore the question is simply one of balancing two injuries, neither of which is irreparable, between two innocent parties. The ideal consideration that it is an irreparable injury to the plaintiff to be deprived of his property without his consent is, of course, not admitted.

v. Kansas City, 21 Fed. 257, 261; Fullenwider v. Supreme Council etc. League, 73 Ill. App. 321; Wilcox v. Wheeler, 47 N. H. 488; Scharr v. City of Camden (N. J. Ch.), 49 Atl. 817; Fisher v. Carpenter, 67 N. H. 569, 39 Atl. 1018; Edwards v. Allouez Min. Co., 38 Mich. 46, 31 Am. Rep. 301. That the balance of injury is not to be considered: Norton v. Elwert, 29 Or. 583, 41 Pac. 926; Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374 (case of nuisance, but the argument is none the less in point here).

<sup>96</sup> Ante, § 502.

§ 1923. (§ 509.) Personal Remedy Open to Plaintiff.—In a number of cases a plaintiff has sought injunctions against trespasses when it would be possible for him by his own personal efforts to put an end to the trespass, and thus render the legal remedy adequate. In the leading case in which the question was considered, the defendant had covered a lot belonging to the plaintiff with large rocks, and in reply to the argument of counsel the court said:97 "It is now said that the remedy was at law; that the owner could have removed the stone and then recovered of the defendant for the expense incurred. But to what locality could the owner remove them? He could not put them in the street; the defendant presumably had no vacant lands of his own on which to throw the burden; and it would follow that the owner would be obliged to hire some vacant lot or place of deposit, become responsible for the rent, and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance for the owner what the latter is bound to do, I should very much doubt its authority. On the contrary, the law is the other way. And all the cases which give to the injured party successive actions for the continuance of the wrong are inconsistent with the idea that the injured party must once for all remove it." These arguments are not easy to meet, and there are cases in accord with its suggestion;98 on the other hand, there are cases in which the burden thrown upon the plaintiff in putting an end to the trespass himself would not be heavy, and in which, therefore, the injunction has been

<sup>97</sup> Per Finch, J., in Wheelock v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67, affirming 53 N. Y. Super. Ct. (21 Jones & S.) 286.

<sup>98</sup> Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760; Kern v. Field, 68 Minn. 317, 64 Am. St. Rep. 479, 71 N. W. 393. See Beach v. Crane, 2 N. Y. 86, 97, 49 Am. Dec. 369.

denied.<sup>99</sup> If, however, the party whose land is trespassed upon wishes by his own efforts to remove the trespassing object, he may of course do so, and equity will not interfere with him.<sup>100</sup>

§ 1924. (§ 510.) Relief Given.—A brief paragraph may perhaps properly be given to noting the relief which equity gives in such cases of trespass as fall within its jurisdiction. It is, of course, clear that the only ground on which a case of trespass can be brought into equity is the plaintiff's right to an injunction, and this is therefore the primary relief given him. It is usually prohibitory, but only because prohibitory relief is more often desired. Despite occasional dicta to the contrary, 101 the use of mandatory injunctions is well established. The discussion of the questions when equity will put a plaintiff in possession, and the effect of the balance of injury which will be caused by granting or withholding its relief, have made necessary previous citation in this chapter of numerous cases in which mandatory injunctions were issued. A few others are collected in the note, 102 in some of which the court went

99 Indianapolis Rolling Mill Co. v. City of Indianapolis, 29 Ind. 245; Boyden v. Bragaw, 53 N. J. Eq. (8 Dick.) 26, 30 Atl. 330; Mechanics' Foundry of San Francisco v. Ryall, 75 Cal. 601, 17 Pac. 703; cf. De Groot v. Peters, 124 Cal. 406, 71 Am. St. Rep. 91, 57 Pac. 209. And see Rankin v. Charless, 19 Mo. 551, 61 Am. Dec. 574; Avery v. Empire Woolen Co., 82 N. Y. 582; Hamilton v. Stewart, 59 Ill. 330.

100 Lyle v. Little, 83 Hun, 532, 33 N. Y. Supp. 8; Windfall etc. Co. v. Terwilliger, 152 Ind. 364, 53 N. E. 284; De Sale v. Millard, 108 Mich. 581, 66 N. W. 481.

101 Way Cross etc. Co. v. Southern Pine Co., 111 Ga. 233, 36 S. E. 641: Newlin v. Prevo, 81 Ill. App. 75.

102 Crocker v. Manhattan etc. Co., 61 App. Div. 226, 70 N. Y. Supp. 492, modifying 31 Misc. Rep. 687, 66 N. Y. Supp. 84; Norton v. Elwert, 29 Or. 583, 41 Pac. 926; United States v. Brighton Ranche Co., 26 Fed. 218; Creely v. Bay State etc. Co., 103 Mass. 514; Wilmarth v. Woodcock, 66 Mich. 331, 33 N. W. 400; Norwalk Heating

the length of decreeing not only the undoing of wrongful acts, but also the doing of rightful ones—not merely destructive, but constructive acts. 103 Further, the general principle of equity to give full relief in a cause in which it has jurisdiction for any purpose applies in case of trespass as well as elsewhere. That it is under this rule that equity acts in passing on disputed titles has already been seen.<sup>104</sup> On the same principle equity gives damages for past trespassing in addition to an injunction, 105 but not when the injunction is refused for want of jurisdiction. 106 Or damages only may be given when the court has jurisdiction of the cause, but finds it necessary to refuse the injunction for some other reason than want of jurisdiction, as, for example, because an injunction would be futile. 107 The flexibility of injunctions in the hands of the courts also enables them. by simply framing the decree in the alternative, to ac-

etc. Co. v. Vernam, 75 Conn. 662, 96 Am. St. Rep. 246, 55 Atl. 168; Hirschberg v. Flusser, 87 N. J. Eq. 588, 101 Atl. 191 (mandatory injunction granted); Kershishian v. Johnson, 210 Mass. 135, 36 L. R. A. (N. S.) 402, 96 N. E. 56. A mandatory injunction to compel repair of a party-wall to prevent parts falling on plaintiff's premises was denied in Lyons v. Walsh (Conn.), 101 Atl. 488, L. R. A. 1917F, 680.

103 Lake Shore etc. Co. v. Wiley, 193 Pa. St. 496, 44 Atl. 583; Bussier v. Weekey, 11 Pa. Super. Ct. 463. Compare Mackenzie v. Minis, 132 Ga. 323, 16 Ann. Cas. 723, 23 L. R. A. (N. S.) 1003, 63 S. E. 900.

104 Ante, § 506. See, also, Kilgore v. Norman, 119 Fed. 1006.

105 Morris v. Bean, 123 Fed. 618; Bird v. Wilmington etc. Co., 8 Rich. Eq. (S. C.) 46, 64 Am. Dec. 739; Downing v. Dinwiddie, 132 Mo. 92, 33 S. W. 470; Bishop v. Baisley, 28 Or. 119, 41 Pac. 936. The defendant will be compelled to account and give satisfaction for injuries already done: United States v. Midway Northern Oil Co., 232 Fed. 619.

106 Pres. etc. Baltimore etc. Road v. United etc. Co., 93 Md. 138, 48 Atl. 723.

107 Lewis v. Town of N. Kingston, 16 R. I. 15, 27 Am. St. Rep. 724, 11 Atl. 173; Lane v. Michigan Traction Co., 10 Det. Leg. News, 685, 97 N. W. 354.

complish the purpose of condemnation proceedings in cases in which the defendant has the right of eminent domain, 108 or to give permanent damages to the plaintiff in cases in which at law he could recover only the damages caused him up to the date of the suit. 109

§ 1925. (§ 511.) Estoppel, Laches, Acquiescence.— The general equitable rules as to estoppel, laches and acquiescence also apply in the subject of this chapter. No discussion of these rules will be undertaken here, as they are treated elsewhere; a few cases illustrating their application in cases of trespass are collected in the note.<sup>110</sup>

108 Henderson v. New York Cent. etc. Co., 78 N. Y. 423; Pappenheim v. Metropolitan etc. Co., 128 N. Y. 436, 26 Am. St. Rep. 486, 13 L. R. A. 401, 28 N. E. 518. See ante, §§ 470, 473.

109 Crocker v. Manhattan Ins. Co., 61 App. Div. 226, 70 N. Y.
Supp. 492, affirming 31 Misc. Rep. 687, 66 N. Y. Supp. 84; Goldbacher v. Eggers, 38 Misc. Rep. 36, 76 N. Y. Supp. 881; affirmed in 84 N. Y. Supp. 1127.

110 Estoppel.—City of New York v. Pine, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. 592, reversing 50 C. C. A. 145, 112 Fed. 98, 103 Fed. 337; Pennsylvania R. Co. v. Glenwood etc. Co., 184 Pa. St. 227, 41 Wkly. Not. Cas. 441, 39 Atl. 80; Bright v. Allan, 203 Pa. St. 394, 93 Am. St. Rep. 769, 53 Atl. 251.

Laches.—Southard v. Morris Canal Co., 1 N. J. Eq. 519; Scudder v. Trenton etc. Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Becker v. Lebanon etc. Co., 188 Pa. St. 484, 43 Wkly. Not. Cas. (Pa.) 229, 41 Atl. 612. See, also, ante, chapter I.

Acquiescence.—Bassett v. Salisbury etc. Mills, 47 N. H. 426; Blanchard v. Doering, 23 Wis. 200; Lehigh Valley Coal Co. v. Lentz, 228 Pa. 346, 77 Atl. 511. It has been said that the doctrine applies only to interlocutory injunctions: Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215.

## CHAPTER XXIV.

## INJUNCTION AGAINST NUISANCE.

## ANALYSIS.

8	512.	Nature	of	the	iur	isdiction	

- § 513. When the legal remedy is adequate.
- §§ 514-517. Extent of the jurisdiction.
  - § 514. Irreparable and continuing or recurring nuisances.
  - § 515. Illustrations.
  - § 516. Injunctions on sole ground of preventing multiplicity of suits.
  - § 517. Miscellaneous grounds of jurisdiction.
  - § 518. What the plaintiff must allege.
- §§ 519-522. Previous trial at law.
  - § 520. Not necessary to granting of temporary injunctions.
  - § 521. Nor in all cases of permanent injunctions.
  - § 522. Cases in which it is important.
- §§ 523-525. Threatened nuisance.
  - § 523. Imminent danger.
  - § 524. Illustrations.
  - § 525. Must threatened injury be irreparable?
  - § 526. Damage necessary to justify an injunction.
  - § 527. Criminal and statutory nuisances.
  - § 528. The defendant's motive.
- §§ 529-531. The balance of injury.
  - § 530. Balance between private parties.
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  - § 532. Nuisance easily avoided by the plaintiff.
- §§ 533-536. Relief given.
  - § 533. Mandatory injunctions.
  - § 534. Form of injunction.
  - § 535. Temporary injunctions.
  - § 536. Complete relief.
  - § 537. Estoppel, acquiescence, laches.
  - § 538. Parties.
  - § 539. Reasonable use not a defense.
  - § 540. Nor the fact that other causes contribute.
  - § 541. Legalized nuisances.
  - § 542. Public -nuisances.

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§ 1926. (§ 512.) Nature and Extent of the Jurisdiction.—The term "nuisance" has in equity no different signification from that given it in law. Anything which is a nuisance in law is also a nuisance in equity, and, on the other hand, "it is true that equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law; there is no such thing as an equitable nuisance." This is not saying that the jurisdiction of law and that of equity are co-extensive; it is simply pointing out that equity in the determination of what constitutes a nuisance follows the law.2 Whether. assuming a nuisance to exist, equity will take jurisdiction to enjoin it, is another question, a question which is answered in every particular case by determining whether there is a need of equity interposing; whether, in the usual phrase, the legal remedy is adequate. No special attention need, therefore, be given here to a definition of nuisance, though such of its characteristics as affect the equitable remedy will be spoken of in connection with those features of the equitable remedy to which they are related.

(§ 513.) When the Legal Remedy is Adequate.—While the jurisdiction of law over nuisance and that of equity are not co-extensive, much more nearly than in cases of trespass it is true that every person injured by a nuisance may come into law or equity, whichever he prefers, for his remedy. The reason for this is, that from their nature and effect, most nuisances cannot be satisfactorily remedied at law. The grounds on

<sup>1</sup> Per Kindersley, V. C., in Soltau v. De Held, 2 Sim., N. S., 133 151.

<sup>2</sup> Banies v. Baker, 1 Amb. 158; Wolcott v. Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790; Mississippi etc. Co. v. Ward, 67 U. S. (2 Black) 485, 17 L. Ed. 311; Brady v. Weeks, 3 Barb. 157; Watson v. City of Columbia, 77 Mo. App. 267; Northern Pac. R. R. Co. v. Whalen, 149 U. S. 157, 37 L. Ed. 686, 13 Sup. Ct. 822.

which equity enjoins nuisances are chiefly, two, viz., irreparable injury to plaintiff, and the prevention of multiplicity of suits. Those which will not be enjoined, therefore, are such nuisances only as do not fall within either of the above classes. But this necessarily means a comparatively small number of cases, for it is characteristic of nuisances in general that they are either continuous or recurring, or else they cause irreparable injury, and in many cases, indeed, they are of a character to bring them within both of the reasons for equity's intervention. It is said in one case: "It is not in every case of nuisance that this court should interfere. I think that it ought not to do so in cases in which the injury is merely temporary and trifling; but I think that it ought to do so in cases in which the injury is permanent and serious."3 The language of another court is that nuisances which are "temporary and occasional only, are not grounds for the interference of this court by injunction, except in extreme cases."4 These two extracts taken together probably contain a complete statement of the kinds of nuisances for which the legal remedy is considered adequate. They are: (1) Nuisances which are temporary and single and which do not cause irreparable injury. (2) Nuisances which, not doing irreparable injury, are yet repeated, but only occasionally, not so often that the suits at law to redress

3 Goldsmid v. Tunbridge etc. Comm'rs, L. R. 1 Ch. App. 349, 354, 355.

Effect of statutory remedy.—A statutory remedy for nuisance does not deprive equity of jurisdiction: Johnson v. V. D. Reduction Co., 175 Cal. 63, L. R. A. 1917E, 1007, 164 Pac. 1119 (see note in L. R. A.); Herring v. Wilton, 106 Va. 171, 117 Am. St. Rep. 997, 10 Ann. Cas. 66, 7 L. R. A. (N. S.) 349, 55 S. E. 546.

4 Swaine v. Great Northern R'y Co., 4 De Gex, J. & S. 211, 216. "The present or threatened injury must be real, not trifling, transient, or temporary": 4 Pom. Eq. Jur., § 1350; cited, McLaughlin v. Sandusky, 17 Neb. 110, 22 N. W. 241.

them cause a vexatious or oppressive amount of litigation.<sup>5</sup>

- § 1928. (§ 514.) Extent of the Jurisdiction; Irreparable and Continuing or Recurring Nuisances.—In the preceding paragraph it is said that the chief forms in which the inadequacy of the common law—the fundamental basis of all equity jurisdiction over torts—manifests itself, are cases of irreparable injury, and cases of continuous or repeated nuisances involving a multiplicity of suits at law.<sup>6</sup> These two grounds of jurisdiction do not readily, if at all, admit of separate treatment,
- <sup>5</sup> For cases of this kind, see Attorney-General v. Sheffield Gas etc. Co., 3 De Gex, M. & G. 304; Blain v. Brady, 64 Md. 373, 1 Atl. 609; Bartlett v. Moyers, 88 Md. 715, 42 Atl. 204; Harrison v. Southwark etc. Co., [1891] 2 Ch. D. 409; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 Pac. 557; Hagge v. Kansas etc. Co., 104 Fed. 391; Nelson v. Milligan, 151 Ill. 462, 38 N. W. 239; Cooke v. Forbes, L. R. 5- Eq. 166; City of Canton v. Canton etc. Warehouse, 84 Miss. 268, 105 Am. St. Rep. 428, 65 L. R. A. 561, 36 South. 266. See, also, Dennis v. Mobile etc. Co., 139 Ala. 109, 35 South. 651; Penn. etc. Co. v. City of Chicago, 181 Ill. 289, 53 L. R. A. 223, 54 N. E. 825.
- 6 "Whenever this court interferes by way of injunction in the shape of prevention rather than allow an injury to be inflicted, it does so in cases where the act complained of is one in respect of which there is also a legal remedy, upon two grounds (they being of a totally distinct character)-first, where the injury is irreparable in the eye of this court, as the cutting down of a tree, although its value may be paid for; and secondly, where the act is continuous, and so continuous that this court acting on the same principle as it acted on in olden times with reference to bills of peace by restraining actions after repeated trials, so now will restrain repeated acts which can only end in incessant actions being brought, will restrain them at once on account of the continuous character of the wrong, which continuous character in itself makes the injury to be grievous. and so far in the eye of this court, irreparable": Per Wood, L. J., in Attorney-General v. Cambridge etc. Gas Co., 17 Week. Rep. 145, L. R. 4 Ch. App. 71. This portion of the text is quoted in Central Iron & Coal Co. v. Vandenheuk, 147 Ala. 546, 119 Am. St. Rep. 102, 11 Ann. Cas. 346, 6 L. R. A. (N. S.) 570, 41 South. 145.

however. The definitions of nuisance very generally agree in including as one of its elements that it is something which interferes with one's comfort in, or enjoyment of, his property, and it is the loss of this comfort and enjoyment in the use of his property which gives the right of action. Now "comfort" and "enjoyment" are almost ideal illustrations of the sort of thing for the permanent loss of which damages will not be a fair or just compensation. They are not to be paid for in money. They are in this respect essentially of the same character as the pretium affectionis which the courts sometimes have made the basis for decreeing specific performance of contracts to sell chattels, or for injunctions against trespasses to chattels. Hence it follows that most nuisances when permanent, or when continuing for any considerable length of time, or when frequently repeated, are properly to be classed as irreparable in their nature. Besides this feature of nuisance (which pertains only to its effect on the person injured) it is to be remembered that the property affected is usually land, which is regarded as peculiarly within the protection of equity; and so far as one's enjoyment of his land is destroyed, it is a destruction, if not physical, vet at least in the character in which it has been held and enjoyed, of what is generally regarded in equity as property so peculiar as not properly to be made a subject of compensation by a jury. In brief, then, a continuing nuisance is in general an irreparable injury, for two distinct reasons: (1) From its effect on the person injured. (2) From the destructive nature of the injury to the use of property of a peculiar character.7

<sup>7</sup> The argument of the text is well illustrated by the facts and the language of the court in Campbell v. Scaman, 63 N. Y. 568, 20 Am. Rep. 567, as the following quotation from the decision, per Earl, J., will show: "The plaintiffs had built a costly mansion and had laid out their grounds and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be com-

But in both the above reasons the fact that the nuisance is permanent or continuous or repeated is a very important, if not essential, element, and, as most nuisances are permanent or continuous, or repeated, this fact alone is enough to bring them into equity. Hence it has not been necessary for the courts to attempt careful definitions of irreparable injury in nuisance cases, as a more obvious and simple ground of jurisdiction is usually ready at hand. And the fact that the studied care of the meaning of the term, which is common in the cases on trespass, is largely wanting in the cases on nuisance, may be perhaps thus explained. This may also ex-

pensated in damages for the destruction of his ornamental trees, and the flowers and vines which surround his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. These damages are irreparable, too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health.

"Here the injunction also prevents a multiplicity of suits. The injury is a recurring one, and every time the poisonous breath from defendant's brick-kiln sweeps over plaintiff's land they have a cause of action. Unless the nuisance be restrained the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted by the termination of such litigations by a single suit.

"The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from the plaintiffs' land. Nuisances causing damage less frequently have been restrained."

8 The following are illustrations of the rather cursory treatment given to the definition of the word in the cases on nuisance: "The

plain the frequent practice of the equity courts in nuisance cases to confine their attention to the question of fact whether a nuisance exists or not, and to assume jurisdiction as a matter of course. Both of the above

foundation of this jurisdiction, interfering by injunction, is that head of mischief, alluded to by Lord Hardwicke (1 Dick. 164), that sort of material injury to the comfort of the existence of those who dwell in the neighboring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages, more or less, would be given in an action at law": Per Lord Eldon in Attorney-General v. Nichol, 16 Ves. 338, 342. "The familiar ground on which the extraordinary power of the court is invoked in such cases is that it is inequitable and unjust that the injured party should be compelled to resort to repeated actions at law to recover damages for his injury, which, after all, in this class of cases, are incapable of measurement": Per Pitney, V. C., in Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374, 377, 378. "There are many injuries which in the very nature of things cannot be repaired by any money consideration-such, for instance, as result from acts which outrage the feelings and wound the sensibilities, or deprive us of objects of affection, and of things, perhaps trivial in themselves, but of inestimable value by reason solely of being associated with some precious memory or touching incident of our lives; or it may be that the maintenance of the writ was required to preserve to us our homes, and to establish us in a state or condition which, lost for the moment, can never be recovered nor the loss atoned for by money": Crescent City etc. Co. v. Police Jury, 32 La. Ann. 1194, quoted with approval in State ex rel. Violett v. King, 46 La. Ann. 78, 14 South. 423, 425.

9 Crump v. Lambert, L. R. 3 Eq. 409; Proprietors etc. Wharf v. Proprietors etc. Wharf, 85 Me. 175, 27 Atl. 93; Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374. In Crump v. Lambert, Lord Romilly, M. R., said: "With respect to the question of law, I consider it to be established by numerous decisions that smoke, unaccompanied with noise or noxious vapors, that noise alone, that offensive vapors alone, although not injurious to health, may severally constitute an injury to the owner of adjoining or neighboring property; that if they do so, substantial damages may be recovered at law, and that this court, if applied to, will restrain the continuance of the nuisance by injunction in all cases where substantial damages could be recovered at law. . . . The law on this subject is, I apprehend, the same, whether it be enforced by action at law or by bill in equity. In any case where a plaintiff could obtain substan-

suggestions are borne out by the following language of the court in a well-considered American case: next position taken in behalf of the defendant is, that even if the subtraction of this water is to be held to be wrongful with respect to the complainant, still a court of equity will not give relief by way of injunction, but will leave the parties injured to their remedy at law. If this were an application for a preliminary injunction it is clear that an objection of this kind should prevail, for the act which the defendant threatens to do is obviously not of a character to inflict any irreparable injury. But after a court of equity has entertained a bill, and, instead of sending the case to a trial at law, has itself tried the questions of fact involved, and settled the legal right in favor of the complainant, it certainly would be a result much to be deprecated, if, at such a stage of the controversy, it was the law that the chancellor were required to say to such a complainant, 'Your right is clear; if you sue at law you must inevitably recover, and after several recoveries it will then be the duty of this court, on the ground of avoiding a multiplicity of suits, to enjoin the continuance of this nuisance; still you must go through the form of bringing such suits, before this court of equity can or will interfere.' In those cases in which to the mind of the chancellor, the right of the complainant is clear, and the damage sustained by him is substantial, so that his right to recover damages at law is indisputable, and the chancellor has considered and established his right,

tial damages at law, he is entitled to an injunction to restrain the nuisance in this court. . . . The real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence." In Hennessy v. Carmony, the court, per Pitney, V. C., said: "The result of a careful review of the evidence upon my mind is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this court."

I think it not possible that any authority can be produced which sustains the doctrine contended for by the counsel of the defendant.''10

§ 1929. (§ 515.) Illustrations.—The cases in which nuisances were enjoined were not frequent before the middle of the last century, but since that time they have become very numerous, covering a wide variety of states of fact. Illustrations are injunctions against the pollution, 11 diversion, 12 obstruction, 13 or abstraction 14 of

10 Per Beasley, C. J., in Higgins v. Flemington Water Co., 36 N. J. Eq. 538, 544.

11 Crossley v. Lightowler, L. R. 2 Ch. App. 478; Holt v. Corporation of Rochdale, L. R. 10 Eq. 354; McIntyre Bros. v. McGavin, [1893] App. Cas. 268; Platt v. Waterbury, 72 Conn. 531, 77 Am. St. Rep. 335, 48 L. R. A. 691, 45 Atl. 154; Chapman v. City of Rochester, 110 N. Y. 273, 6 Am. St. Rep. 366, 18 N. E. 88; Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 51 L. R. A. 687, 58 N. E. 142; Fuller v. Swan etc. Co., 12 Colo. 12, 19 Pac. 836; Village of Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 360, 37 N. E. 218; Valparaiso v. Hagen, 153 Ind. 337, 74 Am. St. Rep. 305, 48 L. R. A. 707, 54 N. E. 1062; Barton v. Union Cattle Co., 28 Neb. 350, 26 Am. St. Rep. 340, 7 L. R. A. 457, 44 N. W. 454.

12 Pugh v. Golden etc. R'y Co., L. R. 15 Ch. D. 330; Gardner v. Village of Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Smith v. City of Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Pine v. Mayor etc. N. Y., 103 Fed. 337; Rupley v. Welch, 23 Cal. 452; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Moore v. Clear Lake Water Works, 68 Cal. 146, 8 Pac. 816; Saint v. Guerrerio, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335; Watson v. New Milford etc. Co., 71 Conn. 442, 42 Atl. 265; Kay v. Kirk, 76 Md. 41, 35 Am. St. Rep. 408, 24 Atl. 326; Raymond v. Winsette, 12 Mont. 551, 33 Am. St. Rep. 604, 31 Pac. 537.

13 McKee v. Delaware etc. Co., 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305; Belknap v. Trimble, 3 Paige, 577; Ferry Pass Inspectors' & S. Ass'n v. White River Inspectors' & S. Ass'n, 57 Fla. 399, 22 L. R. A. (N. S.) 345, 48 South. 643; Smart v. Aroostook Lumber Co., 103 Me. 37, 14 L. R. A. (N. S.) 1083, 68 Atl. 527; Viebahn v. Board of Crow Wing County Comm'rs, 96 Minn. 276, 3 L. R. A. (N. S.) 1126, 104 N. W. 1089.

14 Mostyn v. Atherton, [1899] 2 Ch. 360; Arthur v. Case, 1 Paige,

running water; the pollution, taking, or waste of percolating water; <sup>15</sup> noises of various kinds; <sup>16</sup> vibration from machinery or from pounding; <sup>17</sup> unpleasant

447. For a fuller discussion of nuisances to running water, see post, Vol. II, chapter on Injunctions for Protection of Water Rights.

15 Ballard v. Tomlinson, L. R. 29 Ch. D. 115; Proprietors etc. River v. Braintree etc. Co., 149 Mass. 480, 4 L. R. A. 272, 21 N. E. 761; Barclay v. Abraham, 12I Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080. See Trinidad Asphalt Co. v. Abard, 68 L. J. P. C. 114, [1899] App. Cas. 594, 81 L. J., N. S., 132, 48 Week. Rep. 116; Sutton v. Findlay Cemetery Ass'n, 270 Ill. 11, Ann. Cas. 1917B, 559, 110 N. E. 315.

16 Soltau v. De Held, 2 Sim., N. S., 133 (ringing of bells in a chapel and a church at frequent intervals every day); Walker v. Brewster, L. R. 5 Eq. 25 (brass band which played twice a week from 2 or 3 o'clock in the afternoon until 11 o'clock at night); Bellamy v. Wells, 60 L. J. Ch. D. 156 (sporting club, patrons of which annoyed the plaintiffs by whistling for cabs after midnight); Ball v. Ray, L. R. 8 Ch. App. 467 (noise made by horses in a stable adjoining the plaintiff's hotel); Bishop v. Banks, 33 Conn. 118, 87 Am. Dec. 197 (bleating of calves during the night-time in the defendant's slaughter-house pens); Hill v. McBurney, 112 Ga. 788, 52 L. R. A. 398, 38 S. E. 42 (blowing of a factory whistle at unseasonable hours); Trom v. Lewis, 31 Ind. App. 178, 66 N. E. 490 (beer garden); Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241 (skating-rink); Stevenson v. Pucci, 32 Misc. Rep. 464, 66 N. Y. Supp. 712 (blasting near plaintiff's house before 7 o'clock in the morning or after 6 o'clock in the evening); Sturges v. Bridgman, L. R. 11 Ch. D. 852 (vibration from mortar and pestle); Rogers v. John Week etc. Co., 117 Wis. 5, 93 N. W. 821. See, also, First Ave. Coal & Lumber Co. v. Johnson, 171 Ala. 470, 32 L. R. A. (N. S.) 522, 54 South. 598 (planing-mill and coal-yard); Stevens v. Rockport Granite Co., 216 Mass. 486, Ann. Cas. 1915B, 1054 (see cases cited in note), 104 N. E. 371; Blomen v. N. Barstow Co., 35 R. I. 198, 44 L. R. A. (N. S.) 236, 85 Atl. 924 (noise from drop-hammer); Herring v. Wilton, 106 Va. 171, 117 Am. St. Rep. 997, 10 Ann. Cas. 66, 7 L. R. A. (N. S.) 349, 55 S. E. 546 (barking dogs); Grantham v. Gibson, 41 Wash. 125, 111 Am. St. Rep. 1003, 3 L. R. A. (N. S.) 447, 83 Pac. 14 (shootinggallery).

17 Hennessy v. Carmony, 50 N. J. Eq. (5 Dick.) 616, 25 Atl. 374; Sturges v. Bridgman, L. R. 11 Ch. D. 852; English v. Progress etc. Co., 95 Ala. 259, 10 South. 134 (injunction refused, because fact that

odors from urinals, privies, horses, stables, slaughter-houses, and the like; 18 noxious vapors, gases or smoke from brick-kilns, factories, blacksmith-shops and the like; 19 objects or acts which are dangerous to those in their vicinity, such as powder magazines, 20 hos-

nuisance existed was not established); Colwell v. St. Pancras etc. Council, [1904] L. R. 1 Ch. 707.

18 Vernon v. Vestry etc. Westminster, L. R. 16 Ch. D. 449; Radican v. Buckley, 138 Ind. 582, 38 N. E. 53; Perrine v. Taylor, 43 N. J. Eq. 128, 12 Atl. 769; Lippincott v. Leslie, 44 N. J. Eq. 120, 14 Atl. 103; Rapier v. London etc. Co., [1893] 2 Ch. 589; Pruner v. Pendleton, 75 Va. 516, 40 Am. Rep. 738; Reichert v. Geers, 98 Ind. 73, 49 Am. Rep. 736; Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193. See, also, United States v. Luce, 141 Fed. 385; Johnson v. V. D. Reduction Co., 175 Cal. 63, L. R. A. 1917E, 1007, 164 Pac. 1119 (hog ranch); Oehler v. Levy, 234 Ill. 595, 14 Ann. Cas. 891, 17 L. R. A. (N. S.) 1025, 85 N. E. 271 (stable); Singer v. James, 130 Md. 382, 100 Atl. 642 (chicken and hog ranch); Lead v. Inch, 116 Minn. 467, Ann. Cas. 1913B, 891, 39 L. R. A. (N. S.) 234, 134 N. W. 218 (stable).

19 Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Pollock v. Lester, 11 Hare, 266; Crump v. Lambert, L. R. 3 Eq. 409; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; McMorran v. Fitzgerald, 106 Mich. 649, 58 Am. St. Rep. 511, 64 N. W. 569; Peacock v. Spitzelberger, 16 Ky. Law Rep. 803, 29 S. W. 877; Daugherty etc. Co. v. Kittanning etc. Mfg. Co., 178 Pa. St. 215, 35 Atl. 1111. See, also, St. Louis Safe Deposit & Sav. Bank v. Kennett Estate, 101 Mo. App. 370, 74 S. W. 474 (heat from smoke-stack adjoining plaintiff's building). See, also, Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 21 Ann. Cas. 1247, 26 L. R. A. (N. S.) 183, 106 Pac. 581 (smoke); McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40, 13 L. R. A. (N. S.) 465, 81 N. E. 549 (smoke).

20 Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; Wier's Appeal, 74 Pa. St. 230; Tyner v. People's Gas Co., 131 Ind. 408, 31 N. E. 61 (keeping nitroglycerin near plaintiff's dwelling); Blanc v. Murray, 36 La. Ann. 162, 51 Am. Rep. 7 (inflammable building); Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 37 (same as preceding case); Henderson v. Sullivan, 159 Fed. 46, 14 Ann. Cas. 590, 16 L. R. A. (N. S.) 691 (see note), 86 C. C. A. 236. In Heeg v. Licht, supra, the injunction was sought to restrain the defendant from manufacturing and storing upon his premises fireworks or other ex-

pitals for contagious diseases,21 blasting22 and simi-

plosive substances. In pointing out that the existence of a nuisance does not depend at all upon any negligence of the defendant, the court, per Miller, J., said: "Most of the cases cited rest upon the maxim 'sic utere tuo,' etc., and where the right to the undisturbed possession and enjoyment of property comes in conflict with the rights of others, that it is better, as a matter of public policy, that a single individual should surrender the use of his land for especial purposes injurious to his neighbors or to others, than that the latter should be deprived of the use of their property altogether or be subjected to great danger, loss and injury, which might result if the rights of the former were without any restriction or restraint. The keeping of gunpowder or other materials in a place, or under circumstances, where it would be liable, in case of explosion, to injure the dwelling-houses or the persons of those residing in close proximity, we think rests upon the same principle, and is governed by the same rules. An individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of his neighbor, than he is authorized to engage in any other business which may occasion serious consequences." With Blanc v. Murray and Kaufman v. Stein; supra, compare Rhodes v. Dunbar, 57 Pa. St. (7 P. F. Smith) 274, 98 Am. Dec. 221; Duncan v. Hayes, 22 N. J. Eq. 25; Chambers v. Cramer, 49 W. Va. 395, 54 L. R. A. 545, 38 S. E. 691; English v. Progress etc. Co., 95 Ala. 259, 10 South. 134—which cases hold that mere increased risk from fire and consequent rise of insurance rates do not constitute a nuisance and will not be enjoined.

21 Metropolitan Asylum v. Hill, L. R. 6 App. Cas. 196; Gilford v. Babies' Hospital etc. N. Y., 21 Abb. N. C. 159, 1 N. Y. Supp. 448. In Kestner v. Homeopathic Medical & Surgical Hospital, 245 Pa. 326, 52 L. R. A. (N. S.) 1032, 91 Atl. 659, the defendant was enjoined from maintaining an operating-room in such a position that the cries of pain emitted therefrom could be heard at plaintiff's residence.

Cemetery.—Nelson v. Swedish Evan. Lutheran Cemetery Ass'n, 111 Minn. 149, 20 Ann. Cas. 790, 34 L. R. A. (N. S.) 565, 126 N. W. 723, 127 N. W. 626; Sutton v. Findlay Cemetery Ass'n, 270 Ill. 11, Ann. Cas. 1917B, 559 (see cases collected in note as to when cemeteries are a nuisance), 110 N. E. 315.

Undertaker's establishment in residence section.—Saier v. Joy (Mich.), 164 N. W. 507.

22 Hill v. Schneider, 4 N. Y. Ann. Cas. 70, 13 App. Div. 299, 43

lar dangers; things which offend the moral sense, such as brothels;<sup>23</sup> obstruction of highways<sup>24</sup> or naviga-

N. Y. Supp. 1; Stevenson v. Pucci, 32 Misc. Rep. 464, 66 N. Y. Supp. 712; Blackford v. Heman Const. Co., 132 Mo. App. 157, 112 S. W. 287.

23 Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514; Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; Weakley v. Page, 102 Tenn. 178, 46 L. R. A. 552, 53 S. W. 551; Farrell v. Cook, 16 Neb. 483, 49 Am. Rep. 721, 20 N. W. 720 (standing of jacks and stallions in sight of plaintiff's dwelling); Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513; Dempsie v. Darling, 39 Wash. 125, 81 Pac. 152; Tedescki v. Berger, 150 Ala. 649, 11 L. R. A. (N. S.) 1060, 43 South. 960; Seifert v. Dillon, 83 Neb. 322, 131 Am. St. Rep. 642, 17 Ann. Cas. 1126, 19 L. R. A. (N. S.) 1018, 119 N. W. 686. Bullfighting.—State v. Canty, 207 Mo. 439, 123 Am. St. Rep. 393, 13 Ann. Cas. 787, 15 L. R. A. (N. S.) 747, 105 S. W. 1078. Gambling.—Ex parte Allison, 99 Tex. 455, 122 Am. St. Rep. 653, 2 L. R. A. (N. S.) 1111, 90 S. W. 870. These cases do not, of course, hold that immorality is per se a basis for an injunction; such further characteristics as will bring it within the usual definitions of nuisance must be shown. In Cranford v. Tyrrell, supra. Gray, J., said on this point: "The rule of law requires of him who complains of his neighbor's use of his property, and seeks for redress and to restrain him from such use, that he should show that a substantive injury to property is committed. The mere fact of a business being carried on, which may be shown to be immoral and, therefore, prejudicial to the character of the neighborhood, furnishes, of itself, no ground for equitable interference at the suit of a private person."

24 Cabbell v. Williams, 127 Ala. 320, 28 South. 405; Green v. Oaks, 17 Ill. 249; Martin v. Marks, 154 Ind. 549, 57 N. E. 249; Newcome v. Crews, 98 Ky. 339, 32 S. W. 947; Streeter v. Stainaker, 61 Neb. 205, 85 N. W. 47; Grey v. Greenville etc. R. Co., 59 N. J. Eq. 372, 46 Atl. 638; De Witt v. Van Schoyk, 110 N. Y. 7 (affirming 35 Hun, 103), 6 Am. St. Rep. 342, 17 N. E. 425; Hill v. Hoffman (Tenn. Ch. App.), 58 S. W. 929; Callanan v. Gilman, 107 N. Y. 360, 1 Am. St. Rep. 838, 14 S. E. 264; Mayor etc. Columbus v. Jaques, 30 Ga. 506; Winsor v. German Sav. & L. Soc., 31 Wash. 365, 72 Pac. 66 (obstructing common hallway). An unauthorized railroad track in a street may be such a nuisance: Holst v. Savannah Electric Co., 131 Fed. 931; Lake Shore & M. S. R'y Co. v. City of Elyria, 69 Ohio, 414, 69 N. E. 738; Tennessee Brewing Co. v. Union R'y Co., 113

tion;<sup>25</sup> removal of support to land;<sup>26</sup> acts which cause a physical invasion of the plaintiff's land, such as overflowing it,<sup>27</sup> or casting refuse matter upon it.<sup>28</sup> This 'list<sup>29</sup> is not designed to be an exhaustive classification from the nature of nuisance no list could be exhaustive—

Tenn. 53, 85 S. W. 864. See, also, Zook v. Pennsylvania R. Co., 206 Pa. St. 603, 56 Atl. 82; Bischof v. Merchants' Nat. Bank, 75 Neb. 838, 5 L. R. A. (N. S.) 486, 106 N. W. 996.

Pennsylvania v. Wheeling etc. Co., 13 How. (U. S.) 518, 14
L. Ed. 249; Attorney-General v. Eau Claire, 37 Wis. 400. See, also, Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905, 77
Pac. 813 (floating timber); Reyburn v. Sawyer, 135 N. C. 328, 102
Am. St. Rep. 555, 47 S. E. 761.

26 Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579; Finegan v. Eckerson, 32 App. Div. 233, 52 N. Y. Supp. 993; Hunt v. Peake, Johns. 705, 6 Jur., N. S., 1071; Morrison v. Latimer, 51 Ga. 519.

27 Dayton v. Drainage Comm'rs, 128 Ill. 271, 21 N. E. 198; Pence v. Garrison, 93 Ind. 345; Jacobsen v. Van Boening, 48 Neb. 80, 48 Am. St. Rep. 684, 32 L. R. A. 229, 66 N. W. 993; Lake Erie etc. Co. v. Young, 135 Ind. 426, 41 Am. St. Rep. 430, 35 N. E. 177; Patoka Tp. v. Hopkins, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 896; Pettigrew v. Village of Evansville, 25 Wis. 223, 3 Am. Rep. 50; Lamborn v. Covington Co., 2 Md. Ch. 409; Moore v. Chicago etc. Co., 75 Iowa, 263, 39 N. W. 390; Baker v. Weaver, 104 Ga. 228, 30 S. E. 726; Davis v. Londgreen, 8 Neb. 43; Noyes v. Cosselman, 29 Wash. 635, 92 Am. St. Rep. 937, 70 Pac. 61; Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82; Starr v. Woodberry etc. Works (N. J. Ch.), 48 Atl. 911; Abbott v. Pond, 142 Cal. 393, 76 Pac. 60; Carley v. Jennings, 131 Mich. 385, 91 N. W. 634; Louisville & N. R. Co. v. Franklin, 170 Ky. 645, 186 S. W. 643; Brown v. Gold Coin Min. Co., 48 Or. 277, 86 Pac. 361; The Salton Sea Cases, 172 Fed. 792, 97 C. C. A. 214.

28 Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90 (mining debris washed upon the plaintiff's land); Haugh's Appeal, 102 Pa. St. 42, 48 Am. Rep. 193 (privy from which fluid percolated into the plaintiff's well); Heath v. Minneapolis, St. P. & S. S. M. R. Co., 126 Minn. 470, L. R. A. 1916E, 977, 148 N. W. 311.

29 In the making of the above list, the collection and arrangement of the cases in 1 Ames's Cases in Equity Jurisdiction, pages 611-614, has been of material assistance.

but it will serve to show the more common forms of nuisances which have been enjoined and something of the extent of equity jurisdiction of the subject.

§ 1930. (§ 516.) Injunctions on Sole Ground of Preventing Multiplicity of Suits.—In the cases in which the only reason of equity's intervention to enjoin has been to prevent the necessity of a multiplicity of suits at law because of a continuing or recurring nuisance, the courts have shown the same lack of unanimity that is always common to this ground of jurisdiction, whether it arises from a trespass, nuisance or other tort. Consonant to principle, the weight of authority holds that the mere existence of a continuing or recurring nuisance, however trivial, provided only it is sufficient to sustain an action at law for damages, will support a bill for an injunction.<sup>30</sup> There are authorities, however, which

30 Whitfield v. Rogers, 26 Miss. (4 Cush.) 84, 59 Am. Dec. 244; Baltimore etc. R. R. Co. v. Baptist Church, 108 U. S. 317, 329, 27 L. Ed. 739, 2 Sup. Ct. 719; City of Demopolis v. Webb, 87 Ala. 659, 6 South. 408; Lux v. Haggin, 69 Cal. 256, 10 Pac. 674; Koopman v. Blodgett, 70 Mich. 610, 14 Am. St. Rep. 527, 38 N. W. 649; Stevens v. Stevens, 52 Mass. (11 Met.) 251, 45 Am. Dec. 203; Fleischner v. Citizens' etc. Co., 25 Or. 119, 35 Pac. 174; Corning & Winslow v. Troy etc. Factory, 40 N. Y. 191, 39 Barb. 311, 34 Barb. 485, 6 How. Pr. 89; Sullivan v. Jones etc. Co., 208 Pa. St. 540, 57 Atl. 1065; Harper etc. Co. v. Mountain etc. Co., 65 N. J. Eq. 479, 56 Atl. 297; Carpenter v. Capital etc. Co., 178 Ill. 29, 69 Am. St. Rep. 286, 43 L. R. A. 645, 52 N. E. 973; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Hennessy v. Carmony, 50 N. J. Eq. (5 Dick.) 616, 25 Atl. 374. See, also, Bischof v. Merchants' Nat. Bank, 75 Neb. 838, 5 L. R. A. (N. S.) 486, 106 N. W. 996. In Whitfield v. Rogers, supra, the bill was to enjoin the erection of a mill-dam which would cause the plaintiff's land to be overflowed. In affirming the issuance of an injunction by the lower court, Handy, J., said: "It is insisted, in the first place, on the part of the appellant, that the complainant was not entitled to relief in equity on the ground of the private nuisance; because relief in equity will only be granted in such cases where the mischief is irreparable and cannot be compensated in damages.

hold that this is not enough to base an injunction upon, and that the only multiplicity of suits which equity will interfere to prevent is that in which there are a number of parties to the controversy on one side or the other.<sup>31</sup> It may be added further, though the matter calls for no discussion in this place, that the subject of nuisance is the most fruitful field in furnishing the questions of greatest difficulty under the head of bills of peace, viz., questions as to the propriety of joining as plaintiffs or defendants parties between whom there is no "community of interest in the subject-matter of the suit."<sup>32</sup>

§ 1931. (§ 517.) Miscellaneous Grounds of Jurisdiction.—It has already been pointed out in these pages that the fundamental reason for equity's enjoining nuisances is the lack of an adequate legal remedy. It has also been seen that the most common illustrations of inadequacy are the cases in which the injury is irreparable or of a continuing or recurring nature, and that

Authorities are to be found holding this doctrine; but the modern and more approved cases extend the relief much further. . . . The inundations occasioned by the erection of the dam, the injuries thereby caused to the complainant's lands, and the periodical destruction of his timber, did not constitute a single trespass, but, from their nature, must have been 'constantly recurring grievances.' It would have been unreasonable and oppressive to force the complainant into a court of law to redress each repetition of the injury as it might recur from time to time; and therefore, on the very principle of 'suppressing interminable litigation,' and of 'preventing multiplicity of suits,' courts of equity alone can give just and adequate relief in such cases.''

- 3. See Cherry v. Stein, 11 Md. 1, and General Electric R'y Co. v. Chicago etc. Co., 184 Ill. 588, 56 N. E. 963, which in effect hold that the fact of a nuisance being continuous is not enough to allow a plaintiff to come into equity, though there is no discussion of the point in either case.
- 32 This section of the text is cited in Coombs v. Lenox Realty Co., 111 Me. 178, 47 L. R. A. (N. S.) 1085, 88 Atl. 477. See the discussion of this subject in 1 Pom. Eq. Jur., §§ 255-270.

these two grounds of jurisdiction are usually found together in the same cases. This is so largely true that almost all of the cases are rested on one or both of these The few cases that remain are, perhaps, on this account, the more significant in demonstrating that the fundamental reason—the inadequacy of the legal remedy—is not to be reduced to a few or any specific number of forms of manifestation. It is an open inquiry in every case whether the plaintiff can get-adequate relief at law; if not, for any reason, he may come into equity. Here, as elsewhere, "it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy Hence inadequacy has been found in the in equity."33 fact that independent acts of several defendants combine to produce the injury to the plaintiff so that the particular share of damage done by each one is incapable of ascertainment.<sup>34</sup> This reason may apply equally to

<sup>33</sup> Quoted in Lockwood v. Lawrence, 77 Me. 297, 312, 52 Am. Rep. 763, from Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655.

<sup>34</sup> Woodruff v. North Bloomfield Gravel Min. Co., 8 Sawy. (U. S. C. C.) 628, 16 Fed. 25; Lockwood v. Lawrence, 77 Me. 297, 52 Am. Rep. 763; Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419; Madison v. Ducktown, S., C. & I. Co., 113 Tenn. 331, 83 S. W. 658. In the first cited of these cases the court said: "There is a very great difference between seeking to recover damages at law for an injury already inflicted by several parties acting independently of each other, and restraining parties from committing a nuisance in the future. In equity the court is not tied down to one particular form of judgment. It can adapt its decrees to the circumstances in each case, and give the proper relief as against each party, without reference to the action of others, and without injury to either. Each is dealt with, with respect to his own acts, either as affected or as unaffected by the acts of the others. It is not necessary for the prevention of future injury, to ascertain what particular share of the damages each defendant has inflicted in the past, or is about to inflict in the future. It is enough to know he has contributed and is

different states of facts whenever, for any cause, the amount of damage is unascertainable. Its substance is simply the obvious proposition that whenever the estimate of damages recoverable at law must be based largely, or to any considerable degree, upon conjecture, the legal remedy cannot be adequate.<sup>35</sup> Other unusual reasons for granting injunctions have been: in a bill to enjoin the obstruction of a public street by municipal

continuing to contribute to a nuisance, without ascertaining to what extent, and to restrain him from contributing at all."

35 In Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535, the facts were that the defendant proposed to divert fifteen hundred cubic feet of water per second from Kings river, which formed the boundary of the plaintiff's farm for thirty miles and flowed through it for ten miles. In affirming a judgment granting an injunction the court, per Temple, J., said: "It does not follow because the injury is incapable of ascertainment, or of being computed in damages, and therefore only nominal damages can be recovered, that it is trifling or inconsiderable. It is doubtful if it can be said that there is any evidence in the case which tends to show, or if that which was offered would have tended to show, that the injury to plaintiffs was inconsiderable, that it was unascertainable, and in that sense inappreciable; may be a good reason why an injunction should issue. . . . It is obvious that in a climate like that where this land is situated, the benefit derived from a flow of water for thirty miles along its boundary, and ten miles through it, cannot be inconsiderable, but yet the extent of benefit must ever be an unknown quantity." In Lockwood v. Lawrence, supra, the court, per Foster, J., said: "The very difficulty of obtaining substantial damages was stated to be a ground for relief by injunction in Clowes v. Staffordshire Potteries Co., 8 L. R. Ch. App. 125. With still greater force does this apply where the injury is caused by so many, and in such a way, that it would be difficult if not impossible to apportion the damage, or say how far anyone may have contributed to the result, and so damages would be but nominal, and repeated actions, without any substantial benefit, might be the result." See. to the same effect, Lyon v. McLaughlin, 32 Vt. 423. See, also, Gilbert v. Mickle, 4 Sand. Ch. 357. It is not meant to be said that the only ground on which the cases cited in connection with this paragraph of the text might have been, or even were, placed is that to which, in each case, attention is directed here; the present purpose is simply

officers, that the social standing, and character and reputation, of the defendants would make indictment ineffectual, while abatement would not be an adequate remedy because the expense of abating would fall on the tax-payers;<sup>36</sup> and, in a bill by a tenant to have a bridge, which obstructed the entrance to the building he occupied, removed, that the plaintiff's legal remedy was inadequate because he, being a tenant and not owner of the fee, could not maintain an action for abatement but could sue only in case for damages.37 No case has been found so holding, but it would seem clear that the insolvency of a defendant might well be a basis of injunction here just as, by the weight of authority, it is in trespass.<sup>38</sup> As in trespass, too, the basis of an injunction is sometimes said to be that otherwise the defendant would acquire a prescriptive right to do the wrongful act.39

§ 1932. (§ 518.) What the Plaintiff must Allege.—A plaintiff who seeks an injunction against a nuisance must allege his own right clearly and definitely in order that the court's order for the protection of it may be certain and without ambiguity; otherwise the decree

to point out the readiness of the equity courts to make the inadequacy of the legal remedy, in whatever form it may appear, the criterion of their jurisdiction.

- <sup>36</sup> Mayor etc. of Columbus v. Jaques, 30 Ga. 506. See, also, Lefrois v. Monroe County, 24 App. Div. 421, 48 N. Y. Supp. 519.
  - 37 Knox v. Mayor etc. of New York, 55 Barb. 404.
- 38 See Wilson v. Featherstone, 120 N. C. 449, 27 S. E. 121; Walker v. Walker, 51 Ga. 22; Porter v. Armstrong, 132 N. C. 66, 43 S. E. 542; Reyburn v. Sawyer, 135 N. C. 328, 102 Am. St. Rep. 555, 47 S. E. 761.
- 39 Meyer v. Phillips, 97 N. Y. 485, 49 Am. Rep. 538. The criticism of this reason made in the chapter on trespass—viz., that an action at law or an interference with the defendant's wrongful act once in every prescriptive period, will prevent any right from arising by prescription—applies here also: See Hart v. Hildebrandt, 30 Ind. App. 415, 66 N. E. 173.

will, of course, be impossible of intelligent enforcement. He must also, for obvious reasons, allege that the defendant is doing or threatening to do the acts complained of. It is not necessary for the plaintiff to allege that his injury will be irreparable or that the legal remedy is otherwise inadequate, as that is a mere conclusion of law; he must, however, allege facts which will show the injury to himself and the inadequacy of his legal remedy. And in the courts of the United States, at least, this inadequacy is regarded as so important, that it may be insisted on by the court sua sponte, though not raised by the pleadings, nor suggested by counsel.

§ 1933. (§ 519.) Previous Trial at Law.—Since the rights that are involved in cases of nuisance are purely legal, equity taking jurisdiction in particular cases only to furnish a more perfect remedy than the law affords, and following the legal rules in the determination of all questions save the adequacy of the legal remedy, it follows that a problem of procedure may be presented to the equity courts when an injunction is sought by a plaintiff in whose favor the legal right, or the fact that a nuisance exists, has never been determined. In such

<sup>40</sup> Fisk v. Wilber, 7 Barb. 395; Peterson v. Beha, 161 Mo. 513, 62 S. W. 462.

<sup>41</sup> Ploughe v. Boyer, 38 Ind. 115; Chastey v. Ackland, [1895] L. R. 2 Ch. D. 389.

<sup>42</sup> Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245. It is not necessary, however, for him to allege that he has been damaged in a specific sum: Grantham v. Gibson, 41 Wash. 125, 111 Am. St. Rep. 1003, 3 L. R. A. (N. S.) 447, 83 Pac. 14. But see First Ave. Coal & Lumber Co. v. Johnson, 171 Ala. 470, 32 L. R. A. (N. S.) 522, 523, 54 South. 598, where it is said that plaintiff must allege and prove that his remedy at law is incomplete or inadequate.

<sup>43</sup> Sprague v. Rhodes, 4 R. I. 301; Burrus v. City of Columbus, 105 Ga. 42, 31 S. E. 124.

<sup>44</sup> Parker v. Winnipisiogee etc. Co., 67 U. S. (2 Black) 545, 17 L. Ed. 333. And see Burnham v. Kempton, 44 N. H. 78, 92.

case, should the court of equity pass on the questions of law or fact raised? or should it refuse its extraordinary relief until the plaintiff has procured a judgment of a court of law in his favor?

(§ 520.) Not Necessary to Granting of Temporary Injunctions.—The scope of the inquiry may be narrowed by first pointing out the classes of cases in which, though there has been no trial at law, the above problem is not raised. Chief among these is that class of cases in which only a temporary injunction is sought. The purpose of a temporary injunction generally is to keep matters in statu quo while some disputed question of law or fact is being settled. Obviously, granting or refusing it cannot turn upon the settlement of the question, either in law or equity. It has its own rules, which will be considered later, 45 but this is not one of them. The supreme court of the United States in a comparatively early case on this subject said: "The true distinction in this class of cases is that, in prospect of irremediable injury by what is apparently a nuisance, a temporary or preliminary injunction may at once issue. . . . But not a permanent or perpetual one till the title, if disputed, is settled at law."46 And the law is clearly in accord with so much of this distinction as pertains to the granting of temporary injunctions.47

§ 1935. (§ 521.) Nor in All Cases of Permanent Injunctions.—There are, also, some cases in which a permanent injunction is sought, where the objection that the plaintiff has not obtained a judgment at law should

<sup>45</sup> See infra, § 535.

<sup>46</sup> Irwin v. Dixion, 50 U. S. (9 How.) 10, 28, 29, 13 L. Ed. 25, per Woodbury, J.

<sup>47</sup> Sutton v. Lord Montfort, 4 Sim. 565; Kennerty v. Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607; Cronin v. Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605; Rochester v. Erickson, 46 Barb. 92; Burnham v. Kempton, 44 N. H. 78.

be disregarded wholly by a court of equity. The first of these is the case in which the defendant does not dispute either the plaintiff's right or the fact that a nuisance exists; to insist on a trial at law in such case would be to impose needless hardship on both parties to the suit. "The only object in establishing title at law, is to show that the right is in the plaintiff. The suit at law is only a means to accomplish a given end. When the end is already obtained, there could be no reason for doing an idle thing. This, the law, as a rational system, never requires to be done. If the title of the plaintiff be conceded, then there can be no need of a trial at law to establish that which is already admitted,"48 and the reasoning is, of course, the same as to an admission that a nuisance exists. Hence the courts are agreed that no judgment or verdict at law is necessary in such cases. 49 On the same reasoning it is held that a plaintiff's bill is not demurrable for failing to state a previous trial at law; by demurring the defendant admits the plaintiff's right and the fact of an existing nuisance.<sup>50</sup>

<sup>48</sup> Tuolumne Water Co. v. Chapman, 8 Cal. 392, 397.

<sup>49</sup> Duncan v. Hayes and Greenwood, 22 N. J. Eq. 25; Ross v. Butler, 19 N. J. Eq. (4 C. E. Green) 294, 97 Am. Dec. 654; and the cases cited in the next two notes, are a fortiori authorities on this point, also.

<sup>50</sup> Tuolumne Water Co. v. Chapman, 8 Cal. 392; Aldrich v. Howard, 7 R. I. 87, 80 Am. Dec. 636; Smitzer v. McCulloch, 76 Va. 777; Texas etc. R'y Co. v. Interstate Transp. Co., 155 U. S. 585, 39 L. Ed. 271, 15 Sup. Ct. 228; Soltau v. De Held, 2 Sim., N. S., 133; Appeal of Bitting, 105 Pa. St. 517. But see Eastman v. Amoskeag etc. Co., 47 N. H. 71; Weller v. Smeaton, 1 Cox, 102, 1 Brown Ch. 572. In Aldrich v. Howard, supra, the bill was to enjoin the defendant from erecting a large livery-stable in close proximity to the complainant's dwelling-house. Defendant demurred to the bill because, among other reasons, it did not allege a previous trial at law. In passing on this point of the demurrer the court, per Ames, C. J., said: "Nor is it true, that a bill to enjoin such nuisance is demurrable, because it does not state that the rights of the parties, in support of the bill, have been settled by a judgment at law. It may be

next place, a trial at law will not be required when, from the evidence at the hearing, the controverted questions are clear in favor of one or the other party to the suit. Here, too, a trial at law would be superfluous.<sup>51</sup> It is on this ground that courts proceed when they hold that a "mere denial of the complainant's rights by the defendant in his answer will not oust the court of its jurisdiction by injunction"; <sup>52</sup> or that a party who has been for a long time in the undisputed possession of the property or enjoyment of the right with respect to which he complains, may procure an injunction in spite of such denial. <sup>53</sup> And, finally, if both parties consent <sup>54</sup> or re-

very proper that they should be, if uncertain, before the court affords its specific relief; but the title of the plaintiff to the relief he asks may be admitted by the answer, as it is by this demurrer, and, then, why should it be further ascertained, to induce the action of the court?"

- 51 Inchbald v. Barrington, L. R. 4 Ch. 388; Reid v. Gifford, Hopk. Ch. 416; Learned v. Hunt, 63 Miss. 373; Appeal of Pennsylvania Lead. Co., 96 Pa. St. 116, 42 Am. Rep. 534; City of Newcastle v. Raney, 130 Pa. St. 546, 6 L. R. A. 737, 18 Atl. 1066; Deaconess etc. Hospital v. Bontjes, 104 Ill. App. 484; Village of Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218, affirming 49 Ill. App. 530; Shields v. Arndt, 4 N. J. Eq. (3 Green's Ch.) 234; Wood v. McGrath, 150 Pa. St. 451, 16 L. R. A. 715, 24 Atl. 682; Harelson v. Kansas City etc. Co., 151 Mo. 483, 52 S. W. 368. See, also, Oehler v. Levy, 234 Ill. 595, 14 Ann. Cas. 891, 17 L. R. A. (N. S.) 1025, 85 N. E. 271; Sutton v. Findlay Cemetery Ass'n, 270 Ill. 11, Ann. Cas. 1917B, 559, 110 N. E. 315.
- 52 Carlisle v. Cooper, 21 N. J. Eq. (6 C. E. Green) 576, 580; Shields
   v. Arndt, 4 N. J. Eq. (3 Green Ch.) 234.
- 53 Gardner v. Trustees etc. Newburgh, 2 Johns. Ch. 162; Finch v. Resbridger, 2 Vern. 390; Falls Village etc. Co. v. Tibbetts, 31 Conn. 165; Burnham v. Kempton, 44 N. H. 78.
- 54 Mayor of Cardiff v. Cardiff etc. Co., 4 De Gex & J. 596; Ladd v. Granite State Brick Co., 68 N. H. 185, 37 Atl. 1041. As to cases in which the disputed question is one of law, and not of fact, see Rigby v. Great Western R'y Co., 2 Phill. Ch. 49, 51; Harmon v. Jones, Craig & P. 299, 301, in which a distinction is taken that would have great force in a jurisdiction in which the courts of law and equity are distinct.

quest that the equity court try the merits of the disputed question, it will do so;<sup>55</sup> and it has been held that an objection to this course of proceeding cannot be taken if it has not been raised by the answer.<sup>56</sup>

S 1936. (§ 522.) Cases in Which It is Important.— The class of cases not yet discussed is that in which on application for a permanent injunction, the plaintiff's right, or the fact that a nuisance exists, is doubtful on the evidence before the court, and the parties do not consent to have the controversy settled by the court of equity. In this situation the general doctrine is that "either party is entitled to insist that the questions on which the legal rights depend should be tried at law." Satisfactory grounds to support this rule as a matter of reason are not to be found in the cases. Doubtless the explanation of it is largely the fact that in early days the courts of equity were reluctant to undertake the decision of purely legal rights, or questions of fact which ordinarily were tried by a jury. It was "a rule of

<sup>55</sup> Walter v. Selfe, 4 De Gex & S. 315.

<sup>56</sup> Lambert v. Huber, 22 Misc. Rep. 462, 50 N. Y. Supp. 793.

<sup>57</sup> Mayor of Cardiff v. Cardiff etc. Co., 4 De Gex & J. 596. See, also, Imperial G. L. & C. Co. v. Broadbent, 7 H. L. C. 600, 606, 612; City of Pana v. Central Washed Coal Co., 260 Ill. 111, 48 L. R. A. (N. S.) 244, 102 N. E. 992, eiting the text. The right is not sufficiently established at law if the action is pending on appeal: City of Pana v. Central Washed Coal Co., 260 Ill. 111, 48 L. R. A. (N. S.) 244, 102 N. E. 992.

<sup>58</sup> Potts v. Levy, 2 Drew. 272, 277; Harman v. Jones, Craig & P. 299, 301; Walts v. Foster, 12 Or. 247, 7 Pac. 24; Roath v. Driscoll, 20 Conn. 533, 538, 52 Am. Dec. 352. In Roath v. Driscoll, supra, Ellsworth, J., said: "The court doubtless possesses the necessary power, but it is not to be exercised as a matter of course, even when the plaintiff suffers some injury to his real estate. Whenever the right is doubtful, or needs the investigation of a jury, a court of equity is always reluctant to interpose its summary authority, for it is rather the duty of the court to protect acknowledged rights than to establish new and doubtful ones." In Harman v. Jones, supra, an

expediency and policy, rather than an essential condition and basis of the equitable jurisdiction."<sup>59</sup> As such, the grounds on which it arose have largely, if not quite, disappeared with the decay of all hostility of the courts of law against the equity courts and the general merging of both law and equity functions in the same courts. The rule, however, still persists in most jurisdictions in which it has not been abrogated by statute.<sup>60</sup>

injunction had been granted forbidding the defendant from taking land which plaintiff claimed. No legal proceedings were directed. On appeal Lord Cottenham said: "It is said the omission of such a direction was owing to its not having been asked in the court below; but it is the duty of the court to give such direction, whether it be asked for or not. The proper office of the court, upon an application of this kind, is not to ascertain the existence of a legal right, but solely to protect the property, until that right can be determined by the jurisdiction to which it properly belongs. It is the duty of this court to confine itself within the limits of its own jurisdiction; and, therefore, it is a fundamental error in an order of this kind to assume finally to dispose of legal rights, and not to confine itself to protecting the property pending the adjudication of those rights by a court of law." This extract shows clearly the ground on which the rule is based.

59 1 Pom. Eq. Jur., § 252.

60 Earl of Ripon v. Hobart, 3 Mylne & K. 169; Mayor of Cardiff v. Cardiff etc. Co., 4 De Gex & J. 596; Elmhurst v. Spencer, 2 Macn. & G. 45; Van Bergen v. Van Bergen, 3 Johns. Ch. 282, 8 Am. Dec. 511; Irwin v. Dixion, 50 U. S. (9 How.) 10, 13 L. Ed. 25; Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14; Tracy v. Le Blanc, 89 Me. 304, 36 Atl. 399; Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378; Burnham v. Kempton, 44 N. H. 78; Hinchman v. Paterson, 17 N. J. Eq. 75, 86 Am. Dec. 252; Walts v. Foster, 12 Or. 247, 7 Pac. 24; Rhea v. Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Wood v. Mc-Grath, 150 Pa. St. 451, 16 L. R. A. 715, 24 Atl. 682; Roath v. Driscoll, 20 Conn. 538, 52 Am. Dec. 352; Kennerty v. Etiman Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607; Sterling v. Littlefield, 97 Me. 479, 54 Atl. 1108; Sullivan v. Browning, 67 N. J. Eq. 391, 58 Atl. 302; Harrelson v. Kansas City etc. Co., 151 Mo. 482, 52 S. W. 368. See, however, Olmsted v. Loomis, 9 N. Y. 423, and Minke v. Hopeman, 87 Ill. 450, 29 Am. Rep. 63, in which the court of equity decided the question of fact for itself, without putting the case on any of the usual

It has never gone so far, however, as to require the plaintiff's bill to be dismissed because the legal questions had not been determined; the court may retain the bill and procure their ascertainment by directing an issue, or an action, or a case stated, at law; basing its final decree upon the results thus reached. 61 In leaving the subject it should be noted that when the bill is to enjoin a threatened, as distinguished from an existing, nuisance, from the nature of the case the requirement of a previous trial at law cannot be applied. "No such question in this case can be tried at law, no nuisance exists —the object of the bill is to enjoin the defendant from creating one."62 From the foregoing discussion it would appear that the following is an accurate summary of the general rules of equity with respect to the requirement of a previous establishment of the plaintiff's right at law. The requirement does not apply at all to applications for temporary injunctions; nor to bills for permanent injunctions on account of irreparable injury, when the defendant admits the plaintiff's right, or when the right is clear in favor of one of the parties, though disputed, or when both parties consent to a trial of the merits by the equity court; nor to bills for permanent

grounds for taking it out of the rule. In England the rule is abolished by statute, Rolt's Act, 25 & 26 Vict., c. 42 [1862], for a discussion of which see Eaden v. Firth, 1 Hen. & M. 573. The Reformed Procedure has accomplished the same result in New York and California: Corning & Winslow v. Troy etc. Factory, 40 N. Y. 191, 39 Barb. 311, 34 Barb. 485, 6 How. Pr. 89; Pollitt v. Long, 58 Barb. 20; Lux v. Haggin, 69 Cal. 255, 284, 285, 10 Pac. 674. And in Michigan also this has been done by statute: Comp. Laws 1871, § 6377; Robinson v. Baugh, 31 Mich. 290, 292.

61 Attorney-General v. Cleaver, 18 Ves. 211, 219; Rigby v. Great Western R'y Co., 2 Phill. Ch. 49, 51; Davidson v. Isham, 9 N. J. Eq. 186; Clark v. Lawrence, 59 N. C. 83, 78 Am. Dec. 241.

62 Bell v. Blount, 11 N. C. 384, 15 Am. Dec. 526; Porter v. Whitham, 17 Me. 294; Varney v. Pope, 60 Me. 192; Tracy v. Le Blanc, 89 Me. 304, 36 Atl. 399. See, also, Sterling v. Little, 97 Me. 497, 54 Atl. 1108.

injunctions against threatened, as distinguished from existing, nuisances; it does apply to all other bills for permanent injunctions, but there is a tendency to do away with the requirement by statute or judicial innovation.

§ 1937. (§ 523.) Threatened Nuisances; Imminent Danger.—In one sense all injunctions against nuisances are injunctions against threatened nuisances. The only purpose of giving equitable relief at all is the prevention of future harm; but this harm, being future, cannot be a matter of absolute certainty and therefore is only threatened. If, however, at the time the bill is filed a nuisance is actually being committed, there will, in general, be no question that the threatened danger is sufficiently made out to justify an injunction, if the case, in its other aspects, is sufficient. But when the nuisance has not yet come into existence and the plaintiff, therefore, must make out his case of apprehended danger by other means than by pointing to an existing nuisance, a question may be raised concerning the rules by which the court is to be guided. What is believed to be a proper statement of these rules was thus formulated in a leading English case: "There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended statement will, if it comes, be very substantial. I should almost say, it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action."63

<sup>63</sup> Fletcher v. Bealey, L. R. 28 Ch. D. 688, per Pearson, J. The facts of this case were that: The defendants proposed to deposit

a word, the threatened danger must be imminent, and of a character to do irreparable injury. In a bill to

refuse matter from their alkali mills on the bank of a stream about a mile and a half above the plaintiff's paper-mills, in which the water from the river was largely used. It was admitted that after a time there would flow from this "vat waste" a greenish liquid of such noxious character, that any considerable amount of it in the water of the river would be very destructive to the plaintiff's manufacture, and the court thought this liquid, in the natural course of events, might begin to flow into the river in the course of ten years. The plaintiff also contended that the bank where the refuse matter was to be deposited was in danger of slipping into the river. The defendants insisted that they were going to take precautions to provide against both dangers. The court refused the injunction. On the first ground the court said: "I have no doubt that at the end of ten years the water would be sufficiently polluted to do a great amount of injury to the plaintiff. . . . I think that in ten years' time it is highly probable that science (which is now at work on the subject) may have discovered some means for rendering this green liquid innocuous. But, even if no such discovery should be made in that time, I cannot help seeing that there are contrivances, such as tanks and pumps, and other things of that kind, by which the liquid may, as the defendants say, be kept out of the river altogether. Therefore, upon that ground alone, I do not think the action can be supported. . . . I think the danger is not imminent, because it must be some years before any such quantity of the liquid will be found issuing from the heap as would pollute the Irwell to the detriment of the plaintiff." On the claim that the bank was in danger of slipping the court said: "I think that, if any slip does take place, there will be some premonitory symptoms which will warn the plaintiff and the defendants, and give the defendants time to do whatever may be necessary to prevent the heap from slipping into the river, and at the same time enable the plaintiff, if he should think it right to do so, to bring an action against the defendants on the ground of positive and imminent danger at that time." On similar reasoning an injunction against a sewer was refused when the allegation was that it would become noxious in three years: Morgan v. Binghamton, 102 N. Y. 500, 7 N. E. 424; so, an injunction was denied against the erection of a pest-house by city authorities when the latter had taken no official action looking to its erection, the danger in such case being too remote to be considered imminent: City of Kansas City v. Hobbs, 62 Kan. 866, 62 Pac. 324.

enjoin the erection of an engine to pump water into a river which the plaintiffs were cleansing and improving, the court discussed the nature of an imminent danger as follows: "If, indeed, this be a work which not only gives the power of doing mischief, but cannot be used or can hardly, in the common course of things, be used without working mischief, if, in short, it be a thing which can hardly be used without being abused, the case comes to be very different. For, in matters of this description, the law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, according to the same practical and rational view. and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming. Accordingly, if it appeared that the works in question could hardly be used without damage to the inferior districts, I might hold that erecting them was. in itself, a beginning of injury, though there might be a possibility of otherwise using them; and if the damage, should it happen at all, were the destruction and the subjecting of the lower districts to a deluge, I might scrutinize less narrowly the probability of the engines being injuriously worked."64 This passage states and illus-

<sup>64</sup> Earl of Ripon v. Hobart, 3 Mylne & K. 169, 176. The injunction was refused, the court saying as its conclusion on the score of imminence of the danger: "But upon carefully examining the evidence, and indeed it might be enough to say, upon attentively considering the nature of the case, the kind of works and of working in question, and the sort of mischief apprehended, there is no reason for holding that the danger is either certain or very imminent, or

trates clearly the principles which guide the courts in this matter. On the one hand, a mere possibility of a future nuisance will not support an injunction; it must be probable. On the other hand, the plaintiff—who, of course, has the burden of proof<sup>65</sup>—does not need to establish this probability by proof amounting to virtual certainty that the nuisance will occur, nor even proof which establishes it beyond a reasonable doubt;<sup>66</sup> it is sufficient if he show that the *risk* of its happening is greater than a reasonable man would incur. And the balance between these two rules will be affected by the seriousness of the nuisance feared, the strength required for the plaintiff's proof diminishing somewhat as the greatness of the apprehended damage increases.

§ 1938. (§ 524.) Illustrations.—In accordance with these rules it is held that a thing which may or may not be a nuisance, according to the way it is managed or controlled when in use, will not be enjoined. The plaintiff, by showing only the intended construction or use of the thing complained of, does not meet the burden of proof that is on him, "the presumption being that a person entering into a legitimate business will conduct it in a proper way so that it will not constitute a nuisance." Hence injunctions have been refused against

that mischief of a very overwhelming nature is likely to be suddenly done; or, indeed, that any serious injury can be done, without time being afforded for coming to the court with a case free from the present defects." See, also, Mohawk Bridge Co. v. Utica etc. Co., 6 Paige, 554, 563.

<sup>65</sup> Columbia Ave. etc. Co. v. Prison Commission of Ga., 92 Fed. 801; Maysville etc. Co. v. Beyersdorfer, 19 Ky. Law Rep. 1212, 43 S. W. 254; Lambert v. Alcorn, 144 Ill. 313, 331, 21 L. R. A. 611, 33 N. E. 53.

<sup>66</sup> Owen v. Phillips, 73 Ind. 284.

<sup>67</sup> Pope v. Bridgewater, 52 W. Va. 252, 43 S. E. 87. Compare West v. Ponca City Milling Co., 14 Okl. 646, 2 Ann. Cas. 249, 79 Pac. 100.

the erection of a stable,<sup>68</sup> or a planing-mill,<sup>69</sup> or a cotton-gin,<sup>70</sup> or a jail,<sup>71</sup> or a coal-chute;<sup>72</sup> the building of a dam,<sup>73</sup> or an embankment;<sup>74</sup> the opening of a gas-well;<sup>75</sup> the establishment of a private burial ground;<sup>76</sup> the operation of a business, as of a slaughter-house,<sup>77</sup> or a dairy;<sup>78</sup> the discharge of sewage on the plaintiff's land;<sup>79</sup> or the sale of water for purposes of hydraulic mining when the defendant does not know the mining is to be done in a wrongful manner;<sup>80</sup> or the laying of

- 68 Kirkman v. Handy, 30 Tenn. (11 Hump.) 406, 54 Am. Dec. 45 (livery-stable); Shiras v. Ollinger, 50 Iowa, 571, 32 Am. Rep. 138 (livery-stable); St. James's Church v. Arrington, 36 Ala. 546, 76 Am. Dec. 332 (private stable); Rounsaville v. Kohlheim, 68 Ga. 668, 45 Am. Rep. 505 (private stable); Keiser v. Lovett, 85 Ind. 240, 44 Am. Rep. 10 (private stable). In Kirkman v. Handy, the court said: "A livery-stable in a town is not necessarily a nuisance in itself," and therefore a court of equity has no jurisdiction to restrain by injunction, either the completion, because intended for that purpose, or its appropriation to the purpose intended.
  - 69 Dorsey v. Allen, 85 N. C. 358, 39 Am. Rep. 704.
  - 70 Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463.
- 71 Burwell v. Vance County Comm'rs, 93 N. C. 73, 53 Am. Rep. 454.
  - 72 Dalton v. Cleveland etc. R'y Co., 144 Ind. 121, 43 N. E. 130.
- 73 Hoke v. Perdue, 62 Cal. 545; Blair v. Boswell, 37 Or. 168, 61 Pac. 341.
  - 74 Lake Erie etc. Co. v. City of Fremont, 92 Fed. 721.
- <sup>75</sup> Pope v. Bridgewater Gas Co., 52 W. Va. 252, 43 S. E. 87; Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 62 Am. St. Rep. 532, 37 L. R. A. 381, 47 N. E. 2.
- 76 Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14 (private burial ground); Ellison v. Commissioners of Washington, 58 N. C. 57, 75 Am. Dec. 430 (public cemetery); Elliott v. Ferguson, 37 Tex. Civ. 40, 83 S. W. 56 (same).
- 77 Beckhan v. Brown, 19 Ky. Law Rep. 519, 40 S. W. 684. The court in this case said: "A business of itself legitimate should not be enjoined upon the sole ground that it may contingently or eventually become a nuisance."
  - 78 McDonough v. Robbens, 1 Mo. App. Rep. 78, 60 Mo. App. 156.
  - 79 Vicker v. City of Durham, 132 N. C. 880, 44 S. E. 685.
  - 80 County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. 740.

railroad tracks in front of the plaintiff's land;81 in every case the thing complained of may be done in a manner that will cause no harm to the plaintiff, and the mere fact that it is to be done is no proof that it will be done wrongfully. But if the plaintiff can show that the thing complained of will probably be a nuisance to him, he is entitled to an injunction appropriately framed to protect his right that is threatened. Thus, if a structure is being erected, and the plaintiff can show that it is to be used in such a way as will probably be a nuisance to him, he may have this use enjoined, although he may not be able to enjoin the erection of the structure;82 while if the structure itself, without regard to any use of it, will cause a nuisance, the injunction will forbid its erection at all.83 And if this distinction is some-

<sup>81</sup> Drake v. Hudson River etc. Co., 7 Barb. 508.

<sup>82</sup> Cleveland v. Citizens' etc. Co., 20 N. J. Eq. (5 C. E. Green) 201; Attorney-General v. Steward, 20 N. J. Eq. (5 C. E. Green) 415; Ross v. Butler, 19 N. J. Eq. (4 C. E. Green) 294, 97 Am. Dec. 654; Lake Erie etc. Co. v. Young, 135 Ind. 426, 41 Am. St. Rep. 430, 35 N. E. 177. In Cleveland v. Citizens' etc. Co., supra, the bill was brought to enjoin the erection of a gas plant near the plaintiffs' homes. On the facts the court thought the manufacturing of gas might, or might not, be a nuisance, according to the way in which it was conducted, except as to a process of purifying by lime, which the court was satisfied would be a nuisance to the plaintiffs, if used. The injunction was therefore refused as to the building and the manufacturing of gas as a whole, but granted against the particular process of purifying by lime. In Attorney-General v. Steward, supra, the bill was for an injunction against erecting a slaughter-house. Here, too, the court was of the opinion that the business might be so carried on as not to be a nuisance. The defendants admitted, however, that they might discharge the blood from one hundred slaughtered hogs daily into a creek which flowed past plaintiffs' land below, contending . that this would not pollute the stream. The court thought it would pollute the stream; hence the injunction was refused as to the erection of the building, and the slaughtering, but was granted to restrain the defendants from permitting the blood to flow into the creek.

<sup>83</sup> Rochester v. Erickson, 46 Barb. 92 (projecting wall into a navigable river); Bell v. Blount, 11 N. C. 384, 15 Am. Dec. 526 (mill-

times disregarded and the structure as wern as the wrongful use of it enjoined, it is doubtless because of the fact that the erection will be useless for any other purpose than the wrongful one; hence a strict limitation of the scope of the injunction is not very closely observed.<sup>84</sup> Thus the courts have enjoined the erection of a privy near plaintiff's house; <sup>85</sup> of a toll-gate; <sup>86</sup> and of a powder magazine. <sup>87</sup> So, too, threatened acts which if done would cause a nuisance, as the diversion of water, <sup>88</sup> or discharge of sewage on the plaintiff's land, <sup>89</sup> or the use of an artificial pond as a place for dumping

dam, when the pond collected by it would very probably render the community unhealthy).

84 On this point the court in Cleveland v. Citizens' etc. Co., supra, said: "The application is to restrain putting up the building, and also manufacturing gas. As to the building itself, it can be of no injury to anyone if no gas is ever made in it. But it is usual and proper, where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain the erection. The works, if erected, might tempt the owner to use them, and it seems like trifling to permit anyone to go on with a building which he can never be permitted to use." This reasoning could not apply, of course, in any case in which the defendant wished to go on with the building for some other purpose, if rightful, than the prohibited one, nor would it seem to make any difference that this other purpose was formed after the defendant learned he would be enjoined from carrying out his original plan.

85 Mily v. O'Hearn, 13 Ky. Law Rep. 834, 18 S. W. 529 (erection of a privy ten feet from the plaintiff's well and thirteen feet from her dining and bed rooms. But, in the same jurisdiction, the erection of a privy one hundred and fifty feet from the plaintiff's well and dwelling was not enjoined: Davis. v. Atkins, 18 Ky. Law Rep. 73, 35 S. W. 271).

86 President etc. Road Co. v. Anderson, 22 Ky. Law Rep. 1626, 61 S. W. 13.

- 87 Wier's Appeal, 74 Pa. St. 230.
- 88 Kimberly v. Hewitt, 75 Wis. 371, 44 N. W. 303.
- 89 New York Cent. etc. Co. v. City of Rochester, 127 N. Y. 591, 28 N. E. 416.

mining debris, 90 have been enjoined. In a majority of the cases of bills to enjoin threatened nuisances, however, the injunction has been refused. The explanation of this is that most nuisances consist in doing in a wrongful manner something which is not wrongful in itself; hence till it is actually being done in a wrongful way, the plaintiff has so heavy a task in proving the probability of its being so done, that, in general, he cannot meet it. The courts will not grant the injunction simply because it will do no harm to the defendant; 91 the plaintiff must show clearly that he stands in need of it. 92

§ 1939. (§ 525.) Must Threatened Injury be Irreparable?—On the second branch of the rule quoted above concerning injunctions against threatened nuisances, viz., that the injury must be irreparable, little needs to be said. The significance of it is, of course, that it excludes wholly from the class of cases in which an injunction may be granted against a purely threatened, as distinguished from an existing, nuisance, all those in which the basis of the intervention of equity is solely to prevent a multiplicity of suits. In favor of the rule thus limited, it can be said that there is little, if any, reason for granting relief quia timet with the lack of certainty that any wrong will ever be done which is in-

<sup>90</sup> United States v. Lawrence, 53 Fed. 632. Compare with United States v. North Bloomfield etc. Co., 53 Fed. 625. See further City of St. Louis v. Knopp etc. Co., 104 U. S. 658, 26 L. Ed. 883, and Crompton v. Lea, L. R. 19 Eq. 115, 121, which show that lack of imminence of the threatened nuisance cannot, in general, be taken by demurrer.

<sup>91</sup> Otaheite Gold etc. Co. v. Dean, 102 Fed. 929.

<sup>92</sup> Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516; Branch Turnpike Co. v. Yuba, 13 Cal. 190; Sayre v. Mayor etc. Newark, 58 N. J. Eq. (13 Dick.) 136, 148, 42 Atl. 1068. In Gallagher v. Flury, 99 Md. 181, 57 Atl. 672, it is said that threatened nuisances only of things nuisances per se will be enjoined, but this is clearly an erroneous view, both in reason and by the authorities.

herent in such cases, except when there is strong ground for believing that, unless quia timet relief is given, an adequate remedy will be impossible should the anticipated wrong occur. Negatively, the fact, that almost all the cases of bills for injunction against threatened nuisances conform to the restricted rule, supports this reasoning. There is, however, some American authority the other way.<sup>93</sup>

§ 1940. (§ 526.) Damage Necessary to Justify an Injunction.—The question what amount or character of damage is necessary to sustain an injunction will require only brief treatment, as, in the main, the question, when it arises, is settled by simply applying the rule which is applied on the same point in an action at law. If the injury is irreparable, or such that the damages given by a jury would be conjectural, it is clear, of course, that the question of the extent of damage will not need to be gone into. The class of cases, then, in which it will arise is chiefly, if not exclusively, that in which the reason for coming into equity is to put an end to a permanent or continuing nuisance in order to avoid multiplicity of suits. In this situation the courts generally require no more, but just the same, damage that will sustain an action at law. "The result of a careful review of the evidence upon my mind," said the court in a leading American case,94 "is to lead me to the con-

<sup>93</sup> Whitfield v. Rogers, 26 Miss. (4 Cush.) 84, 59 Am. Dec. 244.
See, also, Lake Erie etc. Co. v. Young, 135 Ind. 426, 41 Am. St. Rep. 430, 35 N. E. 177.

<sup>94</sup> Per Pitney, V. C., in Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374. To the same effect are Salvin v. North Brancepeth Coal Co., L. R. 9 Ch. App. 705, in which the court applied the rule given to the jury in St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642, which was an action at law for damages; Bostock v. North Staffordshire R'y, 5 De Gex & S. 584; Broder v. Saillard, L. R. 2 Ch. D. 692; Proprietors of Me. Wharf v. Proprietors etc. Wharf, 85 Me. 175, 27 Atl. 93; Pach v. Geoffrey, 67 Hun, 401, 22 N. Y. Supp. 275, affirmed

clusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this court." This is the only logical result of the rule that to prevent multiplicity of suits is a head of equity jurisdiction; to hold otherwise would be to say that equity will prevent multiplicity of suits only when the damages are according to some standard of the equity courts, and this would be to do away with just so much of the salutary result of the rule as was affected by applying this different standard. It follows equally that in the class of nuisances in which an action at law may be maintained without showing any damages, because a legal right is invaded, as the interference with water rights, or the right to lateral support, or overflowing the plaintiff's land, and the like, that equity should also enjoin on the same showing; and such is the rule.95

in 143 N. Y. 661, 39 N. E. 21; Crump v. Lambert, L. R. 3 Eq. 409. Conversely, an injunction was refused in Farrell v. New York Steam Co., 23 Misc. Rep. 726, 53 N. Y. Supp. 55, because the plaintiff did not show that the acts would amount to sufficient to maintain an action at law. The bill was to enjoin the operation of a steam plant. The injunction was refused, the court saying: "The evidence does not show that the acts of the defendant have materially lessened the plaintiff's enjoyment of his property. By this I mean those acts of the defendant of which the plaintiff has the legal right to complain." But see Smith v. Ingersoll-Sergeant etc. Co., 12 Misc. Rep. 5, 33 N. Y. Supp. 70, reversing 7 Misc. Rep. 374, 27 N. Y. Supp. 907, in which the language of the court is not consistent with the above cases. In Terrell v. Wright, 87 Ark. 213, 19 L. R. A. (N. S.) 174, 112 S. W. 211, the court said: "Courts interfere by injunction against establishments such as mills and manufactories with great caution, and only in cases where the facts are weighty and important, and the injury complained of is of a serious and permanent character."

95 Union etc. Co. v. Dangberg, 81 Fed. 73 (diversion of water); Potter v. Howe, 141 Mass. 357, 6 N. E. 233 (flowing land); Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11 (flowing land; cf. Jacob v. Day, 111 Cal. 571, 44 Pac. 243); Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579 (interference with lateral support enjoined, though damages trifling). Contra, McMaugh v. Burke, 12 R. I. 499. For

§ 1941. (§ 527.) Criminal and Statutory Nuisances. The jurisdiction of equity over nuisance is essentially a civil jurisdiction. "The plaintiff insisted that it was illegal for Roman Catholics to ring and toll bells in a steeple annexed to their place of worship," said the court in Soltau v. De Held.96 "It appears to me that whether that be so or not, is perfectly immaterial in this case; because, if it be illegal, I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not grant an injunction to restrain a man from smuggling, which is an illegal act. If it be illegal, the illegality of it is no ground for my interfering." In accordance with this language the law is settled that an act will not be enjoined as a nuisance merely because it is criminal, even though prohibited by statutes, whether at the suit of a private person<sup>97</sup> or of the

further cases on injunction to prevent interference with water rights, see post, chapter XXVI.

96 Per Cranworth, V. C., 2 Sim., N. S., 133.

97 Sparhawk v. Union etc. R'y Co., 54 Pa. St. 401; Finegan v. Allen, 46 Ill. App. 553; Sheldon v. Weeks, 51 Ill. App. 314; Rice v. Jefferson, 50 Mo. App. 464; Smith v. Lockwood, 13 Barb. 209; Tiede v. Schneidt, 99 Wis. 201, 74 N. W. 798; City of Utica v. Utica Tel. Co., 24 App. Div. 361, 48 N. Y. Supp. 916. See, however, First Nat. Bank of Mt. Vernon v. Sarlls, 129 Ind. 201, 28 Am. St. Rep. 185, 13 L. R. A. 481, 28 N. E. 434 (removal of wooden building within fire limits, against city ordinance); Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333 (same as preceding case); Schulze v. Corporation of Galasheils, [1895] App. Cas. 656; Dubos v. Dreyfous, 52 La. Ann. 1117, 27 South. 663 (failure to ventilate stables, as required by ordinance); State v. Crawford, 28 Kan. 726, 42 Am. Rep. 182. In this last case the court uttered the following dictum: "We would think that every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated. is a public nuisance." In the two Indiana cases, also, the court seemed to think that the effect of the statute was to make the prohibited act a nuisance. In Griswold v. Brega, 160 Ill. 490, 52 Am. St. Rep. 350, 43 N. E. 864, affirming 57 Ill. App. 554, the required statutory consent of property owners to allow a wooden building to be brought within the fire limits was procured by fraud on some of them. public.<sup>98</sup> The converse of this is not true; indeed it is well established that it is no defense to a bill to enjoin that which is a nuisance to show that it is also a crime; <sup>99</sup> if the law were otherwise, public nuisances which at common law are public offenses, could never be enjoined. <sup>100</sup> A more difficult question is raised when the legislature makes an act a nuisance which was not such at common law, and provides that it shall be subject to injunction in equity. Is such legislation consistent with the provision of the federal, and most of the state, constitutions that the right of trial by jury shall be pre-

and on this account the court enjoined the defendant from bringing in the building.

98 Village of St. John v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671 (erection of wooden building contrary to a village ordinance); Inc. Town of Rochester v. Walters, 27 Ind. App. 194, 60 N. E. 1101 (same as preceding case); Village of New Rochelle v. Lang, 75 Hun, 608, 27 N. Y. Supp. 600 (same as preceding case); Pres. etc. Village of Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446 (same as preceding case); Manor Casino v. State (Tex. Civ. App.), 34 S. W. 769 (sale of intoxicating liquor in violation of statute); Borough of Cambridge Springs v. Moses, 22 Pa. Co. Ct. Rep. 637.

99 United States v. Debs, 64 Fed. 724, 753; People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374; Barrett v. Mt. Greenwood etc. Ass'n, 159 Ill. 385, 50 Am. St. Rep. 168, 31 L. R. A. 109, 42 N. E. 891; People's Gas Co. v. Tyner, 131 Ind. 277, 31 Am. St. Rep. 433, 16 L. R. A. 443, 31 N. E. 59; Columbian Athletic Club v. State, 143 Ind. 98, 52 Am. St. Rep. 407, 28 L. R. A. 727, 40 N. E. 915; Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; State v. Saunders, 66 N. H. 39, 18 L. R. A. 646, 25 Atl. 588; North Bloomfield etc. Co. v. United States, 88 Fed. 664, 32 C. C. A. 84, affirming 81 Fed. 243. See, also, People v. Clark, 268 Ill. 156, Ann. Cas. 1916D. 785, 108 N. E. 994; Respass v. Commonwealth, 131 Ky. 807, 21 L. R. A. (N. S.) 836, 115 S. W. 1131; State v. Canty, 207 Mo. 439, 123 Am. St. Rep. 393, 13 Ann. Cas. 787, 15 L. R. A. (N. S.) 747, 105 S. W. 1078; Jones v. State, 38 Okl. 218, Ann. Cas. 1915C, 1031, 44 L. R. A. (N. S.) 161, 132 Pac. 319; State v. Columbia Water Power Co., 82 S. C. 181, 129 Am. St. Rep. 876, 17 Ann. Cas. 343, 22 L. R. A. (N. S.) 435, 63 S. E. 884. For a more complete collection of authorities, see chapter on Injunctions Against Criminal Acts.

100 State v. Crawford, 28 Kan. 726, 42 Am. Rep. 182.

served inviolate? It is held generally, if not universally, that there is nothing unconstitutional in such statutes. The jury trial guarded by the constitutional provision is that which was required by the principles of the common law. Jurisdiction to enjoin future acts in the nature of nuisances has always been a matter for the equity courts, and as such has never required a jury trial; hence an enlargement of this jurisdiction does not trench on the requirement for preserving jury trial.<sup>101</sup>

101 Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641 (keeping a saloon); State v. Saunders, 66 N. H. 39, 18 L. R. A. 646, 25 Atl. 588 (same as preceding case); Davis v. Auld, 96 Me. 559, 53 Atl. 118; Eilenbecker v. Dist. Ct. of Plymouth Co., 134 U. S. 31, 33 L. Ed. 801, 10 Sup. Ct. 424. In the last case cited the plaintiff having been enjoined from violating the liquor law, was afterwards found guilty of contempt for disobeying the injunction and sentenced to pay \$500 or go to prison for three months. He carried the case to the supreme court, because, among other things, the equity court had imposed this punishment upon him without trial by jury. affirming the decision of the state court it was said: "If the objection is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors, which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing the objectionable traffic. And we know of no hindrance in the constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil as to punish the offense as a crime after it has been committed." A city sheltering itself under authority of law from liability for acts which between private individuals would be a nuisance must show an express or clearly implied authority to do such acts: Hill v. Mayor etc. N. Y., 139 N. Y. 495, 34 N. E. 1090, reversing 63 Hūn, 633, 18 N. Y. Supp. 399; Spring v. Delaware, L. & W. R. Co., 88 Hun, 385, 34 N. Y. Supp. 810. Statutes authorizing injunctions against statutory nuisances at the suit of individuals are now almost universally sustained: People v. Smith, 275 Ill. 256, L. R. A. 1917B, 1075, 114 N. E. 31; Ex parte Allison, 48

If it could be shown that the purpose of the act were to punish or make compensation for past acts in equity without jury trial, the decision might be different.<sup>102</sup>

§ 1942. (§ 528.) The Defendant's Motive.—How far the defendant's motive may be of importance in cases of nuisance is, strictly, a matter of substantive law, and not of the equitable remedy. But, inasmuch as, in a narrow range of cases, the question has, of late years, received considerable attention, largely in applications for injunctions, and as it is likely to arise in the future in similar applications, rather than in actions at law, because the equitable remedy is the only one to afford adequate redress, it may be well briefly to treat of it here. If one draws off percolating water and thus dries up his neighbor's well; or erects a high fence on his own land which shuts off the light from the house of his neighbor (who has no easement of light and air), in both

Tex. Cr. App. 634, 13 Ann. Cas. 684, 3 L. R. A. (N. S) 622, 90 S. W. 492.

Violation of municipal ordinance.—It has been held that an individual, specially damaged, may enjoin the erection of a building in violation of a municipal ordinance, although the building is not a nuisance per se: Bangs v. Dworak, 75 Neb. 714, 13 Ann. Cas. 202, 5 L. R. A. (N. S.) 493, 106 N. W. 780. The cases in support of this proposition are collected in 5 L. R. A. (N. S.) 493, note. In Houlton v. Titcomb, 102 Me. 272, 120 Am. St. Rep. 492, 10 L. R. A. (N. S.) 580, 66 Atl. 733, it is said that while equity will not enjoin the mere violation of a municipal ordinance, unless the violation constitutes a nuisance, and while a thing is not a nuisance merely because an ordinance declares it to be such, yet where the state declares buildings erected contrary to ordinances to be nuisances, an injunction may issue.

102 State v. Saunders, 66 N. H. 39, 18 L. R. A. 646, 25 Atl. 588, 594. It is not a violation of such statutes for an officer to sell intoxicating liquors under execution, if the sale is an honest one for the benefit of the plaintiff in execution under proper process; it is a violation, subject to injunction, if the sale by the officer is a collusive attempt to evade the statute: Fears v. State, 102 Ga. 274, 29 S. E. 463. On the subject of this section, see, also, ante, chapter XXI.

cases acting from a malevolent motive to injure the neighbor, and not otherwise to benefit himself than by causing the injury, has the neighbor any legal cause for complaint? In this form, and almost exclusively on the above facts, the question has arisen. In cases of percolating water there are dicta from the earliest cases down, that such water cannot be drawn off for the sole and malicious purpose of injuring one's neighbor. 103 The cases in which the courts have actually decided the question have been mainly on application for injunctions, which have been granted. 104 The ground of de-

103 Chasemore v. Richards, 7 H. L. Cas. 349, 387; Greenleaf v. Francis, 18 Pick. 117; Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Chesley v. King, 74 Me. 164, 43 Am. Rep. 569; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352. Contra, Frazier v. Brown, 12 Ohio St. 294.

104 Forbell v. City of New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 51 L. R. A. 695, 58 N. E. 644; Stillwater Water Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541, 60 L. R. A. 875, 93 N. W. 907; Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080. Contra, Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 355, 94 N. W. 354. In actions at law the same thing has been held in Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276. Contra, Phelps v. Nowlan, 72 N. Y. 39, 28 Am. Rep. 93. In Forbell v. City of New York, supra. it was held that the owner of land could not draw the percolating water into wells for the purpose of selling it for consumption off the land. In Barclay v. Abraham, supra, and Stillwater Water Co. v. Farmer, supra, it was held that one could not collect percolating water on his own land and waste it to the injury of others. In the latter of these cases the court, per Collins, J., said: "In holding as we do, and in laying down a rule which confessedly is something of a departure from the general doctrine found in the books, and is an advanced position, we are not really discarding the maxim, cujus est solum ejus est usque ad cœlum, or doing violence to any of the reasons which have been given for it. We are not involving any set of legal rules in hopeless uncertainty, and therefore rendering their application practically impossible, for the rule which we adopt is not only just, but is exceeding plain, certain, practical, and easy to apply to real conditions. Nor will our recognition of the doctrine of corcision, however, is narrower than the mere impropriety of the defendant's motive: instead it takes the form of a rule of property that one may collect and consume percolating water only for beneficial use on the land on which it is collected; collection of it for any other purpose may be enjoined by any person affected injuriously. Thus expressed it is no more drastic a limitation of property rights than are all the rules which ordinarily define a nuisance; indeed, it is doubtful if it goes so far, while the beneficial results to flow from it are obvious. In dealing with the cases of "spite fences" and similar erections, the courts have made them turn on the malevolent motive of the defendant in erecting the structure. The objections which have been made to such a criterion of legal rights and liabilities have been expressed as follows: "To permit a man to cause a certain injurious effect upon the premises of his neighbor by the erection of a structure on his premises if such structure is beneficial or ornamental, and to prohibit him from causing

relative rights interfere in any manner with material improvements, to the detriment of the state. On the contrary, it will tend to promote the prosperity and general welfare of all citizens whose necessities bring them within its influence. Nor are we entirely without authority for such a doctrine. We therefore formulate and announce the rule governing the facts here to be that, except for the benefit and improvement of his own premises, or for his beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes." In Barclay v. Abraham, supra, the court, per Ladd, J., said: "The prevention of carrying the water from the land of the owner for the purposes of commerce or waste cannot retard the improvement of the land itself. and there is no just ground for tolerating such diversion when the direct result is to deprive the adjoining land owners by the incidental drainage of their land of a supply of water from the same natural reservoir. This would be extracting the subterranean water from the adjoining land to its injury, without any counter benefit to the land through which taken."

the same effect in case the structure is neither beneficial nor ornamental, but erected from motives of pure malice, is not protecting a legal right, but is controlling his moral conduct."105 It would seem clear, however, there is neither justice nor expediency in allowing such things as the building of a spite fence to be done, unless the preservation of property rights demands it. "It is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by law, but is only a more or less necessary incident of rights which are established for very different ends." And, however forcible the objections may be to founding relief upon the defendant's immoral motive alone, it seems clear that here the actual interference with the defendant in the use of his property would be less radical than in most cases of nuisance. There he is not allowed to make a use of his premises which is generally beneficial both to himself and to society; here the use he is making is beneficial to neither and may be equally harmful with recognized nuisances to the plaintiff. As a result of the antagonistic influences that bear on the case in this form, the authorities are divided. Partly by judicial declaration,<sup>107</sup> but more largely by virtue of statutes,<sup>108</sup> the

<sup>105</sup> Letts v. Kessler, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765, overruling 7 Ohio Cir. Rep. 108.

 <sup>106</sup> Per Holmes, J., in Rideout v. Knox, 148 Mass. 368, 12 Am. St.
 Rep. 560, 2 L. R. A. 81, 19 N. E. 390.

<sup>107</sup> Burke v. Smith, 69 Mich. 380, 37 N. W. 838; Flaherty v. Moran, 81 Mich. 52, 2 Am. St. Rep. 510, 8 L. R. A. 183, 45 N. W. 381; Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. 457; Peck v. Roe, 110 Mich. 52, 67 N. W. 1080; Norton v. Randolph, 176 Ala. 381, Ann. Cas. 1915A, 714, 40 L. R. A. (N. S.) 129, 58 South. 283.

<sup>108</sup> Connecticut.—Gen. Stats., ed. 1902, §§ 1013, 1107. Injunctions allowed in Harbison v. White, 46 Conn. 106; Whitlock v. Uhle, 75 Conn. 423, 53 Atl. 891.

weight of authority is that structures of the kind under discussion are unlawful and their maintenance may be enjoined. But the malevolent motive must in such cases be the dominant one, such that even if no other were present it would induce the act complained of; it will not do if it is simply present together with other motives which are worthy. Some courts, however, have declined to adopt even this restricted doctrine, and, preferring the hardship of individual cases to a ground of jurisdiction considered to be so fallible as the defendant's immoral motive, have refused relief. It may

Maine.—Freeman's Supplement, c. 17, § 5. Construed in Lord v. Langdon, 91 Me. 221, 39 Atl. 552.

Massachusetts.—Acts and Resolves, 1887, c. 348. Actions for damages allowed in Rideout v. Knox, 148 Mass. 368, 12 Am. St. Rep. 560, 2 L. R. A. 81, 19 N. E. 390; Smith v. Morse, 148 Mass. 407, 19 N. E. 393; not allowed in Spaulding v. Smith, 162 Mass. 543, 39 N. E. 189.

New Hampshire.—Stats., ed. 1902, c. 143, §§ 28, 29, 30. Construed in Hunt v. Coggin, 66 N. H. 140, 20 Atl. 250.

Vermont.-Laws of Vermont, 1886, No. 84.

Washington.—2 Hill's Ann. Stats. & Codes, § 268; Ballinger's Ann. Codes, § 5433. Injunction allowed in Karasek v. Peier, 22 Wash. 419, 50 L. R. A. 345, 61 Pac. 33.

109 Kuzniak v. Kozminski, 107 Mich. 444, 61 Am. St. Rep. 344, 65 N. W. 275; Ladd v. Flynn, 90 Mich. 181, 51 N. W. 203; Rideout v. Knox, 148 Mass. 368, 12 Am. St. Rep. 560, 2 L. R. A. 81, 19 N. E. 390; Gallegher v. Dodge, 48 Conn. 387, 40 Am. Rep. 182; Lord v. Langdon, 91 Me. 221, 39 Atl. 552; see Hunt v. Coggin, 66 N. H. 140, 20 Atl. 250.

110 Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461; Letts v. Kessler, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765, overruling Kessler v. Letts, 7 Ohio Cir. Rep. 108; Metzker v. Hochrein, 107 Wis. 267, 81 Am. St. Rep. 841, 50 L. R. A. 305, 83 N. W. 308; Bordeaux v. Greene, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; Falloon v. Schilling, 29 Kan. 292, 44 Am. Rep. 642. See, also, Guest v. Reynolds, 68 Ill. 478, 18 Am. Rep. 570; Housel v. Conant, 12 Ill. App. 259. In Burke v. Smith, 69 Mich. 380, 37 N. W. 838, Mahan v. Brown, supra, was distinguished on the ground that the existence of the doctrine of ancient lights in New York made the holding neces-

be permissible to suggest that if the lead of the cases on percolating water were followed, and the decisions based on the reasoning that a man's property right in the passage of light and air over his land is not an absolute right to interfere with it arbitrarily as he chooses, but only for purposes useful and beneficial to him in connection with the land itself, the unfortunate criterion of bad motive would be removed, no harmful restriction of property rights would be created, and the ends of justice would be furthered.

§ 1943. (§ 529.) The Balance of Injury.—The question how far courts of equity, in dealing with cases of admitted or established nuisances, should be influenced, in their determination whether to grant an injunction or to turn the plaintiff over to his remedy at law, by the balance between the injury to the plaintiff from refusing, and to the defendant from granting the injunction,

sary in order that a landowner may be able to prevent an easement of light over his land from arising.

The question of allowing natural gas to escape on one's land has given rise to a similar discussion to that concerning air and percolating water. See Ohio Oil Co. v. State of Indiana, 150 Ind. 698, 50 N. E. 1124; affirmed in 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. 576; Hague v. Wheeler, 157 Pa. St. 324, 37 Am. St. Rep. 736, 22 L. R. A. 141, 27 Atl. 714.

In the following cases there are intimations that the court will consider the parties' motive in ordinary cases of nuisance: Christie v. Davie, [1893] 1 Ch. 316 (motive of defendant in making a noise); Medford v. Levy, 31 W. Va. 649, 13 Am. St. Rep. 887, 2 L. R. A. 368, 8 S. E. 302 (quarrel between neighbors); Bassett v. Salisbury, 47 N. H. 426 (plaintiff bought land flooded by defendant's dam in order to compel defendant to buy other land from him); Edwards v. Allouez Mining Co., 38 Mich. 46, 31 Am. Rep. 301 (similar to preceding case).

Plaintiff's motive.—It has been held that the court will not inquire into plaintiff's motive in bringing the suit; nor into the fact that he may be guilty of a similar nuisance: Davis v. Spragg, 72 W. Va. 672, 48 L. R. A. (N. S.) 173, 79 S. E. 652.

has received considerable attention from the courts, and has met with conflicting answers-often from courts within the same jurisdiction. It is to be noted that the question as here raised excludes certain situations in which its consideration is, beyond all doubt, proper and even necessary. The first of these is on application for temporary injunctions, in which, the questions in dispute being undetermined, the courts must take account of the possibilities of injury in a course of action which the hearing may prove to be the wrong one. 111 The second, is in the determination of the wrongfulness of the defendant's act—the fact of nuisance or no nuisance -in that large class of cases in which there is no invasion of a clearly defined right of the plaintiff—such as, say, the right to have water flow in its accustomed channel-but, rather, of a right which is determined by all the circumstances of the case, place, time, degree, and the like-nuisances such as noise, vibration and pollution of air. In cases of this sort a balancing of injury -the plaintiff's comfort and enjoyment against the public benefit from the prosecution of the business complained of, the defendant's advantage in carrying on his offending business against the plaintiff's welfare—is, of course, an essential factor in the decision whether any nuisance exists or not. But this point having been determined in the plaintiff's favor, the question now to be discussed is, whether, on an application for a permanent injunction against an admitted or proved nuisance, the courts of equity should carry this balancing of injury admittedly further than the courts of law carry it, and make it a test for the granting or withholding of their peculiar relief.

§ 1944. (§ 530.) Balance Between Private Parties.— The balance of injury which may determine the granting or refusing of an injunction arises in two forms,

<sup>111</sup> See infra, § 535.

which, however, may appear together in the same case. In the first of these the balance is between the injuries to the plaintiff, a private individual, and to another private individual: in the second, between the injuries to the plaintiff, a private individual, and to the public, which benefits from the defendant's wrongful enterprise. On the first of these questions, curiously enough, the same jurisdiction furnishes as strong statements on both sides as may be found. In Richard's Appeal, 112 an injunction was sought against the use of bituminous coal in the defendant's iron-works, which materially injured the plaintiff's dwelling-house and his cotton factory. In refusing the injunction the court said: "An error seems somewhat prevalent in portions, at least, of this commonwealth in regard to proceedings in equity to restrain the commission of nuisances. It seems to be supposed that, as at law, whenever a case is made out of wrongful acts on the one side and consequent injury on the other, a decree to restrain the act complained of must as certainly follow as a judgment would follow a verdict in a common-law court. This is a mistake. It is elementary law that in equity a decree is never of right, as a judgment at law is, but of grace. Hence, the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience the former should appear, he will refuse to enjoin." In Evans v. Reading etc. Fertilizing Co.113 the bill was to enjoin the operation of a fertilizer factory, the stench from which rendered the plaintiff's house almost uninhabitable. remarking that the proper application of the "balance. of injury notion" was to motions for preliminary injunctions, the court continued: "But where, upon final hearing, the mind of the chancellor is satisfied that the

<sup>112 57</sup> Pa. St. 105, 98 Am. Dec. 202.

<sup>113 160</sup> Pa. St. 209, 20 Atl. 702,

complainant's right is clear, and the injury sustained by him substantial, so that his claim to damages at law is indisputable, and where, moreover, such damages could not give him adequate redress except by an endless repetition of suits, a refusal of an injunction upon the ground that plaintiff cannot suffer as great a loss from the continuance of the nuisance as defendant would from its interdiction, would be as far from equity as can be. There is, to my mind, no more offensive plea than that by which one seeks to justify an act injurious to his neighbor on the ground of its advantage to himself." The court, in another jurisdiction, replying to the argument for a balancing of the injury said: "If the injuries to the plaintiffs were of a trivial character. they should, perhaps, be considered damnum absque injuria; but a comparison of the value of the conflicting rights would be a novel mode of determining their legal superiority."114 The suggestion of these last two quotations that a balancing of injury is given effect to once in the determination of the fact of nuisance and, hence, does not need to be made a second time in determining the proper remedy, and that it is anomalous to deny the equitable relief in a case where the legal wrong and the inadequacy of the legal remedy are established, is very hard to meet. Denying the injunction puts the hardship on the party in whose favor the legal right exists instead of on the wrong-doer. If relief intermediate between the radical remedy of injunction and the insufficient one of repeated actions at law for damages as they accrue is desirable, it would seem that a legislative provision is necessary to supply it. The weight of authority is against allowing a balancing of injury as a means of determining the propriety of issuing an injunction.115

<sup>114</sup> Weaver v. Eureka Lake Co., 15 Cal. 271.

<sup>115</sup> Higgins v. Flemington Co., 36 N. J. Eq. (9 Stew.) 538; Hennessy v. Carmony, 50 N. J. Eq. (5 Dick.) 616, 25 Atl. 374; Evans v.

Reading etc. Fertilizing Co., 160 Pa. St. 209, 28 Atl. 702; Weaver v. Eureka Lake Co., 15 Cal. 271; Corning v. Troy etc. Factory, 40 N. Y. 191, 39 Barb. 311, 34 Barb. 485, 6 How. Pr. 89; Amsterdam etc. Co. v. Dean, 13 App. Div. 42, 43 N. Y. Supp. 29; Banks v. Frazier, 23 Ky. Law Rep. 1197, 64 S. W. 983; Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. 828; Clowes v. Staffordshire etc. Co., L. R. 8 Ch. App. 125; Pennington v. Brinsop etc. Co., L. R. 5 Ch. D. 769; Young v. Banker etc. Co., [1893] App. Cas. 691, 702; Hobbs v. Amador Co., 66 Cal. 161, 4 Pac. 1147; Chestatee Co. v. Cavenders Co., 118 Ga. 255, 45 S. E. 267; Weston Paper Co. v. Pope, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719; Townsend v. Bell, 62 Hun, 306, 17 N. Y. Supp. 210; Brown v. Ontario etc. Co., 81 App. Div. 273, 80 N. Y. Supp. 837; Beckwith v. Howard, 6 R. I. 1. See, also, 14 Harv. Law Rev., p. 458. It is sometimes said that where the plaintiff suffers real injury which cannot be compensated in damages, the doctrine cannot be applied: Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 66 L. R. A. 712, 57 Atl. 1065. And that comparative injury will not control the court as against an act or series of acts essentially tortious: Bourne v. Wilson-Case Lumber Co., 58 Or. 48, Ann. Cas. 1913A, 245, 113 Pac. 52. In Weston Paper Co. v. Pope, supra, the court, per Hadley, J., said: "The fact that the appellant has expended a large sum of money in the construction of its plant and that it conducts its business in a careful manner and without malice can make no difference in its rights to the stream. Before locating the plant the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion, or corruption, subject only to the reasonable use of the water, by those similarly entitled, for such domestic purposes as are inseparable from and necessary for the free use of their land; and they were bound also to know the character of their proposed business, and to take notice of the size, course and capacity of the stream, and to determine for themselves and at their own peril whether they should be able to conduct their business upon a stream of the size and character of Brandywine creek without injury to their neighbors; and the magnitude of their investment and their freedom from malice furnish no reason why they should escape the consequences of their own folly." In the following cases there are statements of the courts that the balance of injury between the plaintiff and defendant is to be considered in determining whether to issue an injunction. In almost every case, however, the statement has been repudiated by the court making it, or is a dictum, or is a part only of the ground of decision: Davis v.

Sawyer, 133 Mass. 289, 43 Am. Rep. 519 (dictum); Wood v. Sutcliffe, 2 Sim., N. S., 163 (part only of ground of decision, and clearly not the doctrine of the English courts; see cases cited, supra); Richards' Appeal, 57 Pa. St. (7 P. F. Smith) 105, 98 Am. Dec. 202 (overruled in Evans v. Reading etc. Fertilizing Co., supra); Herr v. Central etc. Asylum, 22 Ky. Law Rep. 1722, 61 S. W. 283 (acquiescence of defendant also shown); Hawley v. Beardsley, 47 Conn. 571 (but injury was such that the legal remedy was adequate); Robinson v. Clapp, 67 Conn. 538, 52 Am. St. Rep. 298, 35 Atl. 504 (it was doubtful if thing threatened—cutting away projecting trunk of a boundary tree-was a legal wrong at all); Tuttle v. Church, 53 Fed. 422 (but no nuisance was established in fact); Fox v. Holcomb, 32 Mich. 494; Turner v. Hart, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890; City of Big Rapids v. Comstock, 65 Mich. 78, 31 N. W. 811 (dictum); Potter v. Saginaw etc. R'y Co., 83 Mich. 285, 10 L. R. A. 176, 47 N. W. 217 (dictum); cf. Stock v. Jefferson Tp., 114 Mich. 357, 38 L. R. A. 355, 72 N. W. 132; Dana v. Craddock, 66 N. H. 593, 32 Atl. 757 (dictum); Goodall v. Crofton, 33 Ohio St. 271, 31 Am. Rep. 535 (dictum); Wahl v. Cemetery Ass'n, 197 Pa. St. 197, 46 Atl. 913 (dictum); Becker v. Lebanon etc. Co., 188 Pa. St. 484, 41 Atl. 612 (but laches also present in the case; cf. Pennsylvania cases cited, supra); Morris etc. Co. v. Prudden, 20 N. J. Eq. 530 (cf. New Jersey cases cited, supra); Madison v. Ducktown S., C. & I. Co., 113 Tenn. 331, 83 S. W. 658 (but decision is influenced by a statute).

In the following recent cases injunctions were granted notwithstanding the greater injury suffered by the defendant: United States v. Luce, 144 Fed. 385; Weeks v. Heurich, 40 App. Cas. D. C. 46, Ann. Cas. 1914A, 972 (public garage in residence neighborhood); Stratton & T. Co. v. Meriwether, 150 Ky. 363, 150 S. W. 381 (obstruction in street); State v. Excelsior Powder Mfg. Co., 259 Mo. 254, L. R. A. 1915A, 615, 169 S. W. 267 (powder-mill); Wente v. Commonwealth Fuel Co., 232 Ill. 526, 83 N. E. 1049 (coal-yard); Hard v. Blue Points Co., 170 App. Div. 524, 156 N. Y. Supp. 465 (injunction against obstruction of right of passage); Bourne v. Blue Points Co., 170 App. Div. 524, 156 N. Y. Supp. 466 (same); Faulkenbury v. Wells. 28 Tex. Civ. App. 621, 68 S. W. 327 (cotton-gin); Town of Bristol v. Palmer, 83 Vt. 54, 31 L. R. A. (N. S.) 881, 74 Atl. 332. In the following cases injunctions were refused because of the greater injury which would be suffered by defendant: Bentley v. Empire Portland Cement Co., 48 Misc. Rep. 457, 96 N. Y. Supp. 831; Raymond v. Transit Development Co., 65 Misc. Rep. 70, 119 N. Y. Supp. 655; Downs v. Greer Beatty Clay Co., 29 Ohio C. C. 328; Lewis v. Pingree Nat. Bank, 47 Utah, 35,

§ 1945. (§ 531.) Balance Between the Plaintiff and the Public.—When the defendant's business which constitutes the nuisance complained of is one from which the public benefits directly or in an unusually marked degree, the balance of injury presents itself in a different form. Shall the plaintiff by procuring an injunction put an end to a business from which the public receives large benefit, and from the stopping of which public hardship would ensue? The extreme case which will fully test the rule is that in which the defendant is a quasi-public corporation engaged in supplying a city with water or other necessity. In such a case the nuisance complained of was the smoke from the defendant's waterworks, which, in a material degree, deprived the plaintiffs of the enjoyment of their property. In denying an injunction the court said: "If the defendant were enjoined even for a time, the result might be disastrous; for the water supplied by it is the only efficient means of extinguishing conflagrations at the command of the city or its citizens. Besides this, a daily and hourly supply of water used for many purposes would be cut off. We think it may be safely assumed that the rule in equtiy is, that where the damages can be admeasured and compensated, equity will not interfere where the public benefit greatly outweighs private and indi-

L. R. A. 1916C, 1260, 151 Pac. 558, citing this section of the text (small encroachment of building on highway).

Where plaintiff has been guilty of laches.—Where a party is engaged in a lawful business, which is a nuisance to plaintiff, but plaintiff has been guilty of laches in standing by until after defendant has expended a large sum of money, the court may balance the injury and deny the injunction: McCleery v. Highland Boy Gold Min. Co., 140 Fed. 951; Brokaw v. Carson, 74 W. Va. 340, 81 S. E. 1133; Herr v. Central Kentucky Lunatic Asylum, 110 Ky. 282, 61 S. W. 283; Knoth v. Manhattan R. Co., 187 N. Y. 243, 79 N. E. 1015; Galveston, H. & S. A. R. Co. v. De Groff, 102 Tex. 433, 21 L. R. A. (N. S.) 749, 118 S. W. 134.

vidual inconvenience." 116 On the other side, it has been said by an able chancellor on substantially similar facts: "If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market garden, I have come to the conclusion, that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on. That might be a good ground for the legislature to declare that the company might make gas if they indemnified the plaintiff; but, unless the com-

116 Per Seevers, J., in Daniels v. Keokuk Water-works, 61 Iowa, 549, 16 N. W. 705. To the same effect are statements in the following cases: Miller v. City of Webster City, 94 Iowa, 162, 62 N. W. 648; Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 South. 192 (acquiescence on plaintiff's part also found); Stewart Wire Co. v. Lehigh Coal etc. Co., 203 Pa. St. 474, 53 Atl. 352 (plaintiff guilty of acquiescence, however); Riedeman v. Mt. Morris etc. Co., 56 App. Div. 23, 67 N. Y. Supp. 391 (but there was doubt whether plaintiff was substantially damaged by the thing complained of); Atchison etc. Co. v. Meyer, 62 Kan. 696, 64 Pac. 597 (but the legal remedy was adequate); Simmons (Grey) v. City of Paterson, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 48 L. R. A. 717, 45 Atl. 995 (but plaintiffs were guilty of acquiescence); Fisk v. City of Hartford, 70 Conn. 720, 66 Am. St. Rep. 147, 40 Atl. 906 (but the legal remedy was adequate, and plaintiff had been guilty of laches); Wees v. Coal etc. Co., 54 W. Va. 421, 46 S. E. 166; Lillywhite v. Trimmer, 36 L. J. Ch. 525. See, also, in support of this view: Schwarzenbach v. Oneonta Light & Power Co., 144 App. Div. 884, 129 N. Y. Supp. 384; affirmed in 207 N. Y. 671, 100 N. E. 1134; Chadwick v. Toronto, 32 Ont. L. Rep. 111.

May effect on prosperity of community be considered.—In Townsend v. Norfolk Railway & Light Co., 105 Va. 22, 115 Am. St. Rep. 842, 8 Ann. Cas. 558, 4 L. R. A. (N. S.) 87, 52 S. E. 970, the court said: "It would be a source of regret if, in the administration of justice by the establishment and enforcement of sound principles, the prosperity of our people should be hindered or checked; but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give to every citizen a remedy for wrongs he may sustain, even though inflicted by forces

pany had such a right I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say where a party is substantially damaged, that he can only be compensated by bringing an action toties quoties. That would be a disgraceful state of the law; and I quite agree with the vice-chancellor, in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and district which this company supplies with gas." On

which constitute factors in our material development and growth."

However, a contrary view is maintained in some of the smelter cases.

Mines and smelters.—The question of balancing injury has arisen frequently in recent years in cases where injunctions have been sought against the operation of mines and smelters in such a way as to injure the property of plaintiffs. In some of these cases injunctions have been refused on the grounds that to grant them would result in the closing of large plants, that this would inflict great loss . not only on defendants but also upon employees and communities dependent upon them, and that the damage to plaintiffs was relatively small and capable of ascertainment. This is an extension of the doctrine of public inconvenience as stated in the text: Bliss v. Anaconda Copper Min. Co., 167 Fed. 342; affirmed in Bliss v. Washoe Copper Co., 186 Fed. 789, 109 C. C. A. 133; McCarthy v. Bunker Hill & S. M. & C. Co., 164 Fed. 927, 92 C. C. A. 259; Mountain Copper Co. v. United States, 142 Fed. 625, 73 C. C. A. 621 (injunction denied in suit by federal government). On the other hand, injunctions were granted in the following cases: American Smelting & Ref. Co. v. Godfrey, 158 Fed. 225, 14 Ann. Cas. 8, 89 C. C. A. 139; McCleery v. Highland Boy Gold Min. Co., 140 Fed. 951; Georgia v. Tennessee Copper Co., 206 U. S. 230, 11 Ann. Cas. 488, 51 L. Ed. 1038, 27 Sup. Ct. 618; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. 465 (expressly refusing to follow the other line of cases); People v. Selby Smelting & Lead Co., 163 Cal. 84, Ann. Cas. 1913E, 1267, 124 Pac. 692, 1135.

117 Lord Cranworth in Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436, 462, affirmed in 7 H. L. Cas. 600. To the same effect are Attorney-General v. Council etc. Birmingham, 4 Kay & J. 528, 538; Attorney-General v. Colney etc. Asylum, L. R. 4 Ch. App. 146; Attorney-General v. Terry, L. R. 9 Ch. App. 423; Sammons v. City of

its merits, as well as on authority, the superiority of this latter view seems hardly to admit of doubt. The refusal of the injunction, in the first place, leaves the plaintiff to suffer an admitted legal wrong and to obtain his only redress by an admittedly inadequate remedy. And, in the second place, so far as the interests of the public are considered, that case is not to be distinguished in principle from the taking of property for public purposes which the federal constitution forbids; true, the damage from a nuisance may not always be a

Gloversville, 34 Misc. Rep. 459, 70 N. Y. Supp. 284; Stock v. Jefferson Township, 114 Mich. 357, 38 L. R. A. 355, 72 N. W. 132; Ex parte Martin, 13 Ark. 198, 58 Am. Dec. 321; Village of Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218, affirming 49 Ill. App. 530; Hinchman v. Paterson etc. Co., 17 N. J. Eq. (2 C. E. Green) 75, 86 Am. Dec. 252 (dictum); Aquackanock etc. Co. v. Watson, 29 N. J. Eq. 366; Harper etc. Co. v. Mountain Water Co., 65 N. J. Eq. 479, 56 Atl. 297; Smith v. City of Rochester, 38 Hun, 612, affirmed in 104 N. Y. 674; Duesler v. City of Johnstown, 24 App. Div. 608, 48 N. Y. Supp. 683. See, also, in support of this view, Wood v. Conway, [1914] 2 Ch. 47, 83 L. J. Ch., N. S., 498, 110 L. T., N. S., 917, 78 J. P. 249, 12 L. G. R. 571; Peterson v. City of Santa Rosa, 119 Cal. 387, 391, 51 Pac. 557; State v. Columbia Water Power Co., 82 S. C. 181, 129 Am. St. Rep. 876, 17 Ann. Cas. 343, 22 L. R. A. (N. S.) 435, 63 S. E. 884; Stark v. Coe (Tex. Civ. App.), 134 S. W. 373. In Attorney-General v. Council etc. Birmingham, supra, Wood, V. C., said: "It has been urged upon me more than once during the argument by the counsel for the defendants, that there are 250,000 inhabitants in the town of Birmingham, and that this circumstance must be taken into consideration in determining the question of the plaintiff's right to an injunction. . . . Now, with regard to the question of the plaintiff's right to an injunction, it appears to me, that, so far as this court is concerned, it is a matter of almost absolute indifference whether the decision will affect a population of 250,000 or a single individual carrying on a manufactory for his own benefit. The rights of the plaintiff must be measured precisely as they have been left by the legislature. I am not sitting here as a committee for public safety, armed with arbitrary power to prevent what, it is said, will be a great injury, not to Birmingham only, but to the whole of England,-that is not my function."

"taking" as defined by the authorities, but it would seem within the same reasoning; 118 and, if the public need requires it, the plaintiff's property can be taken or legislative provision made for the payment of permanent damages to him. The objection that temporary hardship to the public may result from granting the injunction at once can be obviated by allowing time for the necessary readjustment, before putting it into effect. 119

§ 1946. (§ 532.) Nuisance Easily Avoided by the Plaintiff.—Closely related to the question discussed in the preceding paragraphs is another which is raised when there is offered as a defense to a bill for an injunction against a nuisance, the fact that the plaintiff could prevent the nuisance by a comparatively small outlay of labor or expense. In most of the cases in which the question has arisen, the defense has been rejected, sometimes with vigor. "Neither does it make any difference," said the court in Paddock v. Somes, 120 "or in any measure operate as an excuse that the nuisance cannot be obviated without great expense, or that the plaintiff himself could obviate the injury at a trifling expense. It is the duty of every person or public body to prevent

118 See Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. (14 Stew.) 316, 56 Am. Rep. 1, 7 Atl. 432; Baltimore etc. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719.

119 See the form of decree in Harding v. Stamford Water Co., 41 Conn. 87, and the remarks of Selwyn, L. J., in Attorney-General v. Colney etc. Asylum, 4 Ch. App. 146, 165, 166.

120 102 Mo. 226, 238, 10 L. R. A. 254, 14 S. W. 746, per Sherwood, J., quoting Wood on Nuisances, 2d ed., 506. Compare Spiker v. Eikenberry, 135 Iowa, 79, 124 Am. St. Rep. 259, 14 Ann. Cas. 175, 11 L. R. A. (N. S.) 463, 110 N. W. 457. It is not necessary to show that plaintiff was not guilty of negligence in not protecting his land; nor need it be shown that he could not have protected himself by exercising due care: Niagara Oil Co. v. Ogle, 177 Ind. 292, Ann. Cas. 1914D, 67, 42 L. R. A. (N. S.) 714, 98 N. E. 60.

a nuisance, and the fact that the person injured could, but does not, prevent damages to his property therefrom is no defense either to an action at law or in equity. A party is not bound to expend a dollar, or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another." In a comparatively early case the same question was raised on the following facts: The plaintiff's spring was overflowed and sediment deposited in it as a result of the working of the defendant's mill. It appeared that the spring could be protected by digging a ditch two hundred and fifty yards long. On these facts it was clear that a small expenditure of labor would give the plaintiff protection equal to that of an injunction and at the same time leave the defendant undisturbed in the exercise of his lawful business. Hence the injunction was refused. 121 The unqualified refusal of the injunction may perhaps be open to criticism in that it leaves the plaintiff to incur the risk of recovering from the defendant compensation for whatever labor or expense he should be put to in doing away with the nuisance. But it seems that a very simple and not uncommon exercise of the court's power to mold decrees according to the needs of the case would, in all such cases, meet this criticism and yet save to the defendant the right to continue his business. A decree so framed as to grant the injunction unless the defendant would either himself do the acts necessary to avoid the nuisance or give sufficient undertaking to protect the plaintiff in doing them, and requiring the plaintiff either to allow the defendant to do the acts or to accept the undertaking, as the case might be, on pain of losing all equitable relief, would do full justice to both parties without hardship to either. 122 It must be said, how-

<sup>121</sup> Rosser v. Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712.

<sup>122</sup> For illustration of this form of decree, see Henderson v. New

ever, that this form of decree has not been adopted by any court in this particular class of cases, although the situation would seem an eminently appropriate one for it. The clear weight of authority is with the first case cited above, granting the injunction unqualifiedly.<sup>123</sup>

§ 1947. (§ 533.) Relief Given; Mandatory Injunctions.—The relief sought in equity against nuisance is, of course, preventive, either to prohibit the creation of a nuisance or to prevent an existing one from continuing in the future. Ordinarily, this end is achieved by a mere prohibitive injunction. When, as is not uncommonly the case, however, the nuisance is one which exists, and will continue to exist, because of acts already done—as, for example, the building of a dam—without further acting on the defendant's part, mere prohibition will not serve to accomplish the desired result; mandatory relief is necessary to end the wrong. In such a case it was said by the court: "It is not to correct a wrong of the past, in the sense of redress for the injury

York Cent. etc. Co., 78 N. Y. 423; Pappenheim v. Metropolitan etc. Co., 128 N. Y. 436, 26 Am. St. Rep. 486, 13 L. R. A. 401, 28 N. E. 518. 123 Paddock v. Somes, 102 Mo. 226, 10 L. R. A. 254, 14 S. W. 746; Boston Ferrule Co. v. Hills, 159 Mass. 147, 20 L. R. A. 844, 34 N. E. 85; Masonic etc. Ass'n v. Banks, 94 Va. 695, 27 S. E. 490; Richmond Mfg. Co. v. Atlantic etc. Co., 10 R. I. 106, 14 Am. Rep. 658; Middlestadt v. Waupaca etc. Co., 93 Wis. 1, 66 N. W. 713; Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. 828; Clowes v. Staffordshire etc. Co., 8 Ch. App. 125; Town of Burlington v. Schwarzman, 52 Conn. 181, 52 Am. Rep. 571; Martin v. Marks, 154 Ind. 549, 57 N. E. 249. Contra, Rosser v. Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712; English v. Progress etc. Co., 95 Ala. 259, 10 South. 134; Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14; Porter v. Armstrong, 132 N. C. 66, 43 S. E. 542. The suggestion of the text would, of course, apply only where the nuisance arose out of the application of the doctrine of correlative rights, not where the defendant's acts which cause the nuisance are wrongful per se; nor would it apply when the acts by which the nuisance was obviated would cause substantial or permanent damage to the plaintiff.

already sustained, but to prevent further injury. The injury consists in the overflow of the lands of the plaintiff. It was not alone the building of the dam that caused the injury, but its maintenance, or continuance, which is a part of the act complained of; and its maintenance can only be estopped so as to prevent its injury by its removal. The removal of the dam, wrongfully constructed, is necessary for and incidentally involved in the preventive redress which the law authorizes."124 On this ground the use of mandatory injunctions is resorted to whenever necessary to give the full relief to which the plaintiff is entitled. In such cases it is generally destructive acts requiring no supervision that are required, as the removal of an object that is, or causes, a nuisance. 125 Occasionally, however, it may be con-

124 Troe v. Larson, 84 Iowa, 649, 35 Am. St. Rep. 336, 51 N. W. 179.

125 Troe v. Larson, supra; Holmes v. Calhoun Co., 97 Iowa, 360, 66 N. W. 145; Middlesex Co. v. City of Lowell, 149 Mass. 509, 21 N. E. 872; Crocker v. Manhattan etc. Co., 61 App. Div. 226, 70 N. Y. Supp. 492; Rothery v. New York Rubber Co., 90 N. Y. 30; Hammond v. Fuller, 1 Paige, 197; City of Mt. Clemens v. Mt. Clemens etc. Co., 127 Mich. 115, 86 N. W. 537, 8 Det. Leg. N. 282; Atchison etc. Co. v. Lang, 46 Kan. 701, 26 Am. St. Rep. 165, 27 Pac. 182; Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193; Martin v. Marks, 154 Ind. 549, 57 N. E. 249; Lake Erie etc. Co. v. Essington, 27 Ind. App. 291, 60 N. E. 457; City of Eau Claire v. Matzke, 86 Wis. 291, 56 N. W. 874; City of Wauwatosa v. Dreutzer, 116 Wis. 117, 92 N. W. 551; McHugh v. Louisville Bridge Co., 23 Ky. Law Rep. 1546, 65 S. W. 456; Great Northern etc. Co. v. Clarence R'y, 1 Coll. C. C. 507; Laybourn v. Gridley, [1892] 2 Ch. 53; Attorney-General v. Heatley, [1897] 1 Ch. 560; Goodrich v. Georgia etc. Co., 115 Ga. 340, 41 S. E. 659; Broome v. New York etc. Co., 42 N. J. Eq. 141, 7 Atl. 851; Clifton v. Town of Weston, 54 W. Va. 250, 46 S. E. 360; Baumgartner v. Bradt, 207 Ill. 345, 69 N. E. 912; Norwalk etc. Co. v. Vernam. 75 Conn. 662, 96 Am. St. Rep. 246, 55 Atl. 168; Ackerman v. True, 175 N. Y. 353, 67 N. E. 629; Village of Oxford v. Willoughby, 181 N. Y. 155, 73 N. E. 677; Allen v. Stowell, 145 Cal. 666, 104 Am. St. Rep. 80, 79 Pac. 371.

structive or continuing acts that are directed.<sup>126</sup> Subject to the reluctance of equity courts to order the doing of acts that will require supervision,<sup>127</sup> it is no distinction between prohibitory and mandatory injunctions or between different kinds of mandatory relief that guides the court in the form of injunction issued, but rather the nature of the relief demanded in order to give the plaintiff the protection to which he is entitled.

Form of Injunction.—The forms of § 1948. **(§ 534.)** injunction used against nuisances illustrate to an unusual degree both the flexibility of equitable procedure and also the relative nature of nuisances. In a great many cases a thing is a nuisance not because it is in itself deemed wrongful in law, but because the manner in which it is done, or the extent to which it is carried. causes it to cross the line beyond which the law will not allow one to go, even in the strict conduct of his own This situation is recognized by equity courts in granting injunctions, with the result that they are generally so framed as to prohibit only that part of the thing complained of which is injurious, saving to the defendant the right to continue his business if it can be conducted in a harmless way. "Injunctions against. carrying on a legitimate and lawful business should go no further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction. When a person is engaged in carrying on such business. he should not be absolutely prohibited from doing so,

126 City of Moundsville v. Ohio etc. Co., 37 W. Va. 92, 20 L. R. A. 161, 16 S. E. 514; City of Kankakee v. Trustees etc. Hospital, 66 Ill. App. 112; Manchester etc. Co. v. Worksop Board of Health, 23 Beav. 198; Kaspar v. Dawson, 71 Conn. 405, 42 Atl. 78; Corning v. Troy etc. Factory, 40 N. Y. 191, 39 Barb. 311, 34 Barb. 485, 61 How. Pr. 89; Bucholz v. New York etc. Co., 148 N. Y. 640, 43 N. E. 76, reversing 66 Hun, 377, 21 N. Y. Supp. 503.

127 See Bradfield v. Dewell, 48 Mich. 9, 11 N. W. 760; Wende v. Socialer Turn Verein, 66 Ill. App. 591; cf. Kaspar v. Dawson, supra.

unless it appears that the carrying on of such business will necessarily produce the injury complained of. If it can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner." This result is sometimes reached by inserting in the prohibition such qualifying words as "to the injury or damage of the plaintiff," or others of similar nature; sometimes by giving the defendant

128 Chamberlain v. Douglas, 24 App. Div. 582, 48 N. Y. Supp. 710. Where it is conceded that the business cannot be carried on without causing the results complained of, the injunction may prohibit operation: Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 21 Ann. Cas. 1247, 26 L. R. A. (N. S.) 183, 106 Pac. 581.

129 Lingwood v. Stowmarket Co., L. R. 1 Eq. 77, 336; Ulbricht v. Eufaula Water Co., 86 Ala. 587, 11 Am. St. Rep. 72, 4 L. R. A. 572, 6 South. 78; Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655; Snow v. Williams, 16 Hun, 468. See, also, McNenomy v. Baud, 87 Cal. 134, 26 Pac. 795; cf. Earl of Ripon v. Hobart, Cooper temp. Brougham, 333, 343; Miller v. Edison etc. Co. of N. Y., 33 Misc. Rep. 664, 68 N. Y. Supp. 900; Schaub v. Perkinson Bros. Const. Co., 108 Mo. App. 122, 82 S. W. 1094; Lorenzi v. Star Market Co., 19 Idaho, 674, 35 L. R. A. (N. S.) 1142, 115 Pac. 490; Stevens v. Rockport Granite Co., 216 Mass. 486, Ann. Cas. 1915B, 1054, 104 N. E. 371. The injunction should be specific as to the particulars not allowed: Singer v. James, 130 Md. 382, 100 Atl. 642. Compare Wolcott v. Doremus (Del. Ch.), 101 Atl. 868.

130 Winchell v. City of Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668 (injunction against discharging sewage into a river, "unless the same shall have first been so deodorized and purified as not to contain foul, offensive, or noxious matter capable of injuring the plaintiff or her property or causing nuisance thereto"); York v. Davidson, 39 Or. 81, 65 Pac. 819 (allowing defendants to impound mining debris only "when they shall have adopted and constructed an efficient and durable system or device for the purpose, such as will meet with the advice and approval of persons skilled in such matters and the court"); cf. City of Grand Rapids v. Weiden, 97 Mich. 82, 56 N. W. 233, in which the court granted an absolute injunction, saying: "A change of method would probably involve large expense in plant, and while it might reduce the evil, would not entirely remove the cause of complaint. An order directing such

leave to apply for a modification of the injunction upon giving satisfactory proof that he can and will conduct his business so as not to amount to a nuisance. Or the court may make a tentative specific order, subject to be modified if experience shows it does not satisfactorily accomplish its purpose. In accordance with the same principle injunctions will not be issued, it is said, against a business which is a nuisance, when the nuisance can be remedied by the use of scientific appliances; instead the court will direct the introduction of such appliances, and whenever necessary to prevent hardship a reasonable amount of time, in which the defendant may conform to the injunction, will be allowed. 134

§ 1949. (§ 535.) Temporary Injunctions. — The granting of a temporary injunction in cases of alleged nuisances does not proceed on different principles from those common to this particular exercise of equity jurisdiction in other cases. Its function is to preserve prop-

change would but invite outlay, and leave defendant subject to other proceedings, probably in the near future, to the same end." In McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40, 13 L. R. A. (N. S.) 465, 81 N. E. 549, it was held that the injunction against a smoke nuisance should be so worded that the use of soft coal might be permitted upon proof of such a change of facts as would make such use of defendant's property no longer unreasonable.

131 Chamberlain v. Douglas, 24 App. Div. 582, 48 N. Y. Supp. 710.
132 Babcock v. New Jersey Stock Yard Co., 20 N. J. Eq. 296 (injunction against keeping hogs in a stockyard more than three hours a day; this time to be further shortened if plaintiff was not adequately protected by the first order); Northwood v. Barber etc. Co., 126 Mich. 284, 8 Det. Leg. N. 1, 54 L. R. A. 54, 85 N. W. 724.

133 Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378; English v. Progress etc. Co., 95 Ala. 259, 10 South. 134.

134 Winchell v. City of Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668; Sammons v. City of Gloversville, 34 Misc. Rep. 459, 70 N. Y. Supp. 284; Bailey v. City of New York, 38 Misc. Rep. 641, 78 N. Y. Supp. 210.

erty until disputed questions concerning it are settled. A plaintiff who moves for such protection must show a prima facie case of right in himself;135 otherwise he makes no title in himself to relief of any kind. And, further, since the time for which the injunction is sought is limited to the period necessary for deciding the disputed questions—that is, till the judgment at law or the decree in equity, as the case may be,-it is clear he must show danger of injury occurring within that interval such that the damages recoverable at law would not be an adequate remedy; which means, generally, that he must show danger of irreparable injury. 136 It is probably because of this that one may lose his right to a temporary injunction by delay in a shorter time than will bar him from procuring a permanent injunction;<sup>137</sup> by his delay he shows that he himself did not consider his damage so serious as to require emergency protec-For the same reason, the injunction is denied if the defendant denies all intention to do the acts which the plaintiff alleges will constitute the nuisance com-

135 Hilton v. Earl of Granville, 1 Craig & P. 283, 292; Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567; Peck v. Elder, 3 Sand. 126.

136 Earl of Ripon v. Hobart, 3 Mylne & K. 169, Cooper temp. Brougham, 333, 343; Reyburn v. Sawyer, 128 N. C. 8, 37 S. E. 954; Chalk v. Wyott, 3 Mer. 688; Mohawk Bridge Co. v. Utica etc. R. R., 6 Paige, 554; Manhattan etc. Co. v. Barker, 7 Rob. (N. Y.) 523; Wilson v. Eagleson, 9 Idaho, 17, 108 Am. St. Rep. 110, 71 Pac. 613; Eden v. Firth, 1 H. & M. 573; Dana v. Valentine, 5 Met. 8. Although no case has been found repudiating or stating any different principle than this, there is, perhaps, a tendency not to inquire strictly whether the injury likely to happen before the trial or hearing will be irreparable or not. See the following cases: Attorney-General v. Steward, 20 N. J. Eq. 415; Wilsey v. Callanan, 66 Hun, 629, 21 N. Y. Supp. 165; Dimon v. Shewan, 34 Misc. Rep. 72, 69 N. Y. Supp. 402; City of Wilmington v. Addicks (Del. Ch.), 47 Atl. 366.

137 Attorney-General v. Sheffield etc. Co., 3 De Gex, M. & G. 304; Hilton v. Earl of Granville, 1 Craig & P. 283, 292, 293; Turner v. Mirfield, 34 Beav. 390; Carlisle v. Cooper, 21 N. J. Eq. 576, 591.

plained of,138 though it does not apply if he simply denies that they will amount to a nuisance, that being simply his opinion. 139 It has already been suggested that since temporary injunctions must be granted while the rights of the parties are yet undetermined, and hence, whichever course the court may pursue, a wrong may result,-from granting an injunction against a defendant whose defense may prove good, or from refusing it to a plaintiff who may prove to be entitled to it,—therefore the courts should take into account, on applications for such injunctions, the balance of injury likely to result from the one or the other of the two courses open, and act accordingly. In the language of a case from which quotation has been made before: "So far as the 'balance of injury' notion refers to the parties to the litigation ... its legitimate application is to motions for preliminary injunctions, not to final decrees. Where the question before the court is as to the propriety of stopping a business by preliminary injunction upon an ex parte showing, which may or may not be substantiated by further examination of the case in due course, it is very well for the chancellor to take into account the magnitude of the defendant's investment, and compare it with the character of the plaintiff's alleged injury; and if the latter appears trifling beside that which would result from the impairment of the former, he may well refuse to exercise his power until more fully advised,"140 and although, as has been seen, all the courts do not agree in limiting the application of the doctrine as narrowly as this, yet they are all agreed that its application

<sup>138</sup> Levy v. Rosenstein, 66 N. Y. Supp. 101; affirmed in 56 App. Div. 618, 67 N. Y. Supp. 630; Manhattan etc. Co. v. Barker (N. Y.), 7 Rob. 523. But see Coker v. Birge, 9 Ga. 425, 54 Am. Dec. 347; s. c., 10 Ga. 326.

<sup>139</sup> Attorney-General v. Cohoes, 6 Paige, 133, 29 Am. Dec. 755; Attorney-General v. Steward, 21 N. J. 340.

<sup>140</sup> Evans v. Reading etc. Co., 160 Pa. St. 209, 28 Atl. 702.

here is a proper one.141 It is perhaps nothing more than the effect of this rule that occasions the frequent expressions of caution and reluctance in granting mandatory temporary injunctions. 142 To order the removal or destruction of an object which is alleged to be or to cause a nuisance is to compel the defendant generally to lose its value, and whatever labor and expense is necessary to obey the order as well. This is often obviously more than it would be merely to order him not to do something, to refrain, by the injunction; hence the balance in his favor against granting the injunction is by so much increased. This is apparently what Lord Thurlow had in mind in an early case in which he refused to order a ditch filled up on motion saying: "I do not like granting these injunctions on motion. The ditch may be a mile long." Yet if the plaintiff's case is strong enough to make the balance of injury favorable to him, the courts have from the time of Lord Thurlow himself granted mandatory temporary injunctions in his behalf; the test for granting or refusing it is the same as for prohibitory injunctions, the difference is in the . facts, 144

v. Lee, 2 Swanst. 333, 335; Eden v. Firth, 1 H. & M. 573; Copper King v. Wabash Min. Co., 114 Fed. 991; Daugherty etc. Co. v. Kittanning etc. Co., 178 Pa. St. 215, 35 Atl. 1111; Toyalack Township v. Monoursville etc. R'y Co., 7 Pa. Dist. Rep. 291; Coe v. Winnipisiogee etc. Co., 37 N. H. 254; Duncan v. Hayes, 22 N. J. Eq. 25; Department of Buildings, City of N. Y., v. Jones, 24 Misc. Rep. 490, 53 N. Y. Supp. 836; Amelia etc. Co. v. Tenn. etc. Co., 123 Fed. 811. Sce, also, in support of the text, Alexander v. Wilkes-Barre Anthracite Coal Co., 245 Pa. 28, 91 Atl. 213; United States v. Luce, 141 Fed. 385 (dictum); Nowak v. Baier, 78 N. J. Eq. 112, 77 Atl. 1062.

142 See Blakemore v. Glamorganshire Canal Navigation, 1 Mylne & K. 154, 185; Lord's Ex'rs v. Carbon etc. Co., 38 N. J. Eq. 452, 459; Herbert v. Pennsylvania R. R. Co., 43 N. J. Eq. 21, 10 Atl. 872.

<sup>143</sup> Anon., 1 Ves. 140.

<sup>144</sup> Mandatory temporary injunctions were allowed in the following cases of nuisance: Robinson v. Lord Byron, 1 Brown C. C. 588;

(§ 536.) Complete Relief.—While the only ground for coming into equity in cases of nuisance is the right to an injunction, yet a party who has established this jurisdictional right will be given all the relief, both equitable and legal in nature, to which his case entitles him. The principle on which this is done is the same that always controls the action of courts of equity, viz., to prevent the obvious hardship of compelling a party to seek relief from a single wrong in two suits prosecuted in different courts. Hence, in addition to injunction, damages for the past nuisance will awarded. 145 And if, after suit is brought and the jurisdiction in equity has attached, the defendant ceases to commit the nuisance, none the less the equity court will give the plaintiff damages and not turn him out of court and compel him to bring another action at law; 146 and

Hepburn v. Gordon, 2 Hen. & M. 345; Westminster Co. v. Clayton, 36 L. J. Ch. 476; Johnson v. Superior Court of Tulare, Co., 65 Cal. 567, 4 Pac. 575; New Rice Milling Co. v. Romero, 105 La. Ann. 439, 29 South. 876. They were refused in Hagen v. Beth, 118 Cal. 330, 50 Pac. 425; Village of Keeseville v. Keeseville etc. Co., 59 App. Div. 381, 69 N. Y. Supp. 249; People v. People's etc. Co., 32 Misc. Rep. 478, 66 N. Y. Supp. 529; Anon., 1 Ves. 140; Blakemore v. Glamorganshire Canal Navigation, 1 Mylne & K. 154. See, further, on the subject of preliminary mandatory injunction, post, Vol. II, chapter XXX.

145 Roberts v. Vest, 126 Ala. 355, 28 South. 412; Platt v. City of Waterbury, 72 Conn. 531, 77 Am. St. Rep. 335, 48 L. R. A. 691, 45 Atl. 154; Coe v. Winnipisiogee etc. Co., 37 N. H. 254; Lonsdale v. City of Woonsocket, 25 R. I. 428, 56 Atl. 448; Keppel v. Lehigh etc. Co., 9 Pa. Dist. Rep. 219; Richi v. Chattanooga etc. Co., 105 Tenn. 651, 58 S. W. 646; Davis v. Lambertson, 56 Barb. 480; Seaman v. Lee, 10 Hun, 607; Rothery v. New York Rubber Co., 24 Hun, 172; Baker v. McDaniel, 178 Mo. 447, 77 S. W. 531; Fox v. Corbitt, 137 Tenn. 466, 194 S. W. 88. Contra, Miner v. Nichols, 24 R. I. 199, 52 Atl. 893. See, also, Pom. Eq. Jur., § 237.

146 Smith v. Ingersoll etc. Co., 7 Misc. Rep. 374, 27 N. Y. Supp. 907; Moon v. Nat. etc. Co. of Am., 31 Misc. Rep. 631, 66 N. Y. Supp. 33; Whaley v. City of New York, 83 App. Div. 6, 81 N. Y. Supp.

it is sometimes held that the injunction also will issue even in this case. 147

§ 1951. (§ 537.) Estoppel, Acquiescence, Laches.—These subjects require no special treatment here, being adequately discussed elsewhere. An important distinction common to all cases in which an injunction is sought in aid of a legal right is well brought out in the following quotation from a case in which the maintenance and operation of an elevated street railroad adjacent to the plaintiff's property was sought to be enjoined: "The defendants, failing to establish the bar of the statute of limitations, still insist that the affiliated principle of acquiescence constitutes a defense to the action. There is no foundation in the case for a claim that the plaintiff's conduct amounted to an estoppel, and, indeed, the claim is not seriously urged by the appellants. It is obvious that such conduct has never led

1043; McCarthy v. Gaston Ridge Mill & M. Co., 144 Cal. 542, 78 Pac. 7. Of course damages will not be allowed if the plaintiff's right to an injunction at the time of filing his bill is not established: Rosenheimer v. Standard etc. Co., 39 App. Div. 482, 57 N. Y. Supp. 330; Union Planters' Bank & Trust Co. v. Memphis Hotel Co., 124 Tenn. 649, 39 L. R. A. (N. S.) 580, 139 S. W. 715. It has been held that a landlord cannot, in an injunction suit, recover damages after the nuisance is abated, where, at the time of the nuisance, the property was in the possession of a tenant: Miller v. Edison Electric Illuminating Co., 184 N. Y. 17, 6 Ann. Cas. 146, 3 L. R. A. (N. S.) 1060, 76 N. E. 734. See, also, cases collected in note, 3 L. R. A. (N. S.) 1060.

147 Dean etc. Chester v. Smelting Corp., 85 L. T. 67. But see Barber v. Penley, [1893] 2 Ch. 447; Carlin v. Wolff, 154 Mo. 539, 51 S. W. 679, 55 S. W. 441. See contra, Perry v. Howe Co-op. Creamery Co., 125 Iowa, 415, 101 N. W. 150 (citing Pom. Eq. Jur., § 1357). In Carlisle v. Cooper, 21 N. J. Eq. 576, the defendant partially abated the nuisance after the bill was filed and then insisted that the injunction should be refused because the legal remedy was now adequate, but the point was not allowed.

148 See 2 Pom. Eq. Jur., §§ 816-821; ante, chapter I.

the defendants into a line of action which they would not otherwise have pursued, or encouraged them to expend money or make improvements by reason of their reliance upon the alleged inaction or acquiescence of the They inaugurated their enterprise in the face plaintiff. of persistent opposition by the plaintiff and other abutting owners, and carried it to completion while earnest efforts were being made to prevent them. The case is entirely destitute of proof showing the existence of any elements of estoppel, and the defendants are, therefore, driven to rely, in this respect upon the mere inaction of the plaintiff to prosecute his claim. But this question, we also think, is governed by authority equally conclusive with that relating to the statute of limitations. The doctrine of acquiescence as a defense to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal · right has expired, or the party has lost his right of property by prescription or adverse possession. Whatever may be the rule in other states, it can be said that here no period of inaction merely has been held sufficient to justify a nuisance or trespass, unless it has continued for such length of time as will authorize the presumption of a grant. The principle that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violations of this right has been uniformly applied in this court."149

149 Per Ruger, Ch. J., in Galway v. Metropolitan etc. Co., 128 N. Y. 132, 13 L. R. A. 788, 28 N. E. 479. To the same effect are Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, affirming 2 Thomp. & C. 231; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Carlisle v. Cooper, 21 N. J. Eq. 576; 2 Pom. Eq. Jur., § 817, at note 2. See Beekman v. Third Ave. etc. Co., 13 App. Div. 279, 43 N. Y. Supp. 174; Heilman v. Lebanon etc. Co., 175 Pa. St. 188, 34 Atl. 647. The following cases contain discussions of such estoppel and acquiescence as will bar a plaintiff's right to enjoin nuisances: Priewe v. Wisconsin etc. Co., 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780; Herr v. Kentucky etc. Asylum, 22 Ky. Law Rep. 1722; Fisk v. City

of Hartford, 70 Conn. 720, 66 Am. St. Rep. 147, 40 Atl. 906; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 South. 192; Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265; Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441, 52 L. R. A. 409, 49 Atl. 629; Stowell v. Tucker, 7 Idaho, 312, 62 Pac. 1033; City of Leavenworth v. Douglass, 59 Kan. 416, 53 Pac. 123; Pennsylvania etc. Co. v. Montgomery etc. R'y, 167 Pa. St. 62, 46 Am. St. Rep. 659, 27 L. R. A. 766, 31 Atl. 468, 36 Wkly. Not. Cas. 153; McKee v. City of Grand Rapids, 137 Mich. 200, 100 N. W. 580.

Injunctions were denied on the ground of acquiescence in Brokaw v. Carson, 74 W. Va. 340, 81 S. E. 1133; Morrison v. Queen City Electric Light & Power Co., 181 Mich. 624, 148 N. W. 354. And on the ground of laches in Whitmore v. Brown, 102 Me. 47, 120 Am. St. Rep. 454, 9 L. R. A. (N. S.) 868, 65 Atl. 516; Weidner v. Friedman, 126 Tenn. 677, 42 L. R. A. (N. S.) 1041, 151 S. W. 56 (delay of twenty-five years in complaining of disorderly house); Galveston, H. & S. A. R. Co. v. De Groff, 102 Tex. 433, 21 L. R. A. (N. S.) 749, 118 S. W. 134. The owner of an apartment house who encourages building of private garages cannot afterward enjoin their legitimate use on the ground that they constitute a nuisance: Mahoney Land Co. v. Cayuga Investment Co., 88 Wash. 529, Ann. Cas. 1916C, 1234, L. R. A. 1916C, 939 and note, 153 Pac. 308. The doctrine of laches cannot be imputed to the state in its action to enjoin a public nuisance: State v. Excelsior Powder Mfg. Co., 259 Mo. 254, L. R. A. 1915A, 615, 169 S. W. 267.

The mere fact that the plaintiff has moved into the district since the establishment of defendant's business does not constitute any defense to an application for an injunction: Oehler v. Levy, 234 Ill. 595, 14 Ann. Cas. 891, 17 L. R. A. (N. S.) 1025, 85 N. E. 271; Seifert v. Dillon, 83 Neb. 322, 131 Am. St. Rep. 642, 17 Ann. Cas. 1126, 19 L. R. A. (N. S.) 1018, 119 N. W. 686. The fact that the municipal authorities tolerate a bawdy-house and take no steps to abate it will not estop property owner from obtaining an injunction: Ingersoll v. Rousseau, 35 Wash. 92, 1 Ann. Cas. 35, 76 Pac. 513.

In order that conduct may amount to an estoppel, it is necessary that it be shown that the plaintiff had knowledge of the facts: Joos v. Illinois National Guard, 257 Ill. 138, Ann. Cas. 1914A, 862, 43 L. R. A. (N. S.) 1214, 100 N. E. 505. And it is certainly the better rule that mere delay in attacking a continuing nuisance is no defense: Smith v. City of Jefferson, 161 Iowa, 245, Ann. Cas. 1916A, 97, 45 L. R. A. (N. S.) 792, 142 N. W. 220. In general, see City of Pana v. Central Washed Coal Co., 260 Ill. 111, 48 L. R. A. (N. S.) 244, 102 N. E. 992.

§ 1952. (§ 538.) Parties.—The parties who have a sufficient interest to enjoin a nuisance are, in general, those who sustain legal injury. A landlord may do so if the nuisance is one which will permanently damage the reversion; 150 not if it is one that will not do so, and is likely to terminate before the tenancy ends. A tenant may also procure an injunction even when his tenancy is very brief or shortly to end, 152 though there are intimations that he must join the reversioner as a co-plaintiff. A town has been held entitled to maintain suit against an obstruction of a highway because

150 Peck v. Elder, 3 Sand. 126; Faulkenbury v. Wells, 28 Tex. Civ. App. 621, 68 S. W. 327; Shelfer v. London etc. Co., [1895] L. R. 1 Ch. D. 287. But see Goodall v. Crofton, 33 Ohio St. 271, 31 Am. Rep. 535. It is not necessary that the property be occupied: Romano v. Birmingham R'y, L. & P. Co., 182 Ala. 335, Ann. Cas. 1915D, 776, 46 L. R. A. (N. S.) 642, 62 South. 677.

151 Jones v. Chappel, L. R. 20 Eq. 539; Broder v. Saillard, L. R. 2 Ch. D. 692; Cooper v. Crabtree, L. R. 20 Ch. D. 589; Matt v. Shoolbred, L. R. 20 Eq. 22. See, also, Niagara Oil Co. v. Ogle, 177 Ind. 292, Ann. Cas. 1914D, 67, 42 L. R. A. (N. S.) 714, 98 N. E. 60 (landlord who is entitled to share of crops is entitled to relief, although nuisance is temporary).

152 Boston Ferrule Co. v. Hills, 159 Mass. 147, 20 L. R. A. 844, 34 N. E. 85; Hill v. Schneider, 13 App. Div. 299, 4 N. Y. Ann. Cas. 70, 43 N. Y. Supp. 1 (tenancy to expire in less than a year); Broder v. Saillard, L. R. 2 Ch. D. 692; Shelfer v. London etc. Co., [1895] 1 Ch. D. 287; Inchbald v. Robinson, L. R. 4 Ch. 388 (tenant from year to year); Jones v. Chappel, L. R. 20 Eq. 539 (tenant from week to week may enjoin—dictum); Bly v. Edison etc. Co., 172 N. Y. 1, 58 L. R. A. 500, 64 N. E. 745. See, also, Grantham v. Gibson, 41 Wash. 125, 111 Am. St. Rep. 1003, 3 L. R. A. (N. S.) 447, 83 Pac. 14. See McNulty v. Mt. Morris etc. Co., 172 N. Y. 410, 65 N. E. 196, in which a tenant whose term expired pending suit was denied an injunction. A mere licensee is not entitled to sue: Elliott v. Town of Mason, 76 N. H. 229, 37 L. R. A. (N. S.) 357, 81 Atl. 701 (action at law).

153 Broder v. Saillard, L. R. 2 Ch. D. 692; Jones v. Chappel, L. R. 20 Eq. 539.

of its liability to an action for damages by any person injured by the obstruction.<sup>154</sup> On the other hand, a county has been enjoined from allowing a nuisance to continue because the remedy by mandamus was inadequate;<sup>155</sup> and a landowner from permitting a public nuisance to continue on his land, though he did not cause it himself.<sup>156</sup> It has also been held that a grantee of one who has been enjoined from a nuisance connected with the use of the land, is bound by the injunction, though not a party to the suit.<sup>157</sup> That the person committing the nuisance is a tenant, is, of course, no answer to a bill against him,<sup>158</sup> and the lessor may also in such case be enjoined if he threatens to continue the nuisance after the termination of the tenancy.<sup>159</sup>

§ 1953. (§ 539.) Reasonable Use not a Defense.—In this and the two succeeding paragraphs the questions involved are purely legal, having to do with the substantive law of nuisance rather than the equitable remedy. They will require, therefore, no more than a bare statement of the law, with a citation of a few cases in

154 Town of Burlington v. Schwarzman, 52 Conn. 181, 52 Am. Rep. 571; Waukesha v. Village of Waukesha, 83 Wis. 475, 53 N. W. 675; Pittsburgh v. Epping etc. Co., 194 Pa. St. 318, 45 Atl. 129. See, also, Needham v. New York etc. R. R., 152 Mass. 61, 25 N. E. 20; Coast etc. Co. v. Borough of Spring Lake, 56 N. J. Eq. 615, 51 L. R. A. 657, 36 Atl. 21; Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62, 13 South. 289; Tp. of Plymouth v. Chestnut Hill etc. Co., 168 Pa. St. 181, 32 Atl. 19; Woolbridge Tp. v. Raritan etc. Co., 64 N. J. Eq. 169, 53 Atl. 175. See, also, Village of Sand Point v. Doyle, 11 Idaho, 642, 4 L. R. A. (N. S.) 810, 83 Pac. 598.

<sup>155</sup> Lefrois v. Monroe County, 24 App. Div. 421, 48 N. Y. Supp. 519.

<sup>156</sup> Attorney-General v. Tod Headley, [1897] 1 Ch. 560.

<sup>157</sup> Ahlers v. Thomas, 24 Nev. 407, 77 Am. St. Rep. 820, 56 Pac. 93.

<sup>&</sup>lt;sup>158</sup> Broder v. Saillard, L. R. 2 Ch. D. 692; Attorney-General v. Props. etc. Canal, L. R. 2 Eq. 71.

<sup>159</sup> Attorney-General v. Props. etc. Canal, L. R. 2 Eq. 71.

which it has been applied in suits for injunction. It is no defense to an action at law or a bill for an injunction. against a nuisance for the defendant to say he is conducting himself reasonably in doing the thing which is • complained of. "The application of principle governing the jurisdiction of the court in cases of nuisance does not depend on the question whether the defendant is using his own reasonably or otherwise. The real question is, does he injure his neighbor?"160 It is perhaps accurate to say, therefore, that there can be no such thing as a nuisance resulting from reasonable conduct. Nuisance is not based on any rule of negligent or willfully wrongful conduct, but rather on rules of policy which do not allow a person to do those acts which constitute nuisances. If he does so, he is not acting reasonably.161

§ 1954. (§ 540.) Nor the Fact That Other Causes Contribute.—Nor is it a defense that other persons or other causes than the defendant's wrongful acts contribute to the nuisance. If the plaintiff wishes to submit to certain nuisances, that is no reason for allowing the defendant to impose one on him against his will. 162

<sup>160</sup> Reinhardt v. Mentasti, L. R. 42 Ch. D. 685.

<sup>161</sup> Attorney-General v. Cole, [1901] 1 Ch. D. 205; Broder v. Saillard, L. R. 2 Ch. D. 692; Callanan v. Gilman, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264; Filson v. Crawford, 23 N. Y. St. Rep. 355, 5 N. Y. Supp. 882; Susquehanna etc. Co. v. Malone, 73 Md. 268, 25 Am. St. Rep. 595, 9 L. R. A. 737, 20 Atl. 900 (action at law). Contra, Sanders-Clark v. Grosvenor etc., [1900] 2 Ch. D. 373.

<sup>162</sup> Richards v. Daugherty, 133 Ala. 569, 31 South. 934; Stone v. Roscommon etc. Co., 59 Mich. 24, 26 N. W. 216; Weston Paper Co. v. Pope, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719; Butler v. Village of White Plains, 59 App. Div. 30, 69 N. Y. Supp. 193; Indianapolis etc. Co. v. American etc. Co., 57 Fed. 1000, affirming 53 Fed. 970; Richmond etc. Co. v. Atlantic etc. Co., 10 R. I. 106, 14 Am. Rep. 658; Jacobson v. Van Boening, 48 Neb. 80, 48 Am. St. Rep. 684, 32 L. R. A. 229, 66 N. W. 993; Pittsburg etc. Co. v. Town of Crothersville, 159

And if the nuisance results from the combined effect of separate acts of the defendant and others, that also is no defense to a bill for an injunction. 163

§ 1955. (§ 541.) Legalized Nuisances.—Acts which at common law are nuisances may be legalized by statute, if such legislation does not amount to the taking or damaging of property forbidden by constitutional provisions. 164 The effect of such statutes is to take away the wrongful character of the acts legalized; they are no longer torts, and hence, the remedy by injunction against them, of course, ceases. 165

§ 1956. (§ 542.) Public Nuisances. — Public nuisances, as a subject of equity jurisdiction, require only a brief discussion in this place, because the equitable doctrines applicable are essentially the same as those applied to private nuisances; and cases to support the text of this chapter have been drawn from both classes without distinction. "It is on the ground of injury to property that the jurisdiction of this court must rest; and

Ind. 330, 64 N. E. 914. But see Mackey-Smith v. Crawford, 56 App. Div. 136, 67 N. Y. Supp. 541.

163 Lamberton v. Mellish, [1894] L. R. 3 Ch. D. 163; People v. Gold Run etc. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152. *Contra*, West etc. Co. v. Moroni etc. Co., 21 Utah, 229, 61 Pac. 16. See Hillman v. Newington, 57 Cal. 56. See, also, Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 21 Ann. Cas. 1247, 26 L. R. A. (N. S.) 183, 106 Pac. 581; United States v. Luce, 141 Fed. 385.

164 See Woodruff v. N. Bloomfield etc. Co., 9 Sawy. 441, 18 Fed. 753; Le Clercq v. Trustees of Gallipolis, 7 Ohio, 217, 28 Am. Dec. 641.

165 Jordeson v. Sutton etc. Co., [1898] 2 Ch. D. 614, [1899] 2
Ch. 218; Davis v. Mayor of New York, 14 N. Y. (4 Kern.) 506, 67
Am. Dec. 186; Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85; Sayre v. Mayor etc. of Newark, 60 N. J. Eq. 361, 83 Am. St. Rep. 629, 45 Atl. 985; Grey (Attorney-General) v. Mayor etc. of Paterson, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 994; McWethy v. Aurora etc.
Co., 202 Ill. 218, 67 N. E. 9.

taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public nuisance and private nuisance is this,—that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind. I think, therefore, that the same principle must govern the question as to the interference of the court, whether the case be one of public or of private nuisance. What, then, is the principle by which the court ought to be governed? I take it to be this: whether the extent of the damage and injury be such that the law will not afford an adequate remedy." Here, too, as in cases of private nuisance, the chief causes of inadequacy lie in the fact that the injury is irreparable or will occasion a multiplicity of suits. If there is a substan-

166 Per Turner, L. J., in Attorney-General v. Sheffield etc. Co., 3 De Gex, M. & G. 304.

167 Suits on behalf of the public: Attorney-General v. Sheffield etc. Co., supra; Attorney-General v. Cambridge etc. Co., 17 Week. Rep. 145, 4 Ch. App. 71; Attorney-General v. Gee, L. R. 10 Eq. 131; Town of Newcastle v. Haywood, 67 N. H. 178, 37 Atl. 1040; State v. Paterson, 14 Tex. Civ. App. 465, 37 S. W. 478; State v. Mayor etc. of Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564. Suits by private individuals: Kenney v. Consumers' etc. Co., 142 Mass. 417, 8 N. E. 138; State ex rel. Gibson v. Chicago, B. & Q. R. Co. (Mo. App.), 191 S. W. 1051; Attorney-General v. Sheffield etc. Co., 3 De Gex, M. & G. 304; Allen v. Board of Freeholders, 13 N. J. Eq. 68; Whaley v. Wilson, 112 Ala. 627, 20 South. 922, eiting 4 Pom. Eq. Jur., § 1349; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Georgia Chemical etc. Co. v. Colquitt, 72 Ga. 172; Bigelow v. Hartford Bridge Co., 14 Conn. 565, 579, 36 Am. Dec. 502; Harlan etc. Co. v. Paschall, 5 Del. Ch. 435; Van Wegenen v. Cooney, 45 N. J. Eq. 24, 16 Atl. 689. In Milhau v. Sharp, supra, the court said: "To entitle a plaintiff to relief by injunction who is sustaining, or about to sustain a peculiar injury from a public nuisance, it is also necessary that the injury should be such as cannot be well or adequately compensated in damages at law or such as from its continuance or permanent mischief must occasion a constantly recurring grievance which cannot be otherwise prevented, but by injunction." In State v. Baltimore & O. R. Co., tial dispute as to fact or law, and the question is in doubt, a trial at law will be required before equity will intervene. A purely threatened public nuisance may be enjoined, if it is shown to be imminent and serious. Damage will be required or not according as it is, or is not, necessary to maintain an action at law. All public nuisances are crimes, and so, as before pointed out, the entire jurisdiction of equity over them is a denial of the contention that the mere criminality of an act precludes equitable intervention. Public nuisances may be created by statute, and, conversely,

78 W. Va. 526, L. R. A. 1916F, 1001, 89 S. E. 288, it is said that, unless property rights are affected, or unless statute authorizes it, the state cannot enjoin a public nuisance. For a fuller discussion of the grounds of equity jurisdiction, see ante, §§ 514ff.

168 Mohawk etc. Co. v. Utica etc. Co., 6 Paige, 554; Attorney-General v. Cleaver, 18 Ves. 217; Earl of Ripon v. Hobart, 3 Mylne & K. 169; Attorney-General v. Hunter, 1 Dev. Eq. (16 N. C.) 12. See ante, §§ 519-522.

169 Attorney-General v. Steward, 20 N. J. Eq. (5 C. E. Green) 415; County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. 740; City of Rochester v. Erickson, 46 Barb. 92. See ante, §§ 523-525.

170 This statement is subject to the qualifications suggested ante, § 526. In accordance with it are the holdings that purprestures may be enjoined, though there is no damage shown, since the state or crown has the right that its property should not be encroached upon: People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351, affirming 38 Barb. 282; Attorney-General v. Cohoes Co., 6 Paige, 133, 29 Am. Dec. 755; Attorney-General v. Eau Claire, 37 Wis. 400; Revell v. People, 177 Ill. 468, 69 Am. St. Rep. 257, 43 L. R. A. 790, 52 N. E. 1052. See Wood on Nuisances (3d ed.), pp. 107–125. But for a public nuisance generally, actual damage must be proved: See People v. Mould, 37 App. Div. 35, 55 N. Y. Supp. 453, reversing 24 Misc. Rep. 287, 52 N. Y. Supp. 1032, and cases cited: Town of Newcastle v. Haywood, 67 N. H. 178, 37 Atl. 1040. See, however, Attorney-General v. Shrewsbury etc. Co., L. R. 21 Ch. D. 752.

171 See ante, § 527, and note 9. On the general subject, see ante, chapter XXI.

172 Carleton v. Rugg, 149 Mass. 550, 14 Am. St. Rep. 446, 5
 L. R. A. 193, 22 N. E. 55 (saloon); State v. Crawford, 28 Kan. 726,

common-law public nuisances may be legalized by statute.<sup>173</sup> The balance of injury doctrine is subject to the same differences of holding as in cases of private nuisance.<sup>174</sup> It is generally held that a plaintiff may enjoin a nuisance even though he himself easily could avoid or remove it.<sup>175</sup> The relief given is adjusted to the needs of the particular case; though usually prohibitive, it may be by mandatory injunction;<sup>176</sup> it will save to the defendant the right to continue the act complained of in a harmless way if such thing is possible;<sup>177</sup> temporary injunctions are applied here as elsewhere, subject to the general rules governing their use;<sup>178</sup>

42 Am. Rep. 182 (saloon); State v. Noyes, 30 N. H. 279 (bowling-alley); State v. Marston, 64 N. H. 603, 15 Atl. 222 (saloon); State v. Saunders, 66 N. H. 39, 18 L. R. A. 646, 25 Atl. 588 (saloon); State v. Lawler, 85 Iowa, 564, 52 N. W. 490 (saloon); State v. Seeverson, 88 Iowa, 714, 54 N. W. 347 (saloon); State v. Greenway, 92 Iowa, 472, 61 N. W. 239 (saloon); State v. Van Vliet, 92 Iowa, 476, 61 N. W. 241 (saloon); Carter v. Steyer, 93 Iowa, 533, 61 N. W. 956; Detroit etc. Co. v. Eldredge, 109 Mich. 371, 67 N. W. 531 (construction of road from other material than that required by statute); Marvel v. State, 127 Ark. 595, 193 S. W. 259 (liquor selling). See ante, § 527, and note 101.

173 Davis v. Mayor etc. N. Y., 14 N. Y. (4 Kern.) 506, 67 Am. Dec. 186; Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85; Grey, Attorney-General, v. City of Paterson, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 48 L. R. A. 717, 45 Atl. 995. See ante, § 541.

174 That it will be applied: Grey, Attorney-General, v. City of Paterson, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 48 L. R. A. 717, 45 Atl. 995. That it will not be applied, see the cases cited, ante, § 531, note 117.

175 Town of Burlington v. Schwarzman, 52 Conn. 181, 52 Am. Rep. 571; Martin v. Marks, 154 Ind. 549, 57 N. E. 249.

176 Pascagoula etc. Co. v. Dixon, 77 Miss. 587, 78 Am. St. Rep. 537, 28 South. 724. See, also, cases cited, ante, § 533, note 125.

177 Earl of Ripon v. Hobart, 3 Mylne & K. 169; Winchell v. City of Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668.

178 Earl of Ripon v. Hobart, 3 Mylne & K. 169, Cooper temp. Brougham, 333; Attorney-General v. Steward, 20 N. J. Eq. 415; City

and complete relief, legal as well as equitable, will be given.<sup>179</sup> Inasmuch as a prescriptive right to commit a nuisance as against the public cannot arise, the public cannot be precluded by laches at all from procuring an injunction.<sup>180</sup> The parties who may enjoin a public nuisance are, first, the public, through the proper public official;<sup>181</sup> second, private parties. While the public which acts is generally the state, yet by virtue of legislative delegation, often implied, it may be a municipality that files the information.<sup>182</sup> Public nuisances may

of Wilmington v. Addicks (Del. Ch.), 47 Atl. 366; Attorney-General v. Sheffield etc. Co., 3 De Gex, M. & G. 304; Attorney-General v. Cohoes, 6 Paige, 133, 29 Am. Dec. 755; Attorney-General v. Steward, 21 N. J. Eq. 340. See ante, § 535.

179 Richi v. Chattanooga etc. Co., 105 Tenn. 651, 58 S. W. 646.

180 People v. Gold Run etc. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152. And it is held that the same doctrine applies to suits by private individuals who are specially damaged: Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160; Woodruff v. N. Bloomfield etc. Co., 9 Sawy. 513, 18 Fed. 753; Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149. See Clerk & Lindsell, The Law of Torts, pp. 349, 350.

181 "In the case of a public nuisance, the remedy at law is indictment; the remedy in equity, is information at the suit of the attorney-general": Per Cranworth, V. C., in Soltau v. De Held, 2 Sim, N. S., 133. No citation of cases is necessary to sustain so familiar a rule.

Right of state to enjoin acts in another state.—See State of Georgia v. Tennessee Copper Co., 206 U. S. 230, 11 Ann. Cas. 488, 51 L. Ed. 1038, 27 Sup. Ct. 618.

182 Town of Neshkoro v. Nest, 85 Wis. 126, 55 N. W. 176; Clayton County v. Herwig, 100 Iowa, 631, 69 N. W. 1035; Village of Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931; City of Huron v. Bank of Volga, 8 S. D. 449, 66 N. W. 815; City of Mt. Clemens v. Mt. Clemens etc. Co., 8 Det. Leg. N. 282, 127 Mich. 115, 86 N. W. 537; People v. Equity etc. Co., 141 N. Y. 232, 36 N. E. 194; Village of Pewaukee v. Savoy, 103 Wis. 271, 50 L. R. A. 836, 79 N. W. 436; Inhabitants of Houlton v. Titcomb, 102 Me. 272, 120 Am. St. Rep. 492, 10 L. R. A. (N. S.) 580, 66 Atl. 733. In City of Durham v. Eno Cotton Mills, 144 N. C. 705, 11 L. R. A. (N. S.) 1163, 57 S. E. 465, it was held that a city cannot enjoin pollution of water unless it

also be enjoined by private individuals who suffer a special damage. 183

shows special damage. In Village of Oxford v. Willoughby, 181 N. Y. 155, 73 N. E. 677, a village was allowed to maintain the action. The right of towns to enjoin public nuisances is sometimes put upon the ground that their special interest entitles them to maintain action because of special damage to them. See supra, § 538, note 154. Other cases of injunction against public nuisances at the suit of the public are: Pennsylvania v. Wheeling etc. Co., 13 How. 518, 14 L. Ed. 249; Attorney-General v. Brighton, [1900] 1 Ch. 276; Grey v. Greenville etc. R'y Co., 59 N. J. Eq. 372, 46 Atl. 638; Streeter v. Stalnaker, 61 Neb. 205, 85 N. W. 47; People v. Third Ave. R. R., 45 Barb. 68; United States v. Debs, 64 Fed. 724; State v. Meek, 112 Iowa, 338, 84 Am. St. Rep. 342, 51 L. R. A. 414, 84 N. W. 3; Coosaw Min. Co. v. South Carolina, 144 U. S. 564, 36 L. Ed. 537, 12 Sup. Ct. 689; United States v. N. Bloomfield etc. Co., 53 Fed. 625; Berks County v. Reading City etc. Co., 167 Pa. St. 102, 31 Atl. 474, 36 Wkly. Not. Cas. 173; City of Detroit v. Detroit City etc. Co., 56 Fed. 867; Grey v. New York etc. Co., 56 N. J. Eq. 463, 40 Atl. 21; Allegheny City v. Millville etc. Co., 159 Pa. St. 411, 28 Atl. 202. See, also, Alabama Western R. Co. v. State, 155 Ala. 491, 16 Ann. Cas. 485, 19 L. R. A. (N. S.) 1173, 46 South, 468; People v. Clark, 268 Ill. 156, Ann. Cas. 1916D, 785, 108 N. E. 994; State v. Rabinowitz, 85 Kan. 841, 39 L. R. A. (N. S.) 187, 118 Pac. 1040; Respass v. Commonwealth, 131 Ky. 807, 21 L. R. A. (N. S.) 836, 115 S. W. 1131; Attorney-General v. City of Grand Rapids, 175 Mich. 503, Ann. Cas. 1915A, 968, 50 L. R. A. (N. S.) 473, 141 N. W. 890; State v. Columbia Water Power Co., 82 S. C. 181, 129 Am. St. Rep. 876, 17 Ann. Cas. 343, 22 L. R. A. (N. S.) 435, 63 S. E. 884. But in State v. Ehrlick, 65 W. Va. 700, 23 L. R. A. (N. S.) 691, 64 S. E. 935, it is held that the state cannot enjoin a gaming-house as a public nuisance without showing special injury.

183 Injunctions were allowed on this ground in the following cases:

For obstruction of streets and highways: Savannah etc. Co. v. Shiels, 33 Ga. 601; Hill v. Hoffman (Tenn. Ch. App.), 58 S. W. 929; Pettibone v. Hamilton, 40 Wis. 402; Martin v. Marks, 154 Ind. 549, 57 N. E. 249; Green v. Oakes, 17 Ill. 249; Ewell v. Greenwood, 26 Iowa, 377; Smith v. Mitchell, 21 Wash. 586, 75 Am. St. Rep. 858, 58 Pac. 667; Flynn v. Taylor, 127 N. Y. 596, 14 L. R. A. 556, 28 N. E. 418; De Witt v. Van Schoyk, 110 N. Y. 7, 6 Am. St. Rep. 342, 17

N. E. 425, affirming 35 Hun, 103; Stèvenson v. Pucci, 32 Misc. Rep. 464, 66 N. Y. Supp. 712; Cabbell v. Williams, 127 Ala. 320, 28 South. 405; Newcome v. Crews, 98 Ky. 339, 32 S. W. 947; Brauer v. Baltimore etc. Co., 99 Md. 367, 58 Atl. 21; Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 183, 65 N. E. 237; Cereghino v. Or. etc. Co., 26 Utah, 467, 99 Am. St. Rep. 843, 73 Pac. 634; Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275; Illinois Cent. etc. Co. v. Thomas, 75 Miss. 54, 21 South. 601; Central etc. Co. v. Metropolitan etc. Co., 16 App. Div. 229, 44 N. Y. Supp. 752; Hannum v. Media etc. Co., 200 Pa. St. 44, 49 Atl. 789; Irvine v. Atlantic etc. Co., 10 App. Div. 560, 42 N. Y. Supp. 1103; City etc. of Montgomery v. Parker, 114 Ala. 118, 62 Am. St. Rep. 95, 21 South. 452; Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260; Sherlock v. Kansas etc. Co., 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629; Kalteyer v. Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288; Pittsburgh etc. Co. v. Point Bridge Co., 165 Pa. St. 37, 26 L. R. A. 323, 30 Atl. 511, 35 Wkly. Not. Cas. 393. See, also, Dean v. Ann Arbor R. R., 137 Mich. 459, 100 N. W. 773; Forbes v. City of Detroit, 139 Mich. 280, 102 N. W. 740 (encroachment on street). See, also, Bischof v. Merchants' National Bank, 75 Neb. 838, 5 **L.** R. A. (N. S.) 486, 106 N. W. 996.

For obstruction of navigable waters: Milnor v. N. G. R. Co., 70 U. S. (3 Wall.) 782, 16 L. Ed. 1; Morris v. Graham, 16 Wash. 343, 58 Am. St. Rep. 33, 47 Pac. 752; Mayor etc. of New York v. Baumberger, 7 Rob. (N. Y.) 219; Walker v. Sheperdson, 2 Wis. 384, 60 Am. Dec. 423; Reyburn v. Sawyer, 135 N. C. 328, 102 Am. St. Rep. 555, 47 S. E. 761; Smart v. Aroostook Lumber Co., 103 Me. 37, 14 L. R. A. (N. S.) 1083, 68 Atl. 527; Viebahn v. Board of Crow Wing County Comm'rs, 96 Minn. 276, 3 L. R. A. (N. S.) 1126, 104 N. W. 1089; Ferry Pass Inspectors & S. Ass'n v. White River Inspectors' & S. Ass'n, 57 Fla. 399, 22 L. R. A. (N. S.) 345, 48 South. 643.

For pollution of water: Green v. Nunnemacher, 36 Wis. 50.

For flowage of land: Whitfield v. Rogers, 26 Miss. 84, 59 Am. Dec. 244; Mayrant v. City of Columbia, 77 S. C. 281, 10 L. R. A. (N. S.) 1094, 57 S. E. 857. See, also, Stimson v. Town of Brookline, 197 Mass. 568, 125 Am. St. Rep. 382, 14 Ann. Cas. 907, 16 L. R. A. (N. S.) 280, 83 N. E. 893.

For keeping a bawdy-house: Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514, affirming 59 Hun, 618, 13 N. Y. Supp. 951; Dempsie v. Darling, 39 Wash. 125, 81 Pac. 152; Tedescki v. Berger, 150 Ala. 649, 11 L. R. A. (N. S.) 1060, 43 South. 960; Seifert v. Dillon, 83 Neb. 322, 131 Am. St. Rep. 642, 17 Ann. Cas. 1126, 19 L. R. A. (N. S.) 1018, 119 N. W. 686.

For interference with common right of fishery: Cherry Point Fish Co. v. Nelson, 25 Wash. 558, 7 Pac. 55.

For creating a stench: Sayre v. Mayor etc. of Newark, 58 N. J. Eq. 136, 42 Atl. 1068; Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055 (odors from slaughter-house).

Statutory nuisance: Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333 (wooden building within fire limits). Compare Lang v. Merwin, 99 Me. 486, 105 Am. St. Rep. 293, 59 Atl. 1021 (injunction against gambling place, at suit of twenty voters, under statute).

Beer garden: Tron v. Lewis, 31 Ind. App. 178, 66 N. E. 490.

Saloon: Fox v. Corbitt, 137 Tenn. 466, 194 S. W. 88; Detroit Realty Co. v. Barnett, 156 Mich. 385, 21 L. R. A. (N. S.) 585, 120 N. W. 804.

Sunday ball games: Gilbaugh v. West etc. Co., 64 N. J. Eq. 27, 53 Atl. 289; Seastream v. New Jersey Exhibition Co., 67 N. J. Eq. 178, 58 Atl. 532.

Miscellaneous: Johnson v. V. D. Reduction Co., 175 Cal. 63, L. R. A. 1917E, 1007, 164 Pac. 1119 (hog ranch); Joos v. Illinois National Guard, 257 Ill. 138, Ann. Cas. 1914A, 862, 43 L. R. A. (N. S.) 1214, 100 N. E. 505 (rifle range); Nelson v. Swedish Evan. Lutheran Cemetery Ass'n, 111 Minn. 149, 20 Ann. Cas. 790, 34 L. R. A. (N. S.) 565, 126 N. W. 723, 127 N. W. 626 (cemetery); Bangs v. Dworak, 75 Neb. 714, 13 Ann. Cas. 202, 5 L. R. A. (N. S.) 493, 106 N. W. 780 (building erected in violation of ordinance); Bourne v. Wilson-Case Lumber Co., 58 Or. 48, Ann. Cas. 1913A, 245, 113 Pac. 52 (sawmill); Memphis St. R'y Co. v. Rapid Transit Co., 133 Tenn. 99, Ann. Cas. 1917C, 1045, L. R. A. 1916B, 1143, 179 S. W. 635 (jitney bus); Rainey v. Red River, T. & S. R. Co., 99 Tex. 276, 122 Am. St. Rep. 622, 13 Ann. Cas. 580, 3 L. R. A. (N. S.) 590, 89 S. W. 768, 90 S. W. 1096 (railroad terminal).

In the following cases injunctions were refused because the plaintiff failed to show special damage: Taylor v. Portsmouth etc. Co., 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560; Buck etc. Co. v. Lehigh etc. Co., 50 Pa. St. 91, 88 Am. Dec. 534; Pearson v. Allen, 151 Mass. 79, 21 Am. St. Rep. 426, 23 N. E. 731; Schall v. Nusbaum, 56 Md. 512; Osborne v. Brooklyn etc. Co., 5 Blatchf. 366; Currier v. Davis, 68 N. H. 596, 41 Atl. 239; Gulick v. Fisher, 92 Md. 353, 48 Atl. 375; Van Wegenen v. Cooney, 45 N. J. Eq. 24, 16 Atl. 689; Black v. Philadelphia etc. Co., 58 Pa. St. 249; Bosworth v. Normon, 14 R. I. 521; Georgetown v. Alexandria etc. Co., 12 Pet. 91, 9 L. Ed. 1012; Bige-

low v. Hartford etc. Co., 14 Conn. 565, 36 Am. Dec. 502; O'Brien v. Harris, 105 Ga. 732, 31 S. E. 745; Coast Line R. R. v. Cohen, 50 Ga. 451; Hay v. Weber, 79 Wis. 587, 24 Am. St. Rep. 737, 48 N. W. 859; Hartshorn v. South Reading, 3 Allen, 501; Pittsburg etc. Co. v. Cheevers, 149 Ill. 430, 24 L. R. A. 156, 37 N. E. 49; Manufacturers' etc. Co. v. Indiana etc. Co., 155 Ind. 566, 58 N. E. 851; Rhymer v. Fretz, 206 Pa. St. 230, 98 Am. St. Rep. 777, 55 Atl. 959; Steere v. Tucker, 39 R. I. 531, 99 Atl. 583; Parsons v. Hunt (Tex. Civ. App.), 81 S. W. 120. See, also, Dennis v. Mobile & M. R. Co., 137 Ala. 649, 97 Am. St. Rep. 69, 35 South. 30 (citing Pom. Eq. Jur., §§ 1347, 1349, 1350); George v. Peckham, 73 Neb. 794, 103 N. W. 664. See, also, Stoutemyer v. Sharp, 89 Ark. 175, 21 L. R. A. (N. S.) 74, 116 S. W. 189; Louisville Athletic Club v. Nolan, 134 Ky. 220, 23 L. R. A. (N. S.) 1019, 119 S. W. 800 (prize-fight); Cummings Realty & Inv. Co. v. Deere & Co., 208 Mo. 66, 14 L. R. A. (N. S.) 822, 106 S. W. 496 (narrowing highway); Pedrick v. Raleigh & P. S. R. Co., 143 N. C. 485, 10 L. R. A. (N. S.) 554, 55 S. E. 877 (bridge obstructing navigation); Alexander v. Wilkes-Barre Anthracite Coal Co., 254 Pa. 1, L. R. A. 1917B, 310, 98 Atl. 794 (coal mine); Davis v. Spragg, 72 W. Va. 672, 48 L. R. A. (N. S.) 173, 79 S. E. 652 (awning over highway). As to the right of an individual to enjoin the removal of a railroad station, see Horton v. Southern R'y Co., 173 Ala. 231, Ann. Cas. 1914A, 685, 55 South. 531, and cases cited in note.

In Whitfield v. Rogers, 26 Miss. (4 Cush.) 84, 59 Am. Dec. 244, it is said that one who suffers from a public nuisance in common with others may enjoin it without showing special damage. And the same thing was held under statutes in Milhiser v. Willard, 96 Iowa, 327, 65 N. W. 325; Carleton v. Rugg, 149 Mass. 550, 14 Am. St. Rep. 446, 5 L. R. A. 193, 22 N. E. 55.

On the general subject of public nuisances, see, also, ante, chapter XXI.

## CHAPTER XXV.

## INJUNCTIONS TO PROTECT EASEMENTS.

## ANALYSIS.

§ 543. Nature and extent of the equity jurisdiction.

§§ 544-546. Grounds of the jurisdiction.

§ 544. Irreparable injury.

§ 545. Prevention of multiplicity of suits.

§ 546. Other forms of inadequacy of legal remedy.

§ 547. Illustrations.

§ 548. The damage necessary to support an injunction.

§ 549. Previous trial at law.

§§ 550-551. Threatened disturbances.

§ 550. Nature of the threat.

§ 551. Nature of the injury threatened.

§ 552. The balance of injury.

§ 553. Plaintiff's right an absolute one.

§§ 554-559. Relief given.

§ 555. Form of injunction.

§ 556. Temporary injunctions.

§§ 557-558. Effect of change of conditions pending suit.

§ 557. On permanent injunctions.

§ 558. On temporary injunctions.

§ 559. Complete relief.

§ 560. Parties.

§ 1957. (§ 543.) Nature and Extent of the Equity Jurisdiction.—The jurisdiction of equity over easements, as in trespass and nuisance, is for the protection of legal rights for the infringement of which legal remedies are inadequate. In the earlier cases, at least, it was thought that this limitation made the right to equitable relief markedly less extensive than the right to an action at law. In a leading case<sup>1</sup> Lord Eldon, in a suit to enjoin obscuring ancient lights, said: "The foundation

<sup>1</sup> Attorney-General v. Nichol, 16 Ves. 338.

of this jurisdiction, interfering by injunction, is that head of mischief, alluded to by Lord Hardwicke, that sort of material injury to the comfort of those who dwell in the neighboring house, requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law. . . . An action on the case . . . might be maintained in many cases which would not support an injunction." In contrast to this cautious statement of the jurisdiction it was recently said by an American court: "Injunction is uniformly held to be a proper remedy to protect against an interference with the enjoyment of an easement." Of the two statements, the latter more nearly represents the present state of the law; so far is this true, indeed, that the tendency of the courts is to take jurisdiction to enjoin disturbance of easements as a matter of course, without discussion of the grounds of the jurisdiction. The explanation of the change doubtless is that, when once the jurisdiction of equity was established, it was found that most cases could be shown to be incapable of adequate legal remedy, and hence came into equity.3

## § 1958. (§ 544.) Grounds of the Jurisdiction — Irreparable Injury.—The particular forms in which this

- <sup>2</sup> Per Oldham, C., in Keplinger v. Woolsey, 4 Neb. (Unof.) 282, 93 N. W. 1008.
- 3 In Leech v. Schweder, L. R. 9 Ch. App. 463, 476, Mellish, L. J., said: "Practically, in my opinion, there is no difference with respect to light in the amount of damage which would entitle a person to maintain an action at law and that which would entitle him to a bill in equity. The circumstance that all cases of light and air are brought to this court, seems tolerably good evidence that the world at large does not consider that a plaintiff has practically a better chance of succeeding if he has the right to light tried before a judge and jury than if he carries it to this court. I am most unwilling to make a difference between law and equity when I do not find it to exist." See, also, Colls v. Home etc. Stores, [1904] App. Cas. 179, 193, 212, reversing [1902] 1 Ch. D. 302.

inadequacy of the legal remedy manifests itself are substantially the same as in other torts which equity will enjoin. Chief among them, as shown in the decided cases, is that of irreparable injury, which, here as elsewhere, means a destructive act to property of such peculiar character or use that its loss would not be adequately recompensed by the damages a jury's verdict would give.<sup>4</sup> From the nature of easements their disturbance, if other than temporary, is necessarily destructive; and because the easement is always connected with the use of real property, it is generally per se possessed of the peculiar quality which is not adequately to be paid for in damages. Thus, in granting an in-

4 See chapter on Trespass, ante, § 495. It should be noted that this is not saying the injury is beyond any money value. The following language of Wood, V. C., in Dent v. Auction Mart. Co., L. R. 2 Eq. 238, 246, 247, clearly illustrates this point: "It appears to me it cannot safely be held that this court will allow parties so to exercise rights which they may have in their soil as to inflict an injury on their neighbor, if the neighbor is unwilling to take any compensation; or even though he be willing to take compensation, if he is not ready to submit to valuation of a jury, but insists on his own right to determine what the value of his property is. One of the points which was put in argument illustrates this view. It was said there had been negotiations, and Messrs. Dent were willing at one time to have taken £2,000 for their right to oppose the erection of these buildings. After that, it was said to be impossible to regard this as a case of irreparable injury, and that therefore the only ground on which a court of equity interposes in cases of trespass failed. If a man says he will take £2,000, that affords some measure of the amount of the injury. The argument, therefore, would result in this—that because a man says he considers the amount of inconvenience and annovance is so great as not to be estimated by the amount of money damages which a jury would fix, but that he is willing, as persons sometimes are, to sell his comfort and ease for a high pecuniary reward, therefore he is to be compelled to go to a jury who might award him some £100 or £150. His comfort is to be taken away, not at his own estimate, but at the value which a jury might put on it. . . . It appears to me that is a mistaken view of the jurisdiction of the court."

junction against the filling up of part of a reservoir, and thereby interfering with the plaintiff's easement in it, the court said: "The plaintiffs have no adequate remedy at law. In so far as the preservation of the reservoir for holding water is beneficial to the running of their mill, the plaintiffs have the right to maintain the same according to the agreements, stipulations, conditions, and covenants mentioned. The injury complained of goes to the impairment of the use of the property belonging to the plaintiff." And the same idea is expressed in this sentence from another case in which the obstruction of a right of way was enjoined: "No action of damages can give adequate redress to a party who is hemmed in so as to have no passage of egress from his own The free exercise of the right to an easement is generally essential to the enjoyment or beneficial use of land with which it is connected; hence, in most of the cases in which the question of jurisdiction is discussed at all, the ground of equitable interference is said to be the prevention of irreparable injury.7

§ 1959. (§ 545.) Prevention of Multiplicity of Suits. A second ground of jurisdiction to enjoin disturbance

<sup>&</sup>lt;sup>5</sup> Per Cassoday, C. J., in Koenig v. City of Watertown, 104 Wis. 409, 80 N. W. 728.

<sup>6</sup> Per Campbell, J., in Nye v. Clark, 55 Mich. 599, 22 N. W. 57.

<sup>7</sup> Jordeson v. Sutton etc. Co., 68 L. J. Ch. 457, [1899] 2 Ch. 217, 80 L. T., N. S., 815, 63 J. P. 692; Cunningham v. Rome R. R. Co., 27 Ga. 499; Murphey v. Harker, 115 Ga. 77, 41 S. E. 585; Riverdale Park Co. v. Westcott, 74 Md. 311, 28 Am. St. Rep. 249, 22 Atl. 270; Haight v. Littlefield, 71 Hun, 285, 24 N. Y. Supp. 1097; Smith v. Smith, L. R. 20 Eq. 500; Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165; White v. Flannagan, 1 Md. 525, 54 Am. Dec. 668; Jay v. Michael, 92 Md. 198, 48 Atl. 61; First Nat. Bank etc. v. Tyson, 133 Ala. 439, 91 Am. St. Rep. 46, 33 South. 144; Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 566; Nicholas v. Title & Trust Co., 79 Or. 226, Ann. Cas. 1917A, 1149, 154 Pac. 391. But see Gaynor v. Bauer, 144 Ala. 448, 3 L. R. A. (N. S.) 1082, 39 South. 749.

of easements is the prevention of multiplicity of suits. This ground of jurisdiction, while entirely different in character from that of irreparable injury, is very apt to be present with it in the facts of most cases. It is the element of continuance or permanence that causes repeated and harassing litigation, to prevent which is the purpose of equity in enjoining because of multiplicity of suits. In many cases, irreparable injury, too, is present only because the infringement is permanent or, at least, of considerable duration, when a merely temporary infringement would not be irreparable because it would not amount to a destructive act; such are cases of obstruction of ancient lights or of a right of way. Hence the ground of jurisdiction is sometimes so expressed that it is not clear which of the two is meant,8 and it is doubtless generally true that the jurisdiction can be rested on either or both of them. Occasionally, however. the court makes a clear distinction between them. Thus in Hacke's Appeal<sup>9</sup> the court said: "It is not necessary that the plaintiff should prove damage in order to entitle him to his property. . . . The obstruction of a way by the owner of the land, differs widely from the maintenance of a mill or factory which is in itself lawful, but by its noise, fumes or odors, becomes a private nuisance to a person in the vicinity. In the latter case the question of irreparable damage enters, and often a court of equity will not interfere: Richard's Appeal, 57

<sup>8</sup> See Kittle v. Pfeiffer, 22 Cal. 485; Riverdale Park Co. v. Westcott, 74 Md. 311, 28 Am. St. Rep. 249, 22 Atl. 270. In Riverdale Park Co. v. Westcott, supra, the court, in enjoining the destruction of a dam in which the plaintiff had an easement, said: "The dam was absolutely necessary to supply the water to operate the mill and its destruction meant the destruction of the beneficial enjoyment of the mill itself. An action at law would not, under such circumstances, afford an adequate remedy. If the dam was rebuilt the appellant might again destroy it and there would be no end to this litigation."

<sup>9 101</sup> Pa. St. 245.

Pa. St. 105, 98 Am. Dec. 202. The doctrine of that case applies to many other kinds of business; but not where a man buys land subject to an easement, or grants an easement. He cannot appropriate such property against an owner's will and say, 'I will compensate him in damages.' A judgment for damages does not transfer the plaintiff's property in the way to the defendant, as would a judgment in trover or trespass for taking goods. Nor will the law restore the enjoyment to the owner. He may have repeated actions for damages, and neither gain enjoyment nor lose his right thereto. The law does not offer an adequate remedy. He is entitled to a remedy that will restore him to enjoyment, and is not confined to actions at law for damages resulting from obstructions." And other cases in which the courts' notion of the inadequacy of the legal remedy in the particular situations before them was that it could only give damages from time to time in repeated actions, thus causing a needless and harmful multiplicity of suits, are not uncommon.<sup>10</sup> It is this class of cases that marks the great advance of modern law over that stated in the dictum of Lord Eldon above quoted.

§ 1960. (§ 546.) Other Forms of Inadequacy of Legal Remedy.—Almost all the cases of injunctions against infringement of easements in which the question of jurisdiction is noticed are put upon one of the two grounds already discussed. But no more than in cases of trespass or nuisance do these two forms necessarily exhaust the possibilities of form in which inadequacy of

10 Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Spokane Mill Co. v. Post, 50 Fed. 429; White v. Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199; Oswald v. Wolf, 129 Ill. 200, 21 N. E. 839; Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441, 52 L. R. A. 409, 49 Atl. 629; Olivella v. New York etc. Co., 31 Misc. Rep. 203, 64 N. Y. Supp. 1086, affirmed in 64 N. Y. Supp. 1145; Cadigan v. Brown, 120 Mass. 493; Carpenter v. Capital Elect. Co., 178 Ill. 29, 69 Am. St. Rep. 286, 43 L. R. A. 645, 52 N. E. 973.

the legal remedy may manifest itself; and this, in whatever form, is always the fundamental test of the juris-That the cases on easements are so largely in the two classes is, perhaps, partly because they are comparatively few in number, partly because the states of facts are of narrow range and very similar in characteristics. But even here illustrations of an inadequacy of the legal remedy for other reasons than those already mentioned are to be found.<sup>11</sup> Thus, in a very recent case<sup>12</sup> the court said: "Where the facts are of such a nature as to render the measure of damages speculative and impossible to ascertain with any degree of certainty, equitable relief is seldom denied." This means that when the verdict of a jury necessarily would be in the nature of conjecture as to the amount of damages, a sufficient ground of jurisdiction is shown. And an injunction will be granted also to prevent the taking of an easement for public purposes without first making compensation.13

- § 1961. (§ 547.) Illustrations. Interference with rights of way are among the most common disturbances
- 11 In Thurston v. Minke, 32 Md. 487, the court in enjoining an obstruction of an easement of light by a lessee of the plaintiff, rested the jurisdiction on the privity between the parties, by analogy to cases of waste. This was done to distinguish the case from Amelung v. Seekamp, 9 Gill & J. 468, in which the court erroneously held that only those disturbances of easements causing irreparable injury would be enjoined. The reason of the court would probably not be followed now, as a plainer ground of jurisdiction, viz., the prevention of multiplicity of suits arising out of a continuing tort, is very generally recognized.
- <sup>12</sup> Keplinger v. Woolsey, 4 Neb. (Unof.) 282, 93 N. W. 1008. See, also, Newell v. Sass, 142 Ill. 104, 31 N. E. 176; Thorpe v. Brumfit, L. R. 8 Ch. 650.
- <sup>13</sup> McQuigg v. Cullins, 56 Ohio St. 649, 47 N. E. 595; Lowery v. City of Pekin, 186 Ill. 387, 51 L. R. A. 301, 57 N. E. 1062; Ackerman v. True, 56 App. Div. 54, 66 N. Y. Supp. 6. See, also, Wheeler v. Bedford, 54 Conn. 244, 7 Atl. 22.

of easements enjoined in equity; and this interference may be, as it usually is, by obstruction, total or partial, or by other means which render the use of the way less beneficial than it should be. 15 Another large class of

14 Spokane etc. Mill v. Post, 50 Fed. 429; Kittle v. Pfeiffer, 22 Cal. 485; Cunningham v. Rome etc. Co., 27 Ga. 499; Murphey v. Harker, 115 Ga. 77, 41 S. E. 585; Yeager v. Manning, 183 Ill. 275, 55 N. E. 691; Chicago etc. Co. v. Porter, 72 Iowa, 426, 34 N. W. 286; Henry v. City of Louisville, 19 Ky. Law Rep. 790, 42 S. W. 94; Calvert v. Weddle, 19 Ky. Law Rep. 1883, 44 S. W. 648; Kamer v. Bryant, 103 Ky. 723, 46 S. W. 14; White v. Flannigan, 1 Md. 525, 54 Am. Dec. 668; Jay v. Michael, 92 Md. 198, 48 Atl. 61; Lathrop v. Elsner, 93 Mich. 599, 53 N. W. 791; Keplinger v. Woolsey, 4 Neb. (Unof.) 282, 93 N. W. 1008; White v. Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199; Hacke's Appeal, 101 Pa. St. 245; Burke v. Wall, 29 La. Ann. 38, 29 Am. Rep. 316; Tucker v. Howard, 128 Mass. 361; Smith v. Young, 160 Ill. 163, 43 N. E. 486; O'Reagan v. Duggan, 117 Iowa, 612, 91 N. W. 909; Bubenzer v. Philadelphia etc. Co. (Del.) 57 Atl. 242. See, also, Downing v. Corcoran, 112 Mo. App. 645, 87 S. W. 114; Wilson v. D. W. Alderman & Sons Co., 69 S. C. 176, 48 S. E. 81; Driscoll v. Smith, 184 Mass. 221, 68 N. E. 211. See, also, Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87; Smith v. Smith, 21 Cal. App. 378, 131 Pac. 890; Del Monte Livestock Co. v. Board of Comm'rs (Ryan), 24 Colo. App. 340, 133 Pac. 1048; Gibson v. Gross, 143 Ga. 104, 84 S. E. 373; Nevels v. Golden, 147 Ga. 34, 92 S. E. 521; Feitler v. Dobbins, 263 Ill. 78, 104 N. E. 1088; Shedd v. American Maize Products Co., 60 Ind. App. 146, 108 N. E. 610; Ball v. Allen, 216 Mass. 469, Ann. Cas. 1917A, 1248, 103 N. E. 928; Longton v. Stedman, 182 Mich. 405, 148 N. W. 738; Bonnell v. Meeker (N. J. Eq.), 82 Atl. 49; Oregon R. & Nav. Co. v. McDonald, 58 Or. 228, 32 L. R. A. (N. S.) 117, 112 Pac. 413 (railroad right of way); Nicholas v. Title & Trust Co., 79 Or. 226, Ann. Cas. 1917A, 1149, 154 Pac. 391; Bowers v. Myers, 237 Pa. 533, 85 Atl. 860; Mathews v. Hickman, 115 Va. 144, 78 S. E. 555; Flaherty v. Fleming, 58 W. Va. 669, 3 L. R. A. (N. S.) 461, 52 S. E. 857. As to the showing necessary, see Marion County Lumber Co. v. Tilghman Lumber Co., 75 S. C. 220, 55 S. E. 337.

15 Valentine v. Schreiber, 3 App. Div. 235, 38 N. Y. Supp. 417 (plowing road in which the plaintiff had a right of way); Herman v. Roberts, 119 N. Y. 37, 16 Am. St. Rep. 800, 7 L. R. A. 226, 23 N. E. 442 (drawing heavy loads over the plaintiff's way, so as to cut it up

cases is that in which injunctions are granted against obstructions of easements of light and air, often in England, ancient lights, <sup>16</sup> in this country, easements created by grant or covenant, <sup>17</sup> or those which all abutters have over public highways. <sup>18</sup> Another considerable group of cases is that having to do with easements connected with water, as where one has a right to have water come to him through a ditch, <sup>19</sup> raceway, <sup>20</sup> or canal <sup>21</sup> on another's land, or an easement to divert water from its natural course, <sup>22</sup> or to have flood waters

and make repairs necessary); Brandis v. Grissom, 26 Ind. App. 661, 60 N. E. 709 (leaving gates open over right of way).

16 Yates v. Jack, L. R. 1 Ch. App. 295; Hackett v. Boiss, L. R. 20
Eq. 494; Jordeson v. Sutton etc. Co., [1899] 2 Ch. D. 217, 68 L. J. Ch.
457, 80 L. T., N. S., 815, 63 J. P. 692; Warren v. Brown, 71 L J. K.
B. 12, 1 K. B. 15, 85 L. T. 447, 50 Week. Rep. 97; Staight v. Burr,
L. R. 5 Ch. App. 163; Martin v. Price, [1894] 1 Ch. 276; Lazarus v.
Artistic Photographic Co., [1897] 2 Ch. D. 214; Home etc. Stores v.
Colls, [1902] 1 Ch. 302, 71 L. J. Ch. 146, 85 L. T. 701, 50 Week. Rep.
227; Dent v. Auction Mart Co., L. R. 2 Eq. 238; Martin v. Headon,
L. R. 2 Eq. 425; Ecclesiastical Comm'rs v. Kino, L. R. 14 Ch. D. 213;
Robson v. Edwards, [1893] 2 Ch. 146.

17 Brown v. O'Brien, 168 Mass. 484, 47 N. E. 195; Bloom v. Koch,
63 N. J. Eq. 10, 50 Atl. 621; Hennen v. Deveny, 71 W. Va. 629,
L. R. A. 1917A, 524, 77 S. E. 142.

18 First Nat. Bank of Montgomery v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46, 59 L. R. A. 399, 32 South. 144; Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441, 52 L. R. A. 409, 49 Atl. 629. But see Doane v. Lake St. etc. Co., 165 Ill. 510, 56 Am. St. Rep. 265, 36 L. R. A. 97, 46 N. E. 520. See, also, Nieten v. Kimsey, 177 Ky. 817, 198 S. W. 203; United New Jersey R. & C. Co. v. Crucible Steel Co., 85 N. J. Eq. 7, 95 Atl. 243; affirmed, 86 N. J. Eq. 258, 98 Atl. 1087. Compare Bischof v. Merchants' Nat. Bank, 75 Neb. 838, 5 L. R. A. (N. S.) 486, 106 N. W. 996.

 <sup>19</sup> Croke v. Am. Nat. Bank of Denver, 18 Colo. App. 3, 70 Pac.
 229; Gregory v. Nelson, 41 Cal. 278; Cave v. Crafts, 53 Cal. 135.

<sup>&</sup>lt;sup>20</sup> Fulton v. Greocen, 36 N. J. Eq. 216.

<sup>&</sup>lt;sup>21</sup> London etc. Co. v. Evans, [1892] L. R. 2 Ch. D. 432; Maffet v. Quine, 93 Fed. 347.

<sup>22</sup> Quimey v. Stocker, L. R. 1 Ch. App. 396.

flow off over another's land,<sup>23</sup> or an easement of drainage,<sup>24</sup> or an easement in a reservoir.<sup>25</sup> Public easements, as rights of common,<sup>26</sup> or the right to have a public square free from buildings or other encroachments,<sup>27</sup> are also protected by injunction; and this may be procured by a private individual who shows special injury to himself, just as public nuisances may be enjoined by private parties.<sup>28</sup> Easements of support, as in a party-wall,<sup>29</sup> and easements of access to a street or highway<sup>30</sup> are other cases in which injunctions have been granted. A mere license when acted on so as to create an estoppel will also be protected by injunction

- 23 Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Faris v. Dudley, 78 Ala. 277, 56 Am. Rep. 24.
  - 24 Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165.
  - 25 Koenig v. City of Watertown, 104 Wis. 409, 80 N. W. 728.
- 26 Hall v. Byron, L. R. 4 Ch. D. 667; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. 130.
- 27 Rutherford v. Taylor, 38 Mo. 315; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255; Wheeler v. Bedford, 54 Conn. 244, 7 Atl. 22; Sturmer v. County Court etc. County, 42 W. Va. 724, 36 L. R. A. 300, 26 S. E. 532; East Atlanta Land Co. v. Mower, 138 Ga. 380, 75 S. E. 418. To the effect that an abutting owner may maintain suit, see Fessler v. Town of Union, 67 N. J. Eq. 14, 56 Atl. 272.
- 28 Rowzee v. Pierce, 75 Miss. 846, 65 Am. St. Rep. 625, 40 L. R. A.
  402, 23 South. 307; City of Chicago v. Ward, 169 Ill. 392, 61 Am.
  St. Rep. 185, 38 L. R. A. 849, 48 N. E. 927; Smith v. Heuston, 6 Ohio,
  101, 25 Am. Dec. 741. See, also, cases cited in last note, supra.
- 29 Phillips v. Bordman, 4 Allen, 147; Coggins & Owens v. Carey, 106 Md. 204, 124 Am. St. Rep. 468, 10 L. R. A. (N. S.) 1191, 66 Atl. 673. As to the right to enjoin the removal of underlying support by mining, see Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 16 L. R. A. (N. S.) 851, 69 Atl. 329, and cases cited in L. R. A. note.
- 30 Cunningham v. Fitzgerald, 138 N. Y. 165, 20 L. R. A. 244, 33 N. E. 840; West v. Brown, 114 Ala. 118, 21 South. 452; Martin v. Heckman, 1 Alaska, 165 (access to navigable water); Williams v. Los Angeles R'y Co., 150 Cal. 592, 89 Pac. 330; Salmon v. Martin, 156 Ky. 309, 160 S. W. 1058.

as if it were an easement.<sup>31</sup>. This list is not exhaustive, but it includes the more common classes of cases in which injunctions to prevent disturbance of easements have been issued.<sup>32</sup> On the other hand, one who has a right to an easement may be denied equitable relief for its disturbance because of his own inequitable conduct in reference to it.<sup>33</sup> And he himself will be enjoined at the suit of the owner of the servient tenement if he attempts to increase the easement, to which he is entitled, beyond its rightful limits;<sup>34</sup> in such case he is a trespasser.

- 31 Clark v. Glidden, 60 Vt. 702, 15 Atl. 358. See, also, Hazelton v. Putnam, 3 Chand. 117, 54 Am. Dec. 158, 3 Pinn. (Wis.) 107; Dodge v. Johnson, 32 Ind. App. 471, 67 N. E. 560 (irrevocable license protected).
- 32 Miscellaneous.—Piro v. Shipley, 211 Pa. 36, 60 Atl. 325. In the following cases injunctions were refused: Clarke v. Clark, L. R. 1 Ch. 16; Robson v. Whittingham, L. R. 1 Ch. App. 442; Castle v. Bell Tel. Co., 30 Misc. Rep. 38, 61 N. Y. Supp. 743; Goldsboro etc. Co. v. Hines, 126 N. C. 254, 35 S. E. 458; Pendarves v. Monro, [1892] L. R. 1 Ch. 611; Clark v. City of New York, 32 Misc. Rep. 52, 66 N. Y. Supp. 103; Bailey v. Gray, 53 S. C. 503, 31 S. E. 354. In Thomas Cusack Co. v. Mann, 160 Ill. App. 649, an injunction was granted. See, also, First Baptist Society v. Wetherell, 34 R. I. 155, 82 Atl. 1061 (overhanging eaves—dictum).
- 33 McBryde v. Sayre, 86 Ala. 458, 3 L. R. A. 861, 5 South. 791; McAlister v. Henderson, 134 Ind. 453, 34 N. E. 221; Bingham v. Salene, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523; Bullock v. Harrison, 145 Ky. 358, 140 S. W. 536.
- 34 Graves v. Smith, 87 Ala. 450, 13 Am. St. Rep. 60, 5 L. R. A. 298, 6 South. 308 (making openings in a party-wall); Danenhauer v. Devine, 51 Tex. 480, 32 Am. Rep. 627 (same as preceding case); Everly v. Driskill, 24 Tex. Civ. App. 413, 58 S. W. 1046 (same as preceding case); Harber v. Evans, 101 Mo. 661, 20 Am. St. Rep. 646, 10 L. R. A. 41, 14 S. W. 750 (same as preceding case); Allegheny Nat. Bank v. Reighard, 204 Pa. 391, 54 Atl. 268; Calmelet v. Sichl, 48 Neb. 505, 58 Am. St. Rep. 700, 67 N. W. 467 (increasing height of party-wall); Frowenfeld v. Casey, 139 Cal. 421, 73 Pac. 152 (same as preceding case); Woods v. Greensboro etc. Co., 204 Pa. 606, 54 Atl. 470.

§ 1962. (§ 548.) The Damage Necessary to Support an Injunction.—As a matter of reason, it would seem that consistently with the ground of equity to enjoin a continuing tort in order to prevent multiplicity of suits, no discussion of the amount of damage to justify an injunction would be required; that the question in every case would be the purely legal one, What damage is necessary to sustain an action at law? and the rule thus ascertained would control in equity when the wrong complained of is a continuing or recurring one. It has been shown that in dealing with cases of nuisance this is the ground the courts take; hence, for example, a pollution of air will be enjoined only if it causes actual damage to the plaintiff, but a pollution of water may be enjoined, though it causes no such damage, this being the distinction generally made between the two cases in actions at law. In cases of easements, however, this rule of the equity courts has not been followed. The language of Lord Eldon in Attorney-General v. Nichol35 is apparently responsible for the anomalous state of the law. That, it will be remembered, was a case of obstruction of ancient lights. The cases in which the question arose of the amount of damage necessary to sustain an injunction seem to have been almost exclusively cases of the same sort, with the result that Lord Eldon's dictum has been reduced to a rule of law expressed as follows: "We must not always give relief (it was so laid down by Lord Eldon and by Lord Westburn)36 where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive.

<sup>35 16</sup> Ves. 338. The language of Lord Eldon was: "There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained; or an action upon the case; which however might be maintained in many cases which would not support an injunction."

<sup>36</sup> Jackson v. Duke of Newcastle, 3 De Gex, J. & S. 275.

at any other conclusion than this: that where substantial damages would be given at law as distinguished from some small sum of £5, £10, or £20, this court will interpose."<sup>37</sup> This doctrine has been recognized frequently by the English courts,<sup>38</sup> though sometimes in language which indicates doubts of its soundness,<sup>39</sup> and there is at least one case which seems hardly reconcilable with it.<sup>40</sup> In America what authority there is has

37 Per Wood, V. C., in Dent v. Auction Mart Co., L. R. 2 Eq. 238. 38 Martin v. Headon, L. R. 2 Eq. 425; Robson v. Whittingham, L. R. 1 Ch. App. 442; Staight v. Burn, L. R. 5 Ch. App. 163; Warren v. Brown, 71 L. J. K. B. 12, [1902] L. R. 1 K. B. 15, 85 L. T. 444, 50 Week. Rep. 97; Martin v. Price, [1894] L. R. 1 Ch. 276; Home etc. Stores v. Colls, [1902] L. R. 1 Ch. 302, 71 L. J. Ch. 146, 85 L. T. 701, 50 Week. Rep. 227; s. c. on appeal, [1904] App. Cas. 179, 212; Lazarus v. Artistic etc. Co., [1897] L. R. 2 Ch. 214.

39 Johnson v. Wyatt, 33 L. J. Ch. 394, 397; Leech v. Schweder, L. R. 9 Ch. App. 463, 476; Aynsley v. Glover, L. R. 18 Eq. 544, 552. The particular passages referred to are collected in 1 Ames, Cases in Eq. Jur., pp. 535, 536, not.

40 Eccles, Comm'rs. for Eng. v. Kino, L. R. 14 Ch. D. 213. In this case Brett, L. J., adopted as the test for an injunction that "there must be a substantial deprivation of light, sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done." In Dent v. Auction Mart Co., supra, it was carefully explained that this was the rule for determining whether an action would lie at law, but that it did not control the granting of an injunction. See, also, tending in the same way as Brett's view, the opinions of James, L. J., in the same case, at page 220, and in Kelk v. Pearson, L. R. 6 Ch. App. 809, 812, and the opinion of Lord MacNaghten, in Colls v. Home etc. Stores, [1904] App. Cas. 179, 193. See, also, Lloyd v. London etc. R'y, 2 De Gex, J. & S. 567, 579. In Pennington v. Brinsop etc. Co., L. R. 5 Ch. D. 769, 773, Fry, J., distinguishes the rule above considered from that applied in cases of the pollution of running water in which an injunction is granted, though there is no actual damage, on the grounds, first, that as obstructions of light are generally permanent, the damages represent the depreciation in the value of the property affected. and that this is not true of the pollution of running water; and.

divided on the question, though most of the cases adopt the view that substantial damage is necessary to support an injunction.<sup>41</sup>

§ 1963. (§ 549.) Previous Trial at Law.—The effect on the plaintiff's right to an injunction of the fact that his legal right has not been settled previously in a suit at law, is the same as in cases of nuisance. As is pointed out in the discussion of that subject, the question is not involved in the granting or refusing of temporary in-

second, that as the plaintiff's use of running water may vary, it is impossible to foresee the extent of damages done by polluting it, while (by way of inference, he says) this is not true of interference of light. The first distinction is contrary to the following cases: Shadwell v. Hutchinson, 2 Barn. & Adol. 97; Battishill v. Reed, 18 Com. B. 696. See, also, Darley etc. Co. v. Mitchell, L. R. 11 App. Cas. 127; Crumbie v. Wallsend etc. Bd., [1891] 1 Q. B. 93. See Gale on Easements, 7th ed., p. 556. The second distinction is contrary to Yates v. Jack, L. R. 1 Ch. App. 295; Aynsley v. Glover, L. R. 18 Eq. 544, 10 Ch. App. 283, which establish fully the doctrine that the plaintiff's right to complain of an infringement of his easement of light does not depend on the use he is actually making of it, but on any use which he may wish to make of it.

41 Gray v. Manhattan etc. Co., 128 N. Y. 499, 28 N. E. 498; Wormser v. Brown, 149 N. Y. 163, 43 N. E. 524; Greer v. Van Meter, 54 N. J. Eq. 270, 33 Atl. 794; Wilson v. Cohen, Rice Eq. (S. C.) 80; Castle v. Bell Tel. Co., 30 Misc. Rep. 38, 61 N. Y. Supp. 743. Contra, Hacke's Appeal, 101 Pa. St. 245; Collins v. Buffalo etc. Co., 73 App. Div. 22, 76 N. Y. Supp. 420; Townsend v. Epstein, 93 Md. 537, 557, 558, 86 Am. St. Rep. 441, 52 L. R. A. 409, 49 Atl. 629. See, also. Hockersmith v. Glidewell (Ark.), 153 S. W. 252. In Danielson v. Sykes, 157 Cal. 686, 28 L. R. A. (N. S.) 1024, 109 Pac. 87, the court said: "The rule is that if an obstruction to a private easement is continuous, exclusive, and under claim of right, so that it will eventually destroy the easement by adverse possession thereof, an injunction will be granted against such obstruction, although substantial damage has not yet been caused by the obstruction. In such a case the damage will be substantial when the adverse occupation has extinguished the right of way. This is sufficient to justify the injunction to prevent the continued occupation. . . . "

junctions.42 On application for a permanent injunction, if the plaintiff's right is admitted by the defendant, a judgment at law is not required, as it is obviously unnecessary in such case. 43 So, too, though the defendant denies the plaintiff's right or the fact of a disturbance of it, yet if, on the evidence before it, the court is of the opinion that there is no substantial dispute, but, indeed, that the plaintiff's right is clear, the injunction will issue;44 the defendant's right to a trial at law at best extends no further than to doubtful questions. And even when the questions in dispute are doubtful, the court of equity will pass on them, if both parties consent or submit to the jurisdiction. 45 When, however, there is a substantial dispute between the parties, and they have not submitted to have it decided by the equity proceedings, the equity court will generally require the plaintiff to establish his right at law before granting an

<sup>42</sup> See Temporary Injunctions, infra, § 556; also chapter on Nuisance, ante, paragraph on same topic. But see Bonnell v. Meeker (N. J. Eq.), 82 Atl. 49.

<sup>43</sup> Kean v. Asch, 27 N. J. Eq. 57; Shivers v. Shivers, 32 N. J. Eq. 578; Gorton v. Tiffany, 14 R. I. 95; Bright v. Allan, 203 Pa. St. 386, 53 Atl. 248.

<sup>44</sup> Manbeck v. Jones, 190 Pa. St. 171, 42 Atl. 536; Hunter v. Wilcox, 23 Pa. Co. Ct. Rep. 191; Robertson v. Meyer, 59 N. J. Eq. 366, 45 Atl. 983; Richmond v. Bennett, 205 Pa. St. 470, 55 Atl. 17; White v. Flannigan, 1 Md. 525, 54 Am. Dec. 668; Hacke's Appeal, 101 Pa. St. 245; Boyd v. Woolwine, 40 W. Va. 282, 21 S. E. 1020.

<sup>45</sup> The following cases in which the equity courts decided the legal questions involved, nothing being said as to a previous trial at law, are probably to be put upon this ground: Ivimey v. Stocker, L. R. 1 Ch. App. 396 (legal effect of a custom); Corbett v. Jonas, [1892] L. R. 3 Ch. D. 137 (constructions of agreement implied in a sale of land); Phillips v. Treeby, 8 Jur., N. S., 999 (construction of agreement out of which the easement arose); Wheaton v. Maple, [1893] L. R. 3 Ch. D. 48 (question of prescription and construction of a statute); Newman v. Nellis, 97 N. Y. 285 (construction of agreement implied in a sale).

injunction.<sup>46</sup> This rule is one of expediency and policy based on the reluctance of equity to decide purely legal questions, and there is a tendency to disregard it in modern cases, even in the restricted form above stated. Accordingly it has been said that the equity court should itself determine the legal questions involved as an incident to its determination of the propriety of granting an injunction.47 In another case, the court remarked: "The point disputed is the character of the use which he is entitled to make of the wav-a question. not of fact to be found by a jury, but of law to be determined by a court upon an inspection of the alleged grant."48 And it has also been held that an injunction may issue without trial at law if the plaintiff has long enjoyed the privilege, interference with which is complained of.49

- § 1964. (§ 550.) Threatened Disturbances Nature of the Threat.—In dealing with cases of threatened disturbances of easements the courts apply the requirement usual to cases of threatened injuries, *viz.*, that there
- 46 Rhea v. Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Oswald v. Wolf, 129 Ill. 200, 21 N. E. 839; Perkins v. Foye, 60 N. H. 496; Oppenheim v. Loftus (N. J.), 50 Atl. 795; Hart v. Leonard, 42 N. J. Eq. 416, 7 Atl. 865; Bailey v. Culver, 84 Mo. 531; Howell Co. v. Pope etc. Co., 171 Ill. 350, 49 N. E. 497.
- 47 White v. Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199; Fulton v. Greacen, 36 N. J. Eq. 216, 221. To the same effect in case of nuisance, see Spokane etc. Co. v. Post, 50 Fed. 429.
- 48 Shreve v. Mathis, 63 N. J. Eq. 170, 52 Atl. 234. In the following cases, also, the equity courts construed instruments in order to determine the plaintiff's legal rights: Hay v. Knauth, 36 App. Div. 612, 55 N. Y. Supp. 680; Avery v. New York etc. Co., 106 N. Y. 142, 20 N. E. 619.
- 49 Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165. See, also, Nicolls v. Wentworth, 100 N. Y. 455, 3 N. E. 482. For other cases on the general topic of the above paragraph of the text, see 1 Ames, Cases in Eq. Jur., p. 552, which has furnished some of those cited in these notes to it.

must be imminent danger of the wrong occurring. Hence, when the defendant had erected a hoarding which obstructed the light coming to the plaintiff's building over the defendant's premises, for the purpose of testing the plaintiff's right, an injunction against the erection of a building of the same height as the hoarding was refused on the ground that there was no threat of erecting such a building, although the defendant was required to give an undertaking to give notice of his intention to build, and liberty to apply for an injunction was reserved to the plaintiff.<sup>50</sup> If a defendant is planning to build, however, that is a sufficient threat, and an injunction may be procured before the building is even commenced.51 So it is held that a sufficient threat is shown if the defendant merely claims the right to do the anticipated wrongful act, although he denies any present intention to act upon it;52 or, if a wrongful act is being done, it seems that is a sufficient threat of intention to repeat it, even if it were put an end to by abatement in a suit at law or otherwise.53

§ 1965. (§ 551.) Nature of the Injury Threatened.— The character of the threatened injury which will justify an injunction is simply that which would support an injunction on any ground, if it were already being done. Thus in an English case of apprehended obstruction of ancient lights, the court, after stating the principles

<sup>&</sup>lt;sup>50</sup> Smith v. Baxter, [1900] L. R. 2 Ch. D. 138.

<sup>51</sup> Aynsley v. Glover, L. R. 10 Ch. App. 283. It is a sufficient threat when one gives notice of his intention to close a private way: Nevels v. Golden, 147 Ga. 34, 92 S. E. 521. In general, see Ball v. Allen, 216 Mass. 469, Ann. Cas. 1917A, 1248, 103 N. E. 928.

<sup>52</sup> Hall v. Byron, L. R. 4 Ch. D. 667.

<sup>53</sup> Cadigan v. Brown, 120 Mass. 493; Riverdale Park Co. v. Westcott, 74 Md. 311, 28 Am. St. Rep. 249, 22 Atl. 270. For an instance of a threat held not sufficient to warrant an injunction, see Hockersmith v. Glidewell (Ark.), 153 S. W. 252.

which govern the subject, continued: "The application of these principles is far more easy when the building which is complained of has been erected and damages only are claimed; but they have to be applied when the plaintiff comes for an injunction before the building has been erected. It is the duty of the court to arrive at the best conclusion it can upon the effect which the proposed building, if erected, would produce; and if the court is satisfied that in that event the plaintiff would have a good cause of action, the plaintiff is entitled, as a matter of right, to an injunction to prevent the defendant from interfering with his ancient light; or, in other words, to restrain the defendant from committing a wrongful act."54 Hence, if the threat is only of such a tort as would give jurisdiction to a court of equity for the purpose of preventing multiplicity of suits, an injunction will nevertheless issue.55

54 Home etc. Stores v. Colls, [1902] L. R. 1 Ch. 302, 71 L. J. Ch. 146, 85 L. T. 701, 50 Week. Rep. 227. By the words, "cause of action," in the above quotation the court probably meant that substantial damage before referred to in the text which the English courts seem to require to support an injunction against the obstruction of light. For in the same paragraph from which the quotation is taken the court said: "Without substantial interference, there is no right of action; and, in addition, in order to obtain an injunction, the plaintiff must establish substantial injury suffered or threatened."

55 Cadigan v. Brown, 120 Mass. 493; Riverdale Park Co. v. Westcott, 74 Md. 311, 28 Am. St. Rep. 249, 22 Atl. 270. In the first of these cases the court, in overruling a demurrer for want of equity to a bill to enjoin obstruction of a right of way, said, per Morton, J.: "The injury to the plaintiff is permanent and continuous, and a judgment for damages would not furnish them adequate relief. It is true that in an action of tort for the nuisance, they might also obtain a judgment that the nuisance be abated and removed. But the power of a court of law can go no further than to remove the nuisance, while a decree of a court of equity may restrain the continuance or repetition of the nuisance." The basis of equity jurisdiction here is thus admittedly the prevention of multiplicity of

(§ 552.) The Balance of Injury.—The question how far a court should be influenced in its decision, whether to grant or to refuse an injunction, by a comparison of the injury to the defendant from granting it with the injury to the plaintiff from refusing it, has aspects very similar to those presented by the same question in cases of trespass. On the one side, there is the argument against granting injunctions which are oppressive or harsh to the defendant; on the other, the consideration that to refuse the injunction is to compel the plaintiff to sell his property against his will at a valuation, and that, too, in a case in which his legal remedy is admittedly inadequate (for the question does not arise, of course, till the jurisdiction of equity over the particular case has been established). It is probable that the apparent discrepancies between the cases on this point may, to some extent at least, be explained by the fact that the courts tend to give effect to the considerations which, in the particular case before them, outweigh on one side or the other, without a full discussion of the limits of the doctrine. Hence, it is not strange that as fairly typical cases as are to be found on both sides of the question come from the same juris-Thus, in one Massachusetts case<sup>56</sup> the court refused an injunction to remove buildings, because they had been erected innocently, and, as the plaintiff's tenancy was shortly to expire, the injury to him would be very small if the injunction were refused. But when the defendant continued to erect an obstruction over the plaintiff's right of way, knowing the plaintiff contested his right to do so, and the damage to the plaintiff was

suits; and, as the court also admits that the existing tort might be abated by a judgment at law, it is clear there is no reason for coming into equity as to it, but only to prevent its repetition; hence it is the purely threatened, as distinguished from the existing, tort that supports the jurisdiction.

<sup>56</sup> Brande v. Grace, 154 Mass. 210, 31 N. E. 633.

substantial, the same court granted an injunction, although the damage to the defendant from doing so was more than twice that which the plaintiff would have suffered from its refusal.<sup>57</sup> And the supreme court of Michigan in a bill to enjoin the defendant from encroaching three inches on the plaintiff's right of way for the purpose of improving his building, refused injunction because the defendant had begun his improvements, at least, in good faith, and the encroachment did not seriously interfere with the right of way, while enjoining it would have been a serious damage to the defendant.<sup>58</sup> But when the defendant proposed to change a stairway in which the plaintiff had an easement, and, pending a suit to enjoin him, actually did so, the same court compelled him to restore the stairway as it had been before, although to do so cost a large sum of money, while the testimony was contradictory whether the plaintiff would suffer any serious injury from the change of the easement or not.<sup>59</sup> None of these cases make a full statement of the conditions under which the balance of injury shall be considered. They all agree in one particular, however, viz., that the defendant who would claim its consideration in his favor must have committed the tort innocently;60 a willful wrong-doer is

<sup>57</sup> Tucker v. Howard, 128 Mass. 361.

<sup>58</sup> Hall v. Rood, 40 Mich. 46, 29 Am. Rep. 528. It has been said that the balance of injury should be considered when a mandatory injunction is sought: Hill v. Kimball, 269 Ill. 398, 110 N. E. 18; Andrews v. Cohen, 148 N. Y. Supp. 1028, 163 App. Div. 580 (citing the text). But see Longton v. Stedman, 182 Mich. 405, 148 N. W. 738.

<sup>59</sup> Ives v. Edison, 124 Mich. 402, 83 Am. St. Rep. 329, 50 L. R. A. 134, 83 N. W. 120.

<sup>60</sup> There is no apparent agreement among them, however, as to what would constitute an innocent infringement. Thus, in Brande v. Grace, *supra*, the court thought the defendant acted innocently because he committed the encroachment after the lower court had decided as a matter of law that the plaintiff had no right, and pend-

entitled to claim no favor. Doubtless all courts will agree, too, in holding that it shall not have any weight against an injury to the plaintiff of an irreparable character; <sup>61</sup> and probably it will be held that the disproportion of injury to be done by granting the injunction or by refusing it must be very strong in favor of the defendant, to bar granting it. For in cases in which the legal remedy is admittedly inadequate courts of equity will not readily permit a "wrong-doer to compel innocent persons to sell their right at a valuation." <sup>62</sup>

ing an appeal. In Ives v. Edison, supra, the facts were identical except that the decision of the lower court was simply that an injunction was not proper, instead of a denial of the plaintiff's legal right, and the court thought defendant's act was not an innocent wrongdoing; but in Hall v. Rood, supra, the same court thought the defendant satisfied the requirement of good faith because he began the tort in good faith, although the plaintiff objected at once to the encroachment. It would seem that on this point Hall v. Rood is wrong, and Brande v. Grace at least doubtful. It is hard to see how anyone can claim any immunity for a tort on the ground that it was innocently done, when at the time of doing it he knew his right to do it was disputed by the person affected.

61 See Hall v. Rood, 40 Mich. 46, 49, 29 Am. Rep. 528. Courts may differ on the point whether the injunction should not issue if the damages from the disturbance are substantial, even though not irreparable. See the chapter on Trespass, ante, on the same point.

62 Per Gray, C. J., in Tucker v. Howard, 128 Mass. 361. In the following cases the balance of injury was not given any effect: First Nat. Bank of Montgomery v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46, 59 L. R. A. 399, 32 South. 144; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Krehl v. Burrell, L. R. 7 Ch. D. 551. In the following cases it was said the court would be influenced by the balance of injury: Haskell v. Denver etc. Co., 23 Colo. 60, 46 Pac. 121 (public injury); Bailey v. Culver, 84 Mo. 531; St. Louis etc. Bank v. Kennett Estate, 101 Mo. App. 370, 74 S. W. 474; Gray v. Manhattan etc. Co., 128 N. Y. 499, 28 N. E. 498; Wormser v. Brown, 149 N. Y. 163, 43 N. E. 524; Collins v. Buffalo etc. Co., 73 App. Div. 22, 76 N. Y. Supp. 420; Currier's Co. v. Corbett, 2 Drew. & S. 355, 360; Heilman v. Lebanon etc. Co., 180 Pa. St. 627, 37 Atl. 119 (both public and private injury). See, also, Fisk v. Ley, 76 Conn. 295, 56 Atl. 559.

§ 1967. (§ 553.) Plaintiff's Right an Absolute One. Defenses to infringements of easements are often attempted on the theory that the plaintiff has no right to a definite thing, at least not so far as equitable protection is concerned, but only to a certain amount of utility or convenience over the defendant's land. This argument has been steadfastly denied by the courts, on the ground that the plaintiff has a definite property right, which he may protect just as he may his ownership of land. Hence, it has been held no defense to a bill that the plaintiff had more light<sup>63</sup> or a more extensive right of way<sup>64</sup> than he needed, and so was not entitled to enjoin an obstruction. Nor can the defendant justify on the ground that he is willing to give the plaintiff something equally beneficial but different from that to which the plaintiff has a legal right, as an aqueduct in place of a ditch.65 "It is the duty of the courts," said the judge in this case, "to protect a party in the enjoyment of his private property, not to license a trespass upon such property, or to compel the owner to exchange the same for other property to answer private purposes or necessities." And it has been held the same way with reference to giving reflected light instead of the direct rays to which the plaintiff was entitled, and which the defendant's building obstructed.66 Nor can the defendant take advantage of the fact that the plaintiff is himself obstructing his easement; it is nothing to the defendant what the plaintiff may wish to do with his own property.67 Within the same general principle are

 <sup>63</sup> Theed v. Debenham, L. R. 2 Ch. D. 165. See, also, Dyer's Co.
 v. King, L. R. 9 Eq. 438.

<sup>64</sup> White v. Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199.

<sup>65</sup> Gregory v. Nelson, 41 Cal. 278. See, also, Martin v. Price, [1894] L. R. 1 Ch. D. 276.

<sup>66</sup> Dent v. Auction Mart Co., L. R. 2 Eq. 238; Staight v. Burn, L. R. 5 Ch. App. 163; Hackett v. Baiss, L. R. 20 Eq. 494.

<sup>67</sup> Staight v. Burn, L. R. 5 Ch. App. 163.

the cases in which it is urged that the plaintiff is not entitled to an injunction because he can easily obviate the injury by means of his own. This argument is admissible, if at all, only within very narrow limits. when it was argued that the plaintiffs should not be given an injunction against interference with their light because they might have made their windows larger, the court said: "I apprehend it is not for the defendants to tell the plaintiffs how they are to construct their house, and to say, 'You can avoid this injury by doing something for which you would have no protection.' the plaintiffs constructed their new window it could be immediately obstructed as being a new window. have a right already acquired by their old existing window; that right they wish to have preserved intact; and I think they are clearly entitled to retain the right as they acquired it, without being compelled to make any alteration in their house to enable other people to deal with their property."68

§ 1968. (§ 554.) Relief Given.—In cases of disturbance of easements the courts have had occasion to discuss the granting of mandatory injunctions more often, perhaps, than in any other subject, because the tort more frequently than elsewhere consists in the creation of some permanent obstacle in the way of the exercise of

68 Dent v. Auction Mart Co., L. R. 2 Eq. 238; Nye v. Clark, 55 Mich. 599, 22 N. W. 57. See, however, Lining v. Geddes, 1 McCord Ch. (S. C.) 304, 16 Am. Dec. 606, in which the court refused to enjoin the buiding of a fence or cutting a ditch across a right of way, "either of which could be done in less time than a bill for an injunction could be drawn, and might be removed in less time than the motion for the dissolution of the injunction could be argued." The only ground of equity jurisdiction which the court recognized, however, was irreparable injury. Query, what the decision would have been if the prevention of multiplicity of suits had been admitted as a basis for equitable interference.

the plaintiffs' right. In Smith v. Smith<sup>69</sup> Sir George Jessel made the following able criticism of a somewhat common attitude towards them and clear statement of their controlling principle: "As to mandatory injunctions, their history is a curious one, and may account for some of the expressions used by the judges in some of the cases cited. At one time it was supposed that the court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance. 70 The court seems to have thought that there was some wonderful virtue in that form,<sup>71</sup> and that extra caution<sup>72</sup> was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution. Every judge ought to exercise care, and it is not more needed in one case than in another. In looking at the reason of the thing, there is not any pretense for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage, the court never has any hesitation in enjoining him. What difference could it make if instead of fouling it day by day he stopped it altogether? . . . When once the principle was established, why should it make any difference that the wrong-doer had done the wrong. or practically done it before the bill was filed? It could make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence." The argument thus made is sound in reason and has been

<sup>69</sup> L. R. 20 Eq. 500.

<sup>70</sup> See the form of injunction in Lane v. Newdigate, 10 Ves. 192.

<sup>71</sup> For other criticisms of this roundabout form of mandatory injunction, see Blakemore v. Glamorganshire etc. Co., 1 Mylne & K. 154, and Jackson v. Normanby etc. Co., [1899] L. R. 1 Ch. 438.

<sup>72</sup> See Durell v. Pritchard, L. R. 1 Ch. App. 244; Bailey v. Schnitzius, 45 N. J. Eq. 178, 16 Atl. 680.

frequently acted upon by the courts. 73 As will be shown subsequently it does not apply to the granting of temporary injunctions; and there is also one situation in which a difference may be made between prohibitory and mandatory injunctions even on applications for permanent injunctions. That situation is found in the small class of cases in which, under the limitations already indicated, the courts may properly give effect to the balance of injury as a reason for refusing an injunc-The reason for this is inherent in the nature of the case. If the balance of injury is to be applied, the fact that the defendant has a structure erected or other work done, which an injunction would compel him to destroy, makes the injury to be done to him by it so much greater than if a prohibitory injunction against it before its beginning had been granted.74

73 Mandatory injunctions requiring the defendant to remove obstructions to easements (destructive acts) were granted in the following cases; Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427; Russell v. Napier, 80 Ga. 77, 4 S. E. 857; Shivers v. Shivers, 32 N. J. Eq. (5 Stew.) 578; Hunt v. Sain, 180 Ill. 372, 54 N. E. 970; Baskett v. Tippin, 23 Ky. Law Rep. 1895, 66 S. W. 374; Lake Erie etc. Co. v. Essington, 27 Ind. App. 291, 60 N. E. 457; Bright v. Allan, 203 Pa. St. 394, 93 Am. St. Rep. 769, 53 Atl. 251; O'Brien v. Goodrich, 177 Mass. 32, 58 N. E. 151; White v. Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199; Haight v. Littlefield, 71 Hun, 285, 24 N. Y. Supp. 1097; Boland v. St. John's School, 163 Mass. 229, 39 N. E. 1035; Straus v. Putta, 265 Ill. 57, 106 N. E. 437; Longton v. Stedman, 182 Mich. 405, 148 N. W. 738; Bonnell v. Meeker (N. J. Eq.), 82 Atl. 49. Constructive acts were ordered in the following cases; Parker v. Wilson, 66 Ill. App. 91 (restoration of tiling and a ditch); Henry v. Koch, 80 Ky. 391, 44 Am. Rep. 484 (repair of a building); Ives v. Edison, 124 Mich. 402, 83 Am. St. Rep. 329, 50 L. R. A. 134, 83 N. W. 120 (construction of a stairway). See, also, Cleaver v. Mahanke, 120 Iowa, 77, 94 N. W. 279; Springer v. Darlington, 207 Ill. 238, 69 N. E. 946 (breach of party-wall agreement). As to showing necessary to obtain a mandatory injunction, see Hill v. Kimball, 269 Ill. 398, 110 N. E. 18.

74 This is the justification of the language of the court in Brande v. Grace, 154 Mass. 210, 31 N. E. 633, in which Allen, J.,

§ 1969. (§ 555.) Form of Injunction.—The form in which injunctions against disturbance of easements are to be expressed has only two points calling for mention. The first of these is the curious, indirect way in which mandatory injunctions have often been framed. Criticisms of this form in later cases have been referred to before, 75 and it can safely be said that the courts will discard it in favor of more direct statement of the decree made. The second point to be spoken of is the form used in that class of cases in which, like many nuisances, the tort itself arises out of a balancing of conveniences, and not per se from the mere doing of acts regardless of the manner in which or the extent to which they are done. Such are cases of diminution of light or of excessive or otherwise unreasonable use of a right of way. In this class of cases the courts so frame the injunctions as to preserve to the defendant the right to do the acts in question within legal limits.76

said: "In this case it is plain that the alterations are inconsistent with the rights of the plaintiffs under their lease. Under this state of things the defendants might properly have been enjoined from proceeding with their proposed alterations. . . . The rules under which mandatory injunctions have been issued for such a purpose should not be applied in a case like this." (For a fuller statement of this case see ante, paragraph on "The Balance of Injury.") In view of his language quoted in the text this must also be the meaning of Sir George Jessel in Hackett v. Baiss, L. R. 20 Eq. 494, 497: "I do not think with a completed building that the mere fact of its being a few inches too high would have induced the court to grant a mandatory injunction, even if the plaintiff's counsel had not waived it." See, also, Collins v. Buffalo etc. Co., 73 App. Div. 22, 76 N. Y. Supp. 420.

75 See ante, § 554, note 71.

76 Yates v. Jack, L. R. 1 Ch. App. 295, 298 (light); Hall v. Byron, L. R. 4 Ch. D. 667 (rights of common); Herman v. Roberts, 119 N. Y. 37, 16 Am. St. Rep. 800, 7 L. R. A. 226, 23 N. E. 442 (right of way); Cunningham v. Fitzgerald, 138 N. Y. 165, 20 L. R. A. 244, 33 N. E. 840 (right of access on street). In Hackett v. Baiss, L. R. 20 Eq. 494, the injunction specified the particular height to which a

Temporary Injunctions.—In grant-(§ 556.) ing temporary injunctions to protect easements, as in other cases, the court does not take jurisdiction for the purpose of settling the rights of the parties permanently, but simply to preserve the property until the legal title to it is established.<sup>77</sup> The title which the plaintiff must show in such a case is not, of course, an incontestable one; "he makes out a sufficient case when he satisfies the court that his claim is a substantial one, and that there is reasonable ground for doubting the validity of the title of his adversary." The injury against which protection is sought is that which is likely to occur before the question of title between the parties can be settled, that is, in the limited time before a decision of the pending suit can be had. Therefore the plaintiff must allege facts which show danger of such serious injury occurring in this time, as to require intervention of equity to protect the property, while the title to it is still in doubt. Hence the statement is frequently made that he must show a "strong and mischievous case of pressing necessity."79 This ordinarily means that he must show danger of irreparable injury,80 though it might be sufficient

building might go. In Walker v. Brewster, L. R. 5 Eq. 25, the court refused to adopt a specific form. And see Parker v. First Ave. Hotel, L. R. 24 Ch. D. 282.

77 Fulton v. Greacen, 36 N. J. Eq. 216; Todd v. Staats, 60 N. J. Eq. 507, 46 Atl. 645.

78 Id.

<sup>79</sup> Robeson v. Pittenger, 2 N. J. Eq. (1 H. W. Green) 57, 32 Am.
 Dec. 412; Oswald v. Wolf, 129 Ill. 200, 21 N. E. 839.

80 See the following cases in which temporary injunctions were refused because the plaintiff did not make out a sufficiently strong case of danger: Oswald v. Wolf, 129 Ill. 200, 21 N. E. 839; Naylor v. Carson (N. J.), 49 Atl. 529; Amelung v. Seekamp, 9 Gill & J. (Md.) 468; Gulick v. Fisher, 92 Md. 353, 48 Atl. 375; O'Rourke v. City of Orange, 51 N. J. Eq. (6 Dick.) 561, 26 Atl. 858. In Oswald v. Wolf, supra, the court, in refusing the injunction, said: "No interest will be jeopardized, no irreparable damage incurred by the delay necessary to a trial of his rights in that tribunal."

if he should establish that the defendant was insolvent;81 or, it would seem enough, if, for any other reason, the legal remedy for the wrong done pending the litigation would be inadequate. As the injunction is always granted at the risk of restraining one in the use of property to which he may eventually prove entitled, and refused at the risk of denying protection to a plaintiff who is entitled to it, the courts may properly inquire into the balance of injury here, and this is the practice followed.82 Ordinarily the relief afforded by temporary injunctions is prohibitory in nature, and it is sometimes said that mandatory temporary injunctions will not be readily granted,83 though it is admitted they can be used when a strong enough case is made. "The court is always very reluctant to grant a mandatory injunction on an interlocutory application, but where extreme or very serious damage would ensue from withholding it, as in cases of interference with easements, or other cases demanding immediate relief, it will be granted."84 This reluctance of the courts to grant such injunctions does not represent any difference of principle governing their issuance, but rather a difference in the state of facts.

<sup>81</sup> See Raleigh etc. Co. v. Glendon etc. Co., 112 N. C. 661, 17 S. E. 77.

<sup>82</sup> Fulton v. Greacen, 36 N. J. Eq. (9 Stew.) 216, 220, 221; Brower v. Williams, 44 App. Div. 337, 60 N. Y. Supp. 716; Darlington etc. Co. v. Pee Dee etc. Co., 62 S. C. 196, 40 S. E. 169. Temporary prohibitory injunctions were granted in the following cases: Staight v. Burn, L. R. 5 Ch. App. 163; Ecclesiastical Comm'rs for England v. Kino, L. R. 14 Ch. D. 213; Bock v. Stacey, 2 Russ. 121; Lord Battersea v. Commissioners etc. London, [1895] L. R. 2 Ch. D. 708; Robeson v. Pittenger, 2 N. J. Eq. (1 H. W. Green) 57, 32 Am. Dec. 412; Johnston v. Hyde, 25 N. J. Eq. 454, 33 N. J. Eq. 632; Stuyvesant v. Early, 33 Misc. Rep. 644, 68 N. Y. Supp. 903; Moffet v. Quine, 93 Fed. 347; Darlington etc. Co. v. Pee Dee etc. Co., 62 S. C. 196, 40 S. E. 169; Sutter v. Heckman, 1 Alaska, 81.

<sup>83 &</sup>quot;The Lord Chancellor said he never knew an order to pull down anything on motion": Ryder v. Bentham, 1 Ves. Sr. 543.

<sup>84</sup> Whitecar v. Michenor, 37 N. J. Eq. (10 Stew.) 6, 14.

Here, as in applications for prohibitory injunctions, the court must first be satisfied that there is a case of threatened injury for which the legal remedy will be inadequate, and, second, that the balance of injury does not even then require the injunction to be refused. And as the mandatory injunction requires the defendant to destroy or remove property, the balance of injury to him from granting an injunction is by that much increased.<sup>85</sup>

§ 1971. (§ 557.) Effect of Change of Conditions Pending Suit—On Permanent Injunctions.—The refusal of a temporary injunction does not affect the decree which will be made at the hearing. The defendant who pending the suit changes the existing condition, as by the erection of a building, does so at his own risk that the right may ultimately prove to be in the plaintiff. He cannot in such cases claim the advantage that the balance of injury might otherwise allow him, because he has acted with full notice of the other party's claim.86 And it is equally true, of course, that the plaintiff cannot rely upon the granting of a temporary injunction to strengthen his case at the hearing, nor as giving him a warrant to change his position in the expectation of doing so. The decree at the hearing, in other words, is wholly unaffected by the disposition of the motion for a

<sup>85</sup> Temporary mandatory injunctions were granted in the following cases: Hodge v. Giese, 43 N. J. Eq. (16 Stew.) 342, 11 Atl. 484; Beadel v. Perry, L. R. 3 Eq. 465; Ryder v. Bentham, 1 Ves. Sr. 543; Hervey v. Smith, 1 Kay & J. 389. See, also, Staight v. Burn, L. R. 5 Ch. App. 163, 166; Longwood etc. Co. v. Baker, 27 N. J. Eq. 166. A temporary mandatory injunction was refused in Bailey v. Schnitzius, 45 N. J. Eq. 178, 16 Atl. 680. See, also, in general, post, chapter XXX.

<sup>86</sup> Tucker v. Howard, 128 Mass. 361; Naylor v. Carson (N. J.), 49 Atl. 529; Krehl v. Burrell, L. R. 7 Ch. D. 551, affirmed in L. R. 11 Ch. D. 146; Botsford v. Wallace, 72 Conn. 195, 44 Atl. 10; Parker v. First Ave. Hotel Co., L. R. 24 Ch. D. 287; Home etc. Stores v. Colls, [1902] L. R. 1 Ch. D. 302, 313, 314.

temporary injunction.87 A defendant who violates a permanent injunction, by dong some work which has been prohibited will, of course, be compelled to undo it; he is in contempt and it will be "a mild use of the judge's discretion" if he is required to do no more than this.88 But when a defendant who had been temporarily enjoined from erecting structures beyond a certain height, violated the temporary injunction by the erection of certain chimneys, the court nevertheless on the hearing refused to order them removed because they caused no material injury.89 Here, too, the defendant was in contempt and might have been punished for it, but as the hearing showed he ought not to have been enjoined from erecting the chimneys by the temporary injunction, clearly there was no ground for compelling him to tear down what he might afterwards build up again. The defendant had neither harmed nor helped himself as to the matter of final equitable relief, by disobeying the injunction.

§ 1972. (§ 558.) On Temporary Injunctions. — A very similar question to this may be brought before the court on applications for temporary injunctions. A person who has been served with notice of a motion for a temporary injunction against the erection of a building, rushes work on the building with a large force of men, till the hearing of the motion. Has he affected his case with reference to the granting of a temporary injunction either for good or ill? All courts are agreed that he has not strengthened his position. They will not give any weight to the balance of injury in his favor

<sup>87</sup> See Daniel v. Ferguson, [1891] L. R. 2 Ch. D. 27; Von Joel v. Hornsey, [1895] L. R. 2 Ch. D. 774; Beadel v. Perry, infra.

<sup>88</sup> Murphey v. Harker, 115 Ga. 77, 41 S. E. 585.

<sup>89</sup> Beadel v. Perry, 19 L. T., N. S., 760, 17 Week. Rep. 185; s. c. (on earlier hearing), L. R. 3 Eq. 165, 15 L. T., N. S., 345, 15 Week. Rep. 120.

thus created, as to do so, would be to encourage circumvention of the court's jurisdiction. 90 On the other hand there are intimations in some of the English cases that such an erection will be ordered down even in cases in which it would not have been prohibited, "on the ground that the erection of it was an attempt to anticipate the order of the court,"91 This is clearly imposing punishment on the defendant, although he is not in contempt, and may easily subject him to an interlocutory injunction in cases in which, tried by the rules of injunction as measured by the plaintiff's title to it, the facts are not appropriate for granting that relief. It would seem that if such cases were approached just as though the application were for the prohibitory injunction which would have been sought but for the defendant's attempt to gain a wrongful advantage, and if the mandatory injunction were granted or withheld according as the prohibitory injunction would, in that situation, have been granted or withheld, better results would be reached. 92

<sup>90</sup> Smith v. Day, L. R. 13 Ch. D. 651; Daniel v. Ferguson, [1891]
L. R. 2 Ch. D. 27; Von Joel v. Hornsey, [1895] L. R. 2 Ch. D. 774;
Grey v. New York etc. Co., 56 N. J. Eq. (11 Dick.) 463, 40 Atl. 21.
See, also, Beadel v. Perry, L. R. 3 Eq. 456, 15 L. T., N. S., 345, 15
Week Rep. 120.

<sup>91</sup> Per Kay, L. J., in Daniel v. Ferguson, supra. The facts of this case are those supposed in the opening of the above paragraph of the text. See, also, Keeble v. Poole, 105 L. T. 474, 42 Sol. Jour. 791; Colls v. Home etc. Stores, [1894] App. Cas. 179, 193. In Von Joel v. Hornsey, supra, the defendant for several days evaded service of writ in an action to enjoin him from erecting a new building, and meantime hurried the building on. The court, on the hearing of the motion for a temporary injunction, ordered so much of the building as had been erected after the issuance of the writ to be pulled down, Lindley, L. J., saying: "If builders will take the chance of running up a building in that way, they must take the risk of pulling it down."

<sup>92</sup> In Daniel v. Ferguson, supra, Lindley, L. J., said: "The plaintiff makes out a case entitling him to an injunction to keep matters in statu quo till the trial. That being so, the defendant, upon re-

Even if it is necessary or desirable in such a case to inflict punishment on the defendant, which is, perhaps, doubtful, it is hard to see why it should be done by way of awarding relief to the plaintiff without regard to the merits of his case. The defendant is an object of punishment, if at all, for a wrong done to the court, not to the plaintiff.

§ 1973. (§ 559.) Complete Relief.—The usual rule of equity to give complete relief, legal and equitable, in a matter of which it has jurisdiction to award any relief, is applied in cases of enjoining disturbance of easements, so that a plaintiff in addition to an injunction may be given damages also.<sup>93</sup>

§ 1974. (§ 560.) Parties.—The parties who may enjoin disturbance of an easement are all those whose in-

ceiving notice that an injunction is going to be applied for, sets a gang of men to work and runs up his wall to a height of thirty-nine feet before he receives notice that an injunction has been granted. It is right that buildings thus run up should be pulled down at once, without regard to what the result of the trial may be." The opening sentence of this quotation makes it seem that he had in mind the suggestion of the text; nor is the sentence quoted from the opinion of the same judge, in Von Joel v. Hornsey, supra, last note preceding, necessarily inconsistent with it. It does not appear in Von Joel v. Hornsey but that a prohibitory injunction would have been allowed, had the defendant not hurried his building on. In Grey v. New York etc. Co., supra, the defendant company, fearing a rival company might delay or defeat its plans to procure consent from a township committee to lay tracks on a public highway, constructed its tracks on Sunday without procuring consent. The court on motion granted a temporary injunction against the use or further construction of the track. As this is clearly a case in which a prohibitory injunction against the laying of the track would have been granted, the court might very appropriately have gone further and ordered the track removed.

93 Downing v. Dinwiddie, 132 Mo. 92, 33 S. W. 470, 575. See, also, Oregon R. & Nav. Co. v. McDonald, 58 Or. 228, 32 L. R. A.
(N. S.) 117, 112 Pac. 413. But see Feitler v. Dobbins, 263 Ill. 78, 104 N. E. 1088.

terest is such that it may be injured beyond the extent for which legal remedies will be adequate. Thus, it has been held that a tenant from year to year may procure an injunction;94 and so may a tenant whose tenancy had but two years more to run.95 But when at the time of the hearing the plaintiff's lease had, in one case seven, 96 in another, eight, 97 months to run, injunctions were refused, the shortness of the time in both cases being an important element in making proper the application of the balance of injury doctrine.98 It has also been held that one who had only an agreement to take a lease might have an injunction in order to protect his equitable interest.99 And an owner of property which he did not occupy was granted an injunction against obstruction of light. 100 Under the same general principle, it is held that a railroad company has such an interest in its right of way as to be entitled to enjoin interference with it, as by the building of a bridge over it, 101 or the

<sup>94</sup> Simper v. Foley, 2 Johns. & H. 555.

<sup>95</sup> Robson v. Edwards, [1893] L. R. 2 Ch. 146.

<sup>96</sup> Brande v. Grace, 154 Mass. 210, 31 N. E. 633.

<sup>97</sup> Jacomb v. Knight, 32 L. J. Ch., N. S., 600, 11 Week. Rep. 812, 8 L. T., N. S., 621.

<sup>98</sup> Compare with these cases the following language of Wood, V. C., in Dent v. Auction Mart Co., L. R. 2 Eq. 238, 247, 248: "I may suggest a case in which the court would probably not interfere (not merely when the right is of short duration, for I have interfered in cases of very short duration with reference to the obstruction of light), but where the whole of the property is about to cease immediately—as, for instance, in the case of notice given under a Railway Act to take a house, when the house is about to be destroyed and razed to the ground in two or three days' time. That is one of the cases in which damages might be given at law, and yet this court would not think it right to interfere."

<sup>99</sup> Gale v. Abbot, 8 Jur., N. S., 987.

<sup>100</sup> Wilson v. Townsend, 1 Drew. & S. 324.

 <sup>101</sup> Northern etc. Co. v. Harrisburg etc. Co., 177 Pa. St. 142, 34
 L. R. A. 572, 35 Atl. 624.

laying of another track across it.<sup>102</sup> The defendant who may be enjoined is the person who is himself responsible for the wrong. Under this rule the owner of the servient tenement was not enjoined because third parties interfered with the plaintiff's right of way.<sup>103</sup>

102 Atlanta R'y etc. Co. v. Atlanta Rap. Transit Co., 113 Ga. 481, 39 S. E. 12.

103 Mulvaney v. Kennedy, 26 Pa. St. 44. See for cases in actions at law, Gale on Easements (7th ed.), p. 557.

## CHAPTER XXVI.

# INJUNCTIONS FOR THE PROTECTION OF WATER RIGHTS.

#### ANALYSIS.

§ 561. Pollution.

§ 562. Diversion or obstruction.

• § 563. Percolating waters.

§ 564. Navigation.

§ 1975. (§ 561.) Pollution.—Injunctions to protect water rights are very common illustrations of equitable intervention because of the inadequacy of legal remedies. The principles governing the equitable jurisdiction are essentially the same as in nuisance, the legal wrong being in the same class of torts. For a more detailed statement of these principles, therefore, reference should be made to the preceding chapter; herein are simply stated the more general rules as illustrated in the cases on water rights. Pollution of running waters is a matter of frequent injunction.<sup>2</sup> The grounds of the

<sup>1</sup> See ante, chapter XXIV.

<sup>&</sup>lt;sup>2</sup> Fuller v. Swan etc. Co., 12 Colo. 12, 19 Pac. 836; Dwight v. Village of Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; Barton v. Union Cattle Co., 28 Neb. 350, 26 Am. St. Rep. 350; Holsman v. Boiling Spring etc. Co., 14 N. J. Eq. 335; Winchell v. Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668; Townsend v. Bell, 42 N. Y. St. Rep. 229, 17 N. Y. Supp. 210; Goldsmid v. Tunbridge etc. Comm'rs, L. R. 1 Ch. App. 349, L. R. 1 Eq. 161; Holt v. Corp. of Rochdale, L. R. 10 Eq. 354; Chapman v. City of Rochester, 110 N. Y. 273, 6 Am. St. Rep. 366, 1 L. R. A. 296, 18 N. E. 88; Doremus v. Paterson, 65 N. J. Eq. 711, 55 Atl. 304, 69 N. J. Eq. 188, 57 Atl. 548; City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; Parker v. American Woolen Co., 195 Mass. 591, 10 L. R. A. (N. S.) 584, 81 N. E. 468; MacNamara v. Taft, 196 Mass. 597, 13 L. R. A. (N. S.) 1044, 83 N. E. 310; Attorney General v. City of Grand Rapids. 175

jurisdiction are to prevent multiplicity of suits because of a continuing or recurring wrong,3 or to prevent irreparable injury,4 or the fact that the damages are not susceptible of estimation, and hence a verdict would be in the nature of conjecture.<sup>5</sup> It is usually held, too, that it is a taking of property, and hence cannot be authorized by statute except by way of eminent domain with proper provision for making compensation;6 and even then it would not be constitutional if the taking is for a private purpose, and equity may enjoin for these reasons. If the pollution is only temporary and occasional, it will not be enjoined.8 It is the general doctrine that, since riparian owners have the right to have flowing water come to them in its natural purity, and so may bring repeated actions at law for pollution, even though it causes no damage, therefore equity will enjoin such pollution, regardless of the question of damage, in order

Mich. 503, Ann. Cas. 1915A, 968, 50 L. R. A. (N. S.) 473, 141 N. W. 890; Commonwealth v. Kennedy, 240 Pa. St. 214, 47 L. R. A. (N. S.) 673, 87 Atl. 605. But an injunction will not issue at the suit of an individual to prevent the pollution of a tidal navigable stream unless special injury is shown: Bouquet v. Hackensack Water Co., 90 N. J. L. 203, L. R. A. 1917F, 206, 101 Atl. 379.

- 3 Clowes v. Staffordshire etc. Co., L. R. 8 Ch. App. 125.
- 4 Grey, Attorney-General, v. Mayor etc. Paterson, 58 N. J. Eq. 1, 42 Atl. 749.
  - <sup>5</sup> Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763.
- <sup>6</sup> Platt v. City of Waterbury, 72 Conn. 531, 77 Am. St. Rep. 335, 48 L. R. A. 691, 45 Atl. 154; Grey, Attorney-General, v. Mayor etc. of Paterson, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 995; contra, City of Valparaiso v. Hagen, 153 Ind. 337, 74 Am. St. Rep. 305, 48 L. R. A. 707, 54 N. E. 1062.
- 7 Sterling Iron etc. Co. v. Sparks Mfg. Co., 55 N. J. Eq. 824, 41 Atl. 1117; affirming Beach v. Sterling etc. Co., 54 N. J. Eq. 65, 33 Atl. 286. But the legislature may grant the right to pollute tidal waters, since they belong to the public: Mayor etc. Newark v. Sayre, 60 N. J. Eq. 361, 48 L. R. A. 722, 45 Atl. 985, reversing 58 N. J. Eq. 136, 42 Atl. 1068.
  - 8 Peterson v. City of Santa Rosa, 119 Cal. 387, 51 Pac. 557.

to prevent multiplicity of suits.<sup>9</sup> If the nuisance is a public one, a private plaintiff can procure an injunction only upon showing special damage to himself.<sup>10</sup> It is no defense to a bill against one for pollution of a stream that others are also polluting it.<sup>11</sup> Nor, by the better authority, is it a defense that granting the injunction will harm the defendant more than refusing it will harm the plaintiff.<sup>12</sup> Having taken jurisdiction to enjoin the continuance of pollution, equity also awards damages on the principle of giving complete relief.<sup>13</sup>

§ 1976. (§ 562.) Diversion or Obstruction.—"It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this

- 9 Townsend v. Bell, 42 App. Div. 409, 59 N. Y. Supp. 203, affirming 62 Hun, 306, 17 N. Y. Supp. 210; Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589, affirmed in 168 N. Y. 664, 61 N. E. 1131; Crossley v. Lightower, L. R. 2 Ch. App. 478; Pennington v. Brinsop etc. Co., L. R. 5 Ch. D. 769; Young & Co. v. Bankier etc. Co., [1893] L. R. App. Cas. 691. See, also, Parker v. American Woolen Co., 195 Mass. 591, 10 L. R. A. (N. S.) 584, 81 N. E. 468. But see Wood v. Sutcliffe, 2 Sim., N. S., 163; Glenn v. Crescent Coal Co., 145 Ky. 137, 37 L. R. A. (N. S.) 197, 140 S. W. 43.
  - 10 Greene v. Nunnemacher, 36 Wis. 50.
- 11 Butler v. Village of White Plains, 59 App. Div. 30, 69 N. Y. Supp. 193; Sammons v. City of Gloversville, 34 Misc. Rep. 459, 70 N. Y. Supp. 284; Weston etc. Co. v. Pope, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719; Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 51 L. R. A. 687, 58 N. E. 142; Parker v. American Woolen Co., 195 Mass. 591, 10 L. R. A. (N. S.) 584, \$1 N. E. 468.
- 12 Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. 828. But see Grey, Attorney-General, v. Mayor etc. of Paterson, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 995; Parker v. American Woolen Co., 195 Mass. 591, 10 L. R. A. (N. S.) 584, 81 N. E. 468.
- 13 Seaman v. Lee, 10 Hun, 607; Rothery v. New York etc. Co., 24 Hun, 172; Davis v. Lambertson, 56 Barb. 480; Snow v. Williams, 16 Hun, 468.

right. To obstruct or divert a watercourse is a private nuisance." The remedy by injunction which equity affords is very frequently sought. "And the foundation of that jurisdiction," said the court in the same case quoted above, "is the necessity of a preventive remedy when great and immediate mischief, or material injury would arise to the comfort and useful enjoyment of prop-The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which upon just and equitable grounds ought to be prevented." If this oft-quoted language means anything more than that diversion of water will be enjoined when it is irreparable, or when, from its continuance, it would involve repeated suits at law to furnish redress to the plaintiff, and that generally the case will fall within one or both of these familiar heads of jurisdiction, it is believed the authorities do not support it; diversion of water is not per se a thing that will be enjoined. 15 It may, however, be enjoined without a showing of damage; but this results from the fact that at law the plaintiff may maintain an action without proof of damage, on account of the invasion of his right to have the water flow in its accustomed channel, and equity will enjoin under the same circumstances in order to avoid repeated litigation.16 Another ground of jurisdiction may be that,

<sup>14</sup> Per Chancellor Kent in Gardner v. Trustees etc. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526.

<sup>15</sup> In Westbrook Mfg. Co. v. Warren, 77 Me. 437, 1 Atl. 246, an injunction was refused because the diversion complained of was only temporary. See, also, Tuolumne Water Co. v. Chapman, 8 Cal. 392; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731.

<sup>Moore v. Clear Lake Water-works, 68 Cal. 46, 8 Pac. 816; Gould v. Eaton, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577; Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Union etc. Co. v. Danberg, 81 Fed. 73; Duesler v. City of Johnstown, 24 App. Div. 608, 48 N. Y. Supp. 683; Penrhyn etc. Co. v. Granville etc. Co., 84 App. Div. 92, 82 N. Y. Supp.</sup> 

though the injury is not irreparable in the sense of being one of such peculiar character that money will not pay for it, yet the amount of damage is incapable of ascertainment in amount, and equity will not leave the plaintiff to a verdict at law which "cannot be measured by any certain pecuniary standard," but must be based on conjecture;17 such a legal remedy is not adequate. A diversion which is only threatened, and not yet existing, if imminent and likely to cause irreparable injury, may be enjoined. 18 A diversion of water no greater in quantity than an amount which the defendant introduces into the stream above, will not be enjoined, as the plaintiff has no property in the water itself but only in its flowing, and this may be the same though the water is not the identical fluid naturally in the stream. 19 jurisdictions in which prior appropriators' rights are recognized at law, they will also be protected in equity.20 It is held that in determining the propriety of an injunc-

547; Rigney v. Tacoma etc. Co., 9 Wash. 576, 26 L. R. A. 925, 38 Pac. 147; Amsterdam etc. Co. v. Dean, 13 App. Div. 42, 43 N. Y. Supp. 29; Lehigh etc. Co. v. Scranton etc. Co., 6 Pa. Dist. Rep. 291; contra, New Haven etc. Co. v. Borough of Wallingford, 72 Conn. 293, 44 Atl. 235; Watson v. New Milford etc. Co., 71 Conn. 442, 42 Atl. 265; Fifield v. Spring Valley Water-works, 130 Cal. 552, 62 Pac. 1054; Jones v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 54 L. R. A. 630, 64 Pac. 855, 65 Pac. 368.

<sup>17</sup> Heilbron v. Fowler etc. Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Kimberley etc. Co. v. Hewitt, 75 Wis. 371, 44 N. W. 303. See, also, California Pastoral & A. Co. v. Enterprise C. & L. Co., 127 Fed. 741.

<sup>18</sup> Kimberley etc. Co. v. Hewitt, 75 Wis. 371, 44 N. W. 303.

<sup>19</sup> Society etc. Manfs. v. Morris etc. Co., 1 N. J. Eq. (Saxt.) 157, 21 Am. Dec. 41; Butte Canal Co. v. Vaughan, 11 Cal. 143, 70 Am. Dec. 769.

<sup>&</sup>lt;sup>20</sup> Butte Canal Co. v. Vaughan, 11 Cal. 143, 70 Am. Dec. 769; Ophir Min. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550; Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414; Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452; Saint v. Guerrerio, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335; Moe v. Harger, 10 Idaho, 194, 302, 77 Pac. 645.

tion the balance of injury between the plaintiff and the defendant will not be considered.<sup>21</sup> In addition to an injunction, equity will also give damages for past diversion.<sup>22</sup> If the defendant is a municipality or other body having the right of eminent domain, the decree may be so framed as to allow for the making of compensation instead of an unconditional injunction.<sup>23</sup> Riparian owners on non-navigable lakes have rights in the water such that they may enjoin draining or other diversion of it.<sup>24</sup> Cases of injunction against diversion of water other than those already cited are collected in the note below.<sup>25</sup> Obstruction of running water is a wrong of

- 21 Pine v. Mayor etc. N. Y., 103 Fed. 337; Deusler v. City of Johnstown, 24 App. Div. 608, 48 N. Y. Supp. 683; Smith v. Rochester, 38 Hun, 612, affirmed in 104 N. Y. 674; Acquackanonk etc. Co. v. Watson, 29 N. J. Eq. 366; Higgins v. Flemington etc. Co., 36 N. J. Eq. 538; Harper etc. Co. v. Mountain etc. Co., 65 N. J. Eq. 479, 56 Atl. 297; Corning v. Troy etc. Factory, 40 N. Y. 191, 34 Barb. 485, 39 Barb. 311, 6 How. Pr. 89.
  - 22 Roberts v. Vest, 126 Ala. 355, 28 South. 412.
  - 23 Lonsdale v. City of Woonsocket, 25 R. I. 428, 56 Atl. 448.
- <sup>24</sup> Webster v. Harris, 111 Tenn. 668, 59 L. R. A. 324, 69 S. W. 782, citing 1 Pom. Eq. Jur., § 95. See, also, Madson v. Spokane Valley Land & Water Co., 40 Wash. 414, 6 L. R. A. (N. S.) 257, 82 Pac. 718 (navigable lake).
- 25 Pugh v. Golden etc. Co., L. R. 15 Ch. D. 330; Oregon etc. Co. v. Allen etc. Co., 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455; Rupley v. Welch, 23 Cal. 452; Ferrea v. Knife, 28 Cal. 340, 87 Am. Dec. 128; Meng v. Coffee, 67 Neb. 500, 108 Am. St. Rep. 697, 60 L. R. A. 910, 93 N. W. 713; Britt v. Reed, 42 Or. 76, 70 Pac. 1029; Stoner v. Mau, 11 Wyo. 366, 72 Pac. 193, 73 Pac. 548; Kay v. Kirk, 76 Md. 41, 35 Am. St. Rep. 408, 24 Atl. 326; Raymond v. Winsette, 12 Mont. 551, 33 Am. St. Rep. 604, 31 Pac. 537; Rodgers v. Pitt, 129 Fed. 932; Miller & Lux v. Enterprise etc. Co., 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770; Miller & Lux v. Rickey, 127 Fed. 573; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. 49. Abstraction of water: Arthur v. Case, 1 Paige, 447; Mostyn v. Atherton, [1899] 2 Ch. 360; Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265; Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 22 L. R. A. (N. S.) 391, 99 Pac. 502; Miller v. Bay Cities Water Co., 157 Cal.

exactly the same character as diversion, being an interference with the riparian owner's right to have the stream in its quantity and manner, and as a subject of injunction, is governed by the same rules.<sup>26</sup>

256, 27 L. R. A. (N. S.) 772, 107 Pac. 115; Rogers v. Nevada Canal Co., 60 Colo. 59, Ann. Cas. 1917C, 669, 151 Pac. 923; Wilson v. East Jersey Water Co., 78 N. J. Eq. 329, 79 Atl. 440; Trullinger v. Howe, 53 Or. 219, 22 L. R. A. (N. S.) 545, 97 Pac. 548, 99 Pac. 880. As to the effect of acquiescence, see Montecito Val. Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Wilson v. East Jersey Water Co., 78 N. J. Eq. 329, 79 Atl. 440; Cobia v. Ellis, 149 Ala. 108, 42 South. 751.

26 Amsterdam etc. Co. v. Dean, 162 N. Y. 278, 56 N. E. 757, affirming 13 App. Div. 42, 43 N. Y. Supp. 29; City of Janesville v. Carpenter, 77 Wis. 288, 20 Am. St. Rep. 123, 8 L. R. A. 808, 46 N. W. 128; McKee v. Delaware etc. Co., 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305; Belknap v. Trimble, 6 Paige, 577; Koopman v. Blodgett, 70 Mich. 610, 14 Am. St. Rep. 527, 38 N. W. 649; Lone Tree Ditch Co. v. Rapid City etc. Co., 16 S. D. 451, 93 N. W. 650; Union Light etc. Co. v. Lichty, 42 Or. 563, 71 Pac. 1044. See, also, Ferry Pass Inspectors' & S. Ass'n v. Whites River Inspectors' & S. Ass'n, 57 Fla. 399, 22 L. R. A. (N. S.) 345, 48 South. 643; Ireland v. Bowman etc., 130 Ky. 153, 17 Ann. Cas. 786, 113 S. W. 56; Smart v. Aroostook Lumber Co., 103 Me. 37, 14 L. R. A. (N. S.) 1083, 68 Atl. 527; Viebahn v. Board of Crow Wing County Comm'rs, 96 Minn. 276, 3 L. R. A. (N. S.) 1126, 104 N. W. 1089; Morton v. Oregon Short Line R. Co., 48 Or. 444, 120 Am. St. Rep. 827, 7 L. R. A. (N. S.) 344, 87 Pac. 151, 1046; Royce v. Carpenter, 80 Vt. 37, 66 Atl. 888. The same rule applies to the obstruction of a drainage ditch: Robertson v. Lewie, 77 Conn. 345, 59 Atl. 409; Holm v. Montgomery, 62 Wash. 398, 34 L. R. A. (N. S.) 506, 113 Pac. 1115 (irrigation ditch). An owner entitled to riparian rights may enjoin interference by one who holds legal title in trust for the public: Mobile Transp. Co. v. City of Mobile, 153 Ala. 409, 127 Am. St. Rep. 34, 13 L. R. A. (N. S.) 352, 44 South. 976. An owner on one bank of a stream may enjoin the building of a levee on the other bank, when the effect will be to flood his land: Town of Jefferson v. Hicks, 23 Okl. 684, 24 L. R. A. (N. S.) 214, 102 Pac. 79. A village may enjoin a land owner from interfering with the normal flow of surface water: Village of Trenton v. Rucker, 162 Mich. 19, 34 L. R. A. (N. S.) 569, 127 N. W. 39.

§ 1977. (§ 563.) Percolating Waters.—As a result of the legal rule that one has no rights in percolating waters as such, it follows that equity will not interfere with their diversion or obstruction, even when the effect is to cause a spring or well of the plaintiff to dry up or diminish in flow.<sup>27</sup> But it has been held that one can thus take percolating waters from his neighbor only for use in connection with his land; hence taking it simply to waste it<sup>28</sup> or to sell it to a city for municipal purposes<sup>29</sup> has been enjoined. Neither does the doctrine concerning percolating waters apply to subterranean waters flowing in a defined channel, and interference with their flow may be enjoined by a person injured, as a prior appropriator in the jurisdictions where rights of appropriation are recognized,<sup>30</sup> or a person lower down

<sup>27</sup> Trustees etc. Delhi v. Youmans, 50 Barb. 316, 45 N. Y. 362, 6
Am. Rep. 100; Ellis v. Duncan, 21 Barb. 230. See Trinidad etc. Co. v. Ambard, 68 L. J. P. C. 114, [1899] App. Cas. 594, 81 L. T., N. S., 132, 48 Week. Rep. 116.

<sup>28</sup> Stillwater Water Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541, 60 L. R. A. 875, 93 N. W. 907; Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080. In New York, by statute, an injunction may issue to prevent waste by pumping a subterranean reservoir of mineral water: Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 128 Am. St. Rep. 555, 16 Ann. Cas. 989, 23 L. R. A. (N. S.) 436, 87 N. E. 504.

29 Forbell v. City of New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 51 L. R. A. 695, 58 N. E. 644. To the effect that in California percolating water cannot be taken for purposes of sale and use on other land, and that an injunction may issue, see the important case of Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 663, 74 Pac. 766. The right to an injunction may be lost by acquiescence: Barton v. Riverside Water Co., 155 Cal. 509, 23 L. R. A. (N. S.) 331, 101 Pac. 790.

30 Cole etc. Co. v. Virginia Co., 1 Sawy. 470, 686, Fed. Cas. No. 2989; Cross v. Kitts, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409. See, also, Vineland etc. Dist. v. Azusa etc. Co., 126 Cal. 486, 46 L. R. A.

on the channel.<sup>31</sup> Nor can a person by means of percolation interfere with the flow of a stream; this is no less a diversion than if he took the water directly from the stream by a ditch or other channel, and will be restrained in equity.<sup>32</sup> The right to interfere with percolating water is confined to diverting, obstructing, or abstracting it. If one pollutes it and in this condition it injures another, as by flowing into his well, it is a nuisance and as such may be enjoined;<sup>33</sup> and the same thing is true if one causes water to percolate into the land of another and cause injury.<sup>34</sup>

§ 1978. (§ 564.) Obstructions to Navigation. — Obstructions to navigation of navigable streams are, of course, primarily public nuisances and as such subject to indictment or restraint at suit of the proper public officer. If the obstruction is in tidal or other waters in which the state is the actual owner of the soil, it may be one which causes no injury to anyone. In such case it

<sup>820, 58</sup> Pac. 1057. Compare Hamby v. City of Dawson Springs, 126 Ky. 451, 12 L. R. A. (N. S.) 1164, 104 S. W. 259.

<sup>31</sup> Trustees etc. Delhi v. Youmans, 50 Barb. 316, 45 N. Y. 362, 6 Am. Rep. 100; Burroughs v. Satterlee, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808; Keeney v. Carillo, 2 N. M. 480; Taylor v. Welch, 6 Or. 198; Saint Amand v. Lehman, 120 Ga. 253, 47 S. E. 949.

<sup>32</sup> Grand Junction etc. Co. v. Shugar, L. R. 6 Ch. D. 483; Vineland etc. Dist. v. Azusa etc. Co., 126 Cal. 486, 46 L. R. A. 820, 58 Pac. 1057; Proprietors of Mills v. Braintree etc. Co., 149 Mass. 478, 4 L. R. A. 272, 21 N. E. 761.

<sup>33</sup> Ballard v. Tomlinson, L. R. 29 Ch. D. 115; Sutton v. Findlay Cemetery Ass'n, 270 Ill. 11, Ann. Cas. 1917B, 559, L. R. A. 1916B, 1135, 110 N. E. 315; Gilmore v. Royal Salt Co., 84 Kan. 729, 34 L. R. A. (N. S.) 48, 115 Pac. 541; Ulmen v. Town of Mt. Angel, 57 Or. 547, 36 L. R. A. (N. S.) 140, 112 Pac. 529.

<sup>34</sup> Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989.

is not a nuisance but simply a purpresture, which is an intrusion upon the proprietary rights of the state, or crown, which may be remedied by an information of intrusion at common law or an information in equity at suit of the attorney-general, and, in the latter event, it is said that the court of equity may refuse an injunction if the purpresture does no damage to anyone.35 however, the obstruction actually interferes with navigation, it is a nuisance as well as a purpresture, and in this aspect it is subject to the usual rules concerning public nuisances. It may be enjoined at suit of the attorney-general or other proper public officer on behalf of the state, if the legal remedy is inadequate.<sup>36</sup> question whether a nuisance exists or not is doubtful, a suit at law to establish the fact is required.37 nuisances may not only be enjoined by the proper public official, but also by a private individual who shows

<sup>35</sup> See Wood on Nuisances (3d ed.), pp. 107-125; Gould on Waters (3d ed.), §§ 21, 93; People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351, affirming 38 Barb. 282; Attorney-General v. Eau Claire, 37 Wis. 400; Revell v. People, 177 Ill. 468, 69 Am. St. Rep. 257, 43 L. R. A. 790, 52 N. E. 1052; People v. Mould, 37 App. Div. 35, 55 N. Y. Supp. 453, reversing 24 Misc. Rep. 287, 52 N. Y. Supp. 1032.

<sup>36</sup> Georgetown v. Alexandria Canal Co., 12 Pet. 91, 9 L. Ed. 1012; Attorney-General v. Jamaica Pond Co., 133 Mass. 361; Pennsylvania v. Wheeling etc. Co., 13 How. 518, 14 L. Ed. 249; People v. Gould etc. Co., 66 Cal. 138, 56 Am. Rep. 80; State v. Columbia Water Power Co., 82 S. C. 181, 129 Am. St. Rep. 876, 17 Ann. Cas. 343, 22 L. R. A. (N. S) 435, 63 S. E. 884. And the fact that an obstruction will benefit the public will not warrant the refusal of an injunction: State v. Columbia Water Power Co., 82 S. C. 181, 129 Am. St. Rep. 876, 17 Ann. Cas. 343, 22 L. R. A. (N. S.) 435, 63 S. E. 884.

<sup>37</sup> Earl of Ripon v. Hobart, 3 Mylne & K. 169; Crowder v. Tinkler, 19 Ves. 617.

special damage to himself<sup>38</sup> and that his legal remedy is inadequate.<sup>39</sup>

38 Pascagoula etc. Co. v. Dixon, 77 Miss. 587, 78 Am. St. Rep. \_537, 20 South. 724; Morris v. Graham, 16 Wash. 343, 58 Am. St. Rep. 33, 47 Pac. 752; Mayor etc. N. Y. v. Baumberger, 7 Rob. (N. Y.) 219; Cherry Point etc. Co. v. Nelson, 25 Wash. 558, 66 Pac. 55; Esson v. Wattier, 25 Or. 7, 34 Pac. 756; Carvalho v. Brooklyn etc. Co., 56 App. Div. 522, 67 N. Y. Supp. 539.

Injunction to protect oyster-beds.—Cain v. Simonson (Ala.), 3 L. R. A. (N. S.) 205, 39 South. 571.

39 Harlan etc. Co. v. Paschall, 5 Del. Ch. 435; Walker v. Shepardson, 2 Wis. 384, 60 Am. Dec. 423; Pedrick v. Raleigh & P. S. R. Co., 143 N. C. 485, 10 L. R. A. (N. S.) 554, 55 S. E. 877. But a private individual must make out a clear case of special injury: Whitmore v. Brown, 102 Me. 47, 120 Am. St. Rep. 454, 9 L. R. A. (N. S.) 868, 65 Atl. 516.

## CHAPTER XXVII.

# INJUNCTIONS TO PROTECT PATENTS; COPY-RIGHTS AND LITERARY PROPERTY; TRADE-MARKS AND TRADE-NAMES; EXCLUSIVE FRANCHISES.

### ANALYSIS.

§§ 565-573. Patents.

§ 565. In general.

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§ 567a. Paper patents.

§ 568. Incidental relief—Accounting—Damages.

§ 569. Retention of bill after failure of right to injunctive relief.

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§ 570. Defenses-Established license fee; hardship.

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§§ 574-576. Copyrights.

§ 575. Same; preliminary injunctions.

§ 575a. Final injunction and accounting.

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§§ 577-582. Trade-marks, etc.

§ 577. Trade-marks.

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§ 577b. Same; infringement.

§ 577c. Same; preliminary injunction.

§ 577d. Same: laches.

§ 577e. Same; clean hands.

§ 577f. Same; accounting.

§ 578. Unfair competition.

§ 579. Same—Continued.

§ 579a. Same; labels.

§ 579b. Same; refilling.

§ 579c. Same; name of play or book.

§ 579d. Same; geographical names.

§ 579e. Same; advertising.

§ 579f. Same; accounting.

§ 580. Trade-names.

§ 581. Corporate names.

§ 582. Application of "clean hands" maxim.

§§ 583-584. Exclusive franchises.

§ 584. Same—Continued.

§ 1979. (§ 565.) Patents—In General. — The jurisdiction of equity to restrain infringements of patents is well settled. The right granted by a patent is not to practice the invention, but to exclude others from practicing it. The obvious method of protecting this right is by injunction.

An action at law for damages might be brought, and it was formerly said that equity would not grant an injunction until the rights of the plaintiff had been established by an action at law.<sup>2</sup> This rule is now obsolete.<sup>3</sup> The remedy at law has proved ineffective and undesirable. Even if in form an action for damages, parties prefer to have the issues determined by the court alone.<sup>4</sup> As was well said by Judge Lacombe, the decision of the intricate questions in an infringement case by a jury is a lottery.<sup>5</sup>

- 1 U. S. Const., art. I, § 8, subsec. 8; Bloomer v. McQuewan, 14 How. 539, 549, 14 L. Ed. 532, 537.
- <sup>2</sup> Ogle v. Ege, 4 Wash. C. C. 584, Fed. Cas. No. 10,462; Woodworth v. Edwards, 3 Woodb. & Min. 120, Fed. Cas. No. 18,014; Goodyear v. Day, 2 Wall. Jr. 283, Fed. Cas. No. 5569; Doughty v. West, 2 Fish. Pat. Cas. 553, Fed. Cas. No. 4029.
- 3 Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 869, 48 C. C. A. 72; Wise v. Grand Avenue R'y Co., 33 Fed. 277.
- 4 Prepayment Car Sales Co. v. Orange County Traction Co., 214 Fed. 402.
  - 5 Wyckoff v. Wagner Typewriter Co., 88 Fed. 515.

Under the constitution, the cognizance of suits arising under the patent laws belongs exclusively to the federal courts.<sup>6</sup> Diversity of citizenship is unnecessary.<sup>7</sup> But the suit must be based on the patent law. It is not enough that it relate to a patent right. Thus an action for royalties or for the purchase price of a patent, or to enforce or set aside a contract, though such contract be connected with a patent, is not a suit arising under the patent laws, and a federal court has no jurisdiction without diversity of citizenship, even though the defense is the invalidity of the patent.<sup>8</sup> On the other hand, an action for an injunction for the infringement of a patent must be brought in the federal courts, and jurisdiction is not lost by the sole defense being the existence of a license.<sup>9</sup>

As in all cases coming within the jurisdiction of law or equity, the complainant must show a right in himself and a violation thereof by the defendant. To establish this right, he must prove two distinct elements, viz.: (1) That he is the legal or equitable owner of a patent right, and (2) that the patent is valid. The violation of the right is the infringement of the patent.

§ 1980. (§ 566.) Requisites of Bill.—The practice in federal equity cases is governed by the equity rules

<sup>6</sup> U. S. Const., art. III, § 2; Judicial Code, § 24, subsec. 7.

<sup>7</sup> Re Hohorst, 150 U. S. 653, 661, 37 L. Ed. 1211, 14 Sup. Ct. 221.

<sup>8</sup> Herzog v. Heyman, 151 N. Y. 587, 56 Am. St. Rep. 646, 45 N. E.
1127; Pratt v. Paris Gas Light & Coke Co., 168 U. S. 255, 259, 42
L. Ed. 458, 18 Sup. Ct. 62; Excelsior Wooden-Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 285, 46 L. Ed. 910, 22 Sup. Ct. 681.

<sup>9</sup> Chadeloid Chemical Co. v. Johnson, 203 Fed. 993, 122 C. C. A. 293, "A patentee who has given a license under restrictions may sue for an injunction, on the theory that the patent has been infringed by the breach of the conditions on which the patent was granted, a suit arising out of the patent laws, or he may waive the tort of infringement and sue on the broken contract, in which case a federal court would not have jurisdiction": Henry v. A. B. Dick Co., 224 U. S. 1, 14, Ann. Cas. 1913D, 880, 56 L. Ed. 645, 32 Sup. Ct. 364.

revised in 1912 by the supreme court. The procedure has been much simplified and the expense of a suit reduced. The former elaborate method of pleading has been done away with.<sup>10</sup>

An allegation of present or threatened infringement is essential.<sup>11</sup> If the defendant has ceased his infringement, there is no need of equitable relief, and the plaintiff will be remitted to an action for damages at law.<sup>12</sup> There is, however, a presumption that one who has once infringed will do so again, and jurisdiction is not lost by an answer alleging that infringement has ceased.<sup>13</sup>

The customary allegation of a previous decision in plaintiff's favor at law, or in the patent office, or such public acquiescence as will create a presumption of the validity of the patent, is unnecessary. The mere grant of the patent is *prima facie* proof of its validity, and if infringement is clear, the plaintiff's case is established.<sup>14</sup>

A court of equity will try the validity of the patent without the intervention of a jury.<sup>15</sup> The reason given for the exercise of this jurisdiction is that a verdict of

<sup>10</sup> Equity Rules 25 ff.

<sup>11</sup> Tindel-Morris Co. v. Chester Forging etc. Co., 163 Fed. 304; Chester Forging & Eng. Co. v. Tindel-Morris Co., 165 Fed. 899, 91 C. C. A. 577.

<sup>12</sup> Chadeloid Chemical Co. v. Johnson, 203 Fed. 993, 122 C. C. A. 293; Kennicott Water Softener Co. v. Bain, 185 Fed. 520, 107 C. C. A. 626; Ferguson-McKinney Dry Goods Co. v. J. A. Scriven Co., 165 Fed. 655, 91 C. C. A. 491; Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 215 Fed. 594, 131 C. C. A. 662.

<sup>13</sup> General Electric Co. v. Bullock Electric Mfg. Co., 138 Fed. 412; Deere & Webber Co. v. Dowagiac Mfg. Co., 153 Fed. 177, 82 C. C. A. 351; Crier v. Innes, 170 Fed. 324, 95 C. C. A. 508.

<sup>14</sup> Fuller v. Gilmore, 121 Fed. 129; Palmer v. Wilcox Mfg. Co., 141 Fed. 378.

<sup>15</sup> Wirt v. Hicks, 46 Fed. 71; Ames, Cas. in Eq. Jur. 626; Wyckoff
v. Wagner Typewriter Co., 88 Fed. 515; Sanders v. Logan, 2 Fish.
Pat. Cas. 167, Fed. Cas. No. 12,295.

a jury in a case so intricate as one involving the validity of a patent is generally far from satisfactory.<sup>16</sup>

§ 1981. (§ 567.) Magnitude of Injury is Immaterial. The right to a permanent injunction does not depend in any degree upon the magnitude of the injury which the plaintiff has suffered.<sup>17</sup> He has an exclusive right which he is entitled to have protected.

§ 1982. (§ 567a.) Paper Patents.—It was long a disputed question whether a court of equity would grant an

16 Referring to the rule first laid down above, Lacombe, Cir. J., in Wyckoff v. Wagner Typewriter Co., 88 Fed. 515, said: "The rule thus laid down would seem to introduce a most cumbersome, dilatory and unsatisfactory practice. In cases where infringements commenced as soon as the patent was published to the world, it would be impossible for the patentee to show long-continued acquiescence by the public, and he could obtain no relief against infringements until after he had secured a verdict from a jury sustaining the validity of his patent. . . . When one remembers the careful study of intricate machinery, the manipulation of models, the reading and re-reading of technical evidence, the elaborate comparison of documents couched in language which certainly is not that of common speech, the close, hard thinking, sometimes prolonged for weeks, which, in the cases of a complicated patent, has to be gone through with, before a judge, however long his experience with such causes, is able to reach a conclusion on the issues of fact, which, even if erroneous, presents at least the appearance of a logical train of reasoning in its support, it seems safe to say, a priori, that the decision of such questions by an ordinary jury, imprisoned for a few hours, with naught but their vague recollections of the evidence, would be a lottery. . . . For these reasons this court is averse to rendering a decision which would introduce such a practice into this circuit, unless constrained to do so by controlling authority."

17 Wirt v. Hicks, 46 Fed. 71, Ames, Cas. in Eq. Jur., 626; Colgate v. International Ocean Tel. Co., 17 Blatchf. 308, Fed. Cas. No. 2993 ("The right of the plaintiff to use his patented invention where the defendant is using it, is exclusive as against the defendant, although the right of the defendant to lay and maintain a submarine telegraphic cable between Florida and Cuba may be exclusive as against the plaintiff").

injunction in the case of a patent which had never been put into use. 18 This is now settled in the affirmative by the supreme court, 19 the opinion, however, concluding, "whether, however, a case cannot arise where in view of the public interest, a court of equity might be justified in withholding relief by injunction, we do not determine." On the principle we have already stated that the right granted by the patent is the right to exclude, it is evident that in general the use or non-use by the plaintiff of his invention is immaterial. Within the past few years, however, Congress has been twice asked to amend the patent laws in analogy with foreign statutes compelling the granting of licenses, and to refuse relief by injunction to inventors who make no use of their inventions.

§ 1983. (§ 568.) Incidental Relief — Accounting — Damages.—It is a settled principle of equity that where jurisdiction is taken for one purpose it will be retained in order to award full relief. Accordingly, equity, after granting a permanent injunction against the infringement of a patent, will retain the bill to decree an account of profits and sometimes to award damages. The distinction between profits in equity and damages must be

18 Injunction granted: Campbell Printing-Press & Mfg. Co. v. Manhattan R'y Co., 49 Fed. 930; Ames, Cas. in Eq. Jur., 639; United States Fastener Co. v. Bradley, 149 Fed. 222, 79 C. C. A. 180; Fuller v. Berger, 120 Fed. 274, 277, 65 L. R. A. 381, 56 C. C. A. 588. Injunction refused: Hoe v. Knap, 27 Fed. 204, 212; Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co., 86 Fed. 315, 331; dissenting op., Continental Paper Bag Co. v. Eastern Paper Bag Co., 150 Fed. 741, 744, 80 C. C. A. 407; Article by Paul Bakewell in Green Bag for July, 1907.

19 Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 L. Ed. 1122, 28 Sup. Ct. 748, setting forth at page 422, 210 U. S., conflicting decisions of lower courts; E. Bement & Sons v. National Harrow Co., 186 U. S. 70, 90, 46 L. Ed. 1058, 22 Sup. Ct. 747.

carefully noted.20 "Profits are the gains or savings made by the wrong-doer by the invasion of the complainant's property right in his patent. They are the direct pecuniary benefits received, and are capable of definite measurement."21 "If an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits."22 Originally, damages could not be awarded in an equitable action to restrain infringement; 23 but this rule has been changed by statute. "Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision is, that the complainant 'shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby." "24 A bill in equity

 <sup>20</sup> Diamond Stone-Sawing Mach. Co. v. Brown, 166 Fed. 306, 92
 C. C. A. 224.

<sup>21</sup> Head v. Porter, 70 Fed. 498, Ames, Cas. in Eq. Jur., 644.

<sup>22</sup> City of Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. Ed. 1000; Head v. Porter, 70 Fed. 498, Ames, Cas. in Eq. Jur., 644.

<sup>23</sup> City of Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. Ed. 1000.

<sup>24</sup> Act of July 8, 1870, 16 Stats. at L. 198; Birdsall v. Coolidge, 93 U. S. 64, 23 L. Ed. 802 ("Examples of the kind may be mentioned, where the business of the infringer was so improvidently conducted that it did not yield any substantial profits, and cases where the products of the patented improvements were sold greatly below their just and market value, in order to compel the owner of the patent, his assignees and licensees, to abandon the manufacture of the patented product"; Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664, 8 Sup. Ct. 894. A complainant cannot recover both damages and profits: Yesbera v. Hardesty Mfg. Co., 166 Fed. 120, 92 C. C. A. 46; Peerless Brick Machine Co. v. Miracle Pressed Stone Co., 181 Fed. 526. The proper practice is for the master to compute damages and profits separately, and the complainant may elect which to take: Beach v. Hatch, 153 Fed. 763.

for a naked account of profits and damages against an infringer of a patent, cannot be sustained. "Such relief is ordinarily incidental to some other equity, the right to enforce which secures to the patentee his standing in court.<sup>25</sup>

25 Root v. L. S. & M. S. R'y Co., 105 U. S. 189, 26 L. Ed. 975 (per Matthews, J.: "Our conclusion is . . . that the most general ground for equitable interposition is, to insure to the patentee the enjoyment of his specific right by an injunction against a continuance of the infringement; but, that grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate and incomplete; and as such cases canot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule''); Hayward v. Andrews, 106 U. S. 672, 27 L. Ed. 271, 1 Sup. Ct. 544; Vaughan v. Central Pac. R. Co., 4 Sawy. 280, Fed. Cas. No. 16,897; Lord v. Whitehead, 24 Fed. 801; Adams v. Bridgewater Iron Co., 26 Fed. 324; Creamer v. Bowers, 30 Fed. 185; Germaine v. Wilgus, 67 Fed. 597, 14 C. C. A. 561; Russell v. Kern, 69 Fed. 94, 16 C. C. A. 154; Corbin v. Tausig, 137 Fed. 151, 153. See Leslie v. William Mann Co., 157 Fed. 236, where no injunction was asked, but jurisdiction was sustained because of the necessity of discovery and accounting.

Rules as to Accounting and Damages.—An accounting should be refused where the expense would be disproportionate to the benefit of the complainant: Perkins Electric Switch Mfg. Co. v. Yost Electric Mfg. Co., 189 Fed. 625. Established license fees are the best evidence of damages: Fox v. Knickerbocker Engraving Co., 158 Fed. 422; American Sulphite Co. v. De Grasse Paper Co., 193 Fed. 653, 113 C. C. A. 521; but see Bredin v. National Metal etc. Co., 182 Fed. 654 (where patentee reserved a right to manufacture). The burden is on the complainant to show damages, but if the defendant has commingled the elements so as to make it impossible for the complainant to separate them, the defendant must be treated as a trustee ex maleficio who has confused his gains, and must be held liable for

§ 1984. (§ 569.) Retention of Bill After Failure of Right to Injunctive Relief.—Where a bill in equity is brought upon a patent, and during the pendency of the suit the right to an injunction fails by reason of the

all: Westinghouse Electric & Mfg. Co. v. Wagner Electric etc. Co., 225 U. S. 604, 605, 41 L. R. A. (N. S.) 653, 56 L. Ed. 1222, 32 Sup. Ct. 691. In the case just cited, the supreme court laid down the following rules as to measure of damages: (1) Where the defendant has sold or used the patented device, complainant is entitled to all the profits. (2) Where the patent, although using old elements, gives the entire value to the combination, the complainant is entitled to all the profits. (3) Where the profits are made by the use of the article as an entirety, the complainant is entitled to all the profits, unless the defendant can show that part is the result of something else, as to which the burden of proof is on him: Carborundum Co. v. Electric Smelting etc. Co., 203 Fed. 976, 122 C. C. A. 276; Seeger Refrigerator Co. v. American Car & Foundry Co., 219 Fed. 565, 135 C. C. A. 333. (4) But if the patent is only on a part of the machine and creates only a part of the profits, the burden is on the complainant to show how much is due to his invention: Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. 641, 59 L. Ed. 398, 35 Sup. Ct. 221; Seeger Refrigerator Co. v. American Car & Foundry Co., 219 Fed. 565, 135 C. C. A. 333; Beckwith v. Malleable Iron Range Co., 195 Fed. 291. In proper cases, treble damages may be granted: Bredin v. National Metal etc. Co., 182 Fed. 654. court will mold its decree to meet the facts of each case. Where the proofs showed that in certain territory the sales were entirely due to the patented feature, but in other territory, where conditions differed, other factors were the cause of sales, complainant should recover only for profits in the first territory: Van Brunt v. La Crosse Plow Co., 208 Fed. 281. If complainant's machine was the only one on the market and defendant copied it, he must account for all the profits he made from sales of it. If a defendant claims that some of the accounts for sales of infringing devices are uncollectible, he must assign them to complainant if he seeks a reduction of damages on that account: Peerless Brick Machine Co. v. Miracle Pressed Stone Co., 181 Fed. 526. Where complainant's process was the only one that would produce the desired result, the difference in price between the patented product and their similar products, the cost of manufacture being allowed for, is the measure of defendant's profits: Pressed Prism Glass Co. v. Continuous Glass Prism Co., 181 Fed. 151. The fact that complainant has not himself made use of

expiration of the patent, the suit is not determined, but the court will proceed to administer the other relief sought.<sup>26</sup>

A suit will lie although the patent has but a few days to run. The test is sometimes said to be whether there is still time to move for a preliminary injunction, a matter of a few days.<sup>27</sup> But the court may decline to assume jurisdiction on account of plaintiff's delay;<sup>28</sup> or

. . the inventon is one reason for allowing him profits instead of damages: Carborundum Co. v. Electric Smelting & Aluminum Co., 203 Fed. 976, 122 C. C. A. 276. A complainant may recover under the head of damages the profits which he might have gained by supplying the demand, even though it exceed the profits which defendant actually made: Westinghouse v. New York Air Brake Co., 131 Fed. 607, 608. The language on the appeal in 140 Fed. 545, 553, 72 C. C. A. 61, which was apparently misunderstood by Judge Hazel in the later case of Fox v. Knickerbocker Engraving Co., 140 Fed. 714, must be understood with reference to the opinion of the lower court, which expressly says there can be no duplication.

26 Clark v. Wooster, 119 U. S. 322, 30 L. Ed. 392, 7 Sup. Ct. 217; Beedle v. Bennett, 122 U. S. 71, 30 L. Ed. 1074, 7 Sup. Ct. 1090; Consolidated Safety Valve Co. v. Crosby Steam Gauge and Valve Co., 113 U. S. 157, 28 L. Ed. 939, 5 Sup. Ct. 513; Blank v. Manufacturing Co., 3 Wall. Jr. 196, Fed. Cas. No. 1532; Sickles v. Gloucester Mfg. Co., 4 Blatchf. 229, 1 Fish. Pat. Cas. 222, Fed. Cas. No. 12,841; Imlay v. Norwich & W. R. Co., 4 Blatchf. 227, 1 Fish. Pat. Cas. 340, Fed. Cas. No. 7012; Jordan v. Dobson, 2 Abb. U. S. 398, 4 Fish. Pat. Cas. 232, Fed. Cas. No. 7519; Dick v. Struthers, 25 Fed. 103; Adams v. Bridgewater Iron Co., 26 Fed. 324 (suit brought twenty-three days before patent expired); Ross v. City of Fort Wayne, 63 Fed. 466, 11 C. C. A. 288 (suit brought two and one-half months before expiration of patent); Chinnock v. Paterson, P. & S. Tel. Co., 112 Fed. 531, 50 C. C. A. 384; Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631.

27 W. W. Sly Mfg. Co. v. Central Iron Works, 201 Fed. 683, 120 C. C. A. 264; Tompkins v. International Paper Co., 183 Fed. 773, 106 C. C. A. 529; Carnegie Steel Co. v. Colorado Fuel etc. Co., 165 Fed. 195, 91 C. C. A. 229; American Sulphite Pulp Co. v. Crown etc. Paper Co., 169 Fed. 140.

28 Keyes v. Eureka Consol. Min. Co., 158 U. S. 150, 39 L. Ed. 929, 15 Sup. Ct. 772, explained and distinguished in Carnegie Steel Co. v. Colorado Fuel & Iron Co., 165 Fed. 195, 197, 91 C. C. A. 229, hold-

where the invention covers but a part of the defendant's device, and the injury to him from an injunction would be out of proportion to any damages or profits complainant could recover, may refuse an injunction for the remaining time, if defendant will give a bond.<sup>29</sup>

Where the bill is filed at so late a date that not even a preliminary injunction can be obtained, the court may dismiss the suit.<sup>30</sup> Where the right to injunctive relief fails by reason of the death of the defendant after the filing of the bill but before the decree, the court may retain the case to award an account of profits against the executors.<sup>31</sup>

§ 1985. (§ 569a.) Government Contracts. — Where the act of infringement occurs in the course of work for the government, an action in equity will lie against the contractor, and an accounting be granted, although an injunction will be refused for reasons of public policy.<sup>32</sup>

ing that the test of jurisdiction is the situation at the date of filing the bill, and that it is of no importance whether the patent expires thereafter or not. Diamond Stone-Sawing Mach. Co. v. Seus, 159 Fed. 497, holding that equity has no jurisdiction over a suit brought thirteen days before the expiration of the patent, is probably overruled by Tompkins v. International Paper Co., 183 Fed. 773, 106 C. C. A. 529, where a bill was sustained filed the day before the patent expired, the court saying that complainant might have applied for a temporary restraining order upon filing his bill.

29 Draper Co. v. American Loom Co., 161 Fed. 728, 88 C. C. A. 588.

30 Bragg Mfg. Co. v. City of Hartford, 56 Fed. 292; American Cable R'y Co. v. Chicago City R'y Co., 41 Fed. 522; American Cable R'y Co. v. Citizens' R'y Co., 44 Fed. 484; Russell v. Kern, 69 Fed. 94, 16 C. C. A. 154. See, also, Keyes v. Eureka Consol. Min. Co., 158 U. S. 150, 39 L. Ed. 929, 15 Sup. Ct. 772.

31 Kirk v. Du Bois, 28 Fed. 460; Hohorst v. Howard, 37 Fed. 97; Atterbury v. Gill, 3 Ban. & A. 174, Fed. Cas. No. 638; Smith v. Baker, 1 Ban. & A. 117, Fed. Cas. No. 13,010; Head v. Porter, 70 Fed. 498; Griswold v. Hilton, 87 Fed. 256.

32 International Curtis Marine Turbine Co. v. William Cramp etc. Bldg. Co., 211 Fed. 124, 153, 127 C. C. A. 522.

An action will not lie in equity against the government official, there being no right to either an injunction or profits, the remedy being at law for damages.<sup>33</sup> The question is unsettled whether prior to 1910 an action would lie in equity to restrain such an official from a threatened act of infringement.<sup>34</sup> The government could not be sued in tort, and efforts to waive the tort and sue on an implied contract were unsuccessful.<sup>35</sup> In 1910 an act was passed providing in substance that the government might be sued in the court of claims for the use of a patented invention without the license or lawful right to use it.<sup>36</sup> The supreme court has held that this is an exclusive remedy and that a pending suit for an injunction against an official must be dismissed.<sup>37</sup>

A contractor cannot set up as a defense that he is engaged on a government contract. He will be enjoined from infringement, with a clause in the decree exempting the government work from the operation of the injunction.<sup>38</sup>

- § 1986. (§ 569b.) Defenses—In General.—Under the new equity rules the cross-bill has been done away with, and a liberality in defenses permitted to an extent not yet determined.<sup>39</sup> The district courts are sharply in dispute as to whether the defenses permissible are limited
- 33 Belknap v. Schild, 161 U. S. 10, 40 L. Ed. 599, 16 Sup. Ct. 443; International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. Ed. 1134, 24 Sup. Ct. 820, and see strong dissent by Harlan, J.
- 34 Fried, Krupp Aktiengesellschaft v. Crozier, 32 App. Cas. (D. C.) 1, 15 Ann. Cas. 1108.
- 35 Russell v. United States, 182 U. S. 516, 530, 45 **L. Ed.** 1210, 21 Sup. Ct. 899.
  - 36 36 Stats. at Large, p. 851.
- 37 Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 56
  L. Ed. 771, 32 Sup. Ct. 488.
- 38 Firth-Sterling Steel Co. v. Bethlehem Steel Co., 216 Fed. 755, 758, 762.
  - 39 Equity Rule 30.

to those which could formerly be raised by cross-bill,<sup>40</sup> or whether the scope of the issues is only to be limited by the ability of the court to try them all at once.<sup>41</sup> It is believed that the latter view is correct. The rule appears to be founded on the English practice, which is very broad. The supreme court has been asked to explain or modify the rule, but has not done so. As yet no appellate court has construed it.

§ 1987. (§ 569c.) Defenses — Monopolies. — The defense that the complainant is a member of a combination in restraint of trade has been often raised, and almost uniformly overruled.42 The defense is an application of the "clean hands" rule, but does not fall within the rule unless the complainant's claim arises under or by virtue of the alleged unlawful combination. Otherwise the combination is a collateral matter and cannot be availed of as a defense. It is difficult to understand how the violation of an anti-trust law by a complainant confers a right on other persons to infringe his patents. The dictum in an early case denying a complainant relief was unnecessary to the decision, and on appeal the court refused to express any opinion on the point.43 The height of absurdity was reached when an infringer brought an action to restrain a patentee from suing him,

<sup>40</sup> Adamson v. Shaler, 208 Fed. 566; Motion Picture Patents Co. v. Eclair Film Co., 208 Fed. 416; Klauder-Weldon Dyeing Mach. Co. v. Giles, 212 Fed. 452.

<sup>41</sup> Vacuum Cleaner Co. v. American Rotary Valve Co., 208 Fed. 419; Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377; Buffalo Specialty Co. v. Vancleef, 217 Fed. 91.

<sup>42</sup> National Folding-Box & Paper Co. v. Robertson, 99 Fed. 985; General Electric Co. v. Wise, 119 Fed. 922, 924; cases collected in Dr. Miles Medical Co. v. Platt, 142 Fed. 606, 610; Fraser v. Duffey, 196 Fed. 900, 903.

<sup>&</sup>lt;sup>43</sup> National Harrow Co. v. Quick, 67 Fed. 130, 131, 74 Fed. 236, 239, 20 C. C. A. 410.

on the ground that the latter was a member of such a combination.<sup>44</sup>

§ 1988. (§ 570.) Defenses—Established License Fee; Hardship.—Occasionally, when there is an established license fee for the use of a patent, courts of equity refuse relief upon the ground that there is an adequate remedy at law.<sup>45</sup> The courts argue that in such cases the real injury to the plaintiff does not consist in using the invention, but in not paying for it. It is to his interest that his device be widely adopted, and his profit comes from the sums paid for licenses. Frequently there is connected with these cases an element of hardship which appeals to the courts.<sup>46</sup> The patented article may be a

<sup>44</sup> Strait v. National Harrow Co., 51 Fed. 819.

<sup>45</sup> The principle is illustrated by the case of Smith v. Sands, 24 Fed. 470. The defendant bought a single infringing machine, which was used in a sawmill for disposing of rubbish. It was not employed in the manufacture of any article or thing for market or for sale, and it was for the interest of complainants that all sawmills use their patented machines, provided they were paid the price of a license. The court said: "The extent of their injury for using a single machine infringing their patents is the royalty or a suitable license fee. When once they have been paid the price or value of a license, they have received the full measure of the 'actual damage' they suffer for any particular infringing machine used by another, and it is the full remedy they are entitled to, except a court may treble the actual damages if the circumstances justify it": Plotts v. Central Oil Co., 143 Fed. 901, 75 C. C. A. 7. These cases must be distinguished carefully from those in which there is a damaging and constantly increasing competition. It would seem that the principle is one which should be most sparingly applied, for the effect is to compel an inventor to sell his exclusive right.

<sup>46</sup> For cases involving the element of hardship, see Sanders v. Logan, 2 Fish. Pat. Cas. 167, Fed. Cas. No. 12,295 (invention of an improvement for machinery of gristmills; injunction would stop the mill and work a great hardship); Hoe v. Boston Daily Advertiser Corp., 14 Fed. 914 (improvement to printing-press). For miscellaneous instances of refusal of relief on the ground of hardship, see the following cases: Dorsey Harvester Revolving-Rake Co. v.

small part of a machine used by a large manufacturing establishment, and the effect of an injunction may be to close the concern and cause great loss. Under these circumstances, the courts are often led to deny injunctive relief. It would seem that some such case as this must arise in order to warrant the refusal of final relief on the ground of hardship.<sup>47</sup>

§ 1989. (§ 571.) Abandonment of Infringement.— When it appears that prior to the commencement of suit defendant had wholly ceased to infringe and was not threatening and did not intend to infringe further, but had in good faith entirely and finally abandoned the

Marsh, 6 Fish. Pat. Cas. 387, Fed. Cas. No. 4014; Lowell Mfg. Co. v. Hartford Carpet Co., 2 Fish. Pat. Cas. 472, Fed. Cas. No. 8569; Mc-Crary v. Pennsylvania Canal Co., 5 Fed. 367; Draper Co. v. American Loom Co., 161 Fed. 728, 88 C. C. A. 588. In the following cases relief was denied because it would work a hardship on the public: Bliss v. Brooklyn, 4 Fish. Pat. Cas. 596, Fed. Cas. No. 1544 (hose couplings used by the fire department of a city); Ballard v. City of Pittsburgh, 12 Fed. 783 (patent blocks used in city pavement; injunction refused after pavement laid).

47 Where a defendant, a licensee, was in default with his payments and the owner elected to terminate the license, and thereafter sued for infringement, but before suit was brought accepted the royalties due "without prejudice," held, that as he was in equity he must do equity, and the suit was dismissed: Foster Hose Supporter Co. v. Taylor, 184 Fed. 71, 106 C. C. A. 467. It may now be said that the general rule is that it is no defense to an injunction suit that the plaintiff derives his income from royalties or license fees. He is under no obligation to license everyone who applies for a license: Peters v. Chicago Biscuit Co., 142 Fed. 779; American Sulphite Pulp Co. v. Crown etc. Paper Co., 169 Fed. 140; Warren Bros. Co. v. Montgomery, 172 Fed. 414, 423; and a preliminary injunction may be granted: Kryptok Co. v. Haussmann, 216 Fed. 196. It is not a defense to an action for infringement that the plaintiff requested the user to afford the defendant an opportunity to make the sale, though in such a case the court may withhold damages: A. B. Dick Co. v. Henry, 149 Fed. 424; American Malting Co. v. Keitel, 209 Fed. 351, 126 C. C. A. 277.

manufacture and sale of the article, an injunction may be denied;<sup>48</sup> but in such case, it is held, the defendant must set up in his answer that infringement is not further intended.<sup>49</sup>

§ 1990. (§ 572.) Laches.—"Unreasonable delay and the deceitful acts or silence of a patentee which induce an infringer to incur expenses or to become liable to losses for damages which he would not otherwise have suffered may sometimes justly induce a court of equity to stay his suit for an infringement <sup>50</sup> or for an accounting before the time fixed by the analogous statute of limitations has expired.<sup>51</sup> But delay unaccompanied by

<sup>48</sup> General Electric Co. v. New England Electric Co., 123 Fed. 310.

49 Cayuta Wheel & Foundry Co. v. Kennedy Valve Mfg. Co., 127 Fed. 355, Ames, Cas. in Eq. Jur. 638. It is unnecessary for the complainant to allege that the infringement has not ceased, and a demurrer will not lie unless it is apparent on the face of the bill that there is no present infringement: Luten v. Dover Construction Co., 189 Fed. 405.

50 See Lane & Bodley Co. v. Locke, 150 U. S. 193, 37 L. Ed. 1049, 14 Sup. Ct. 78 (acquiescence in use by employers); Keyes v. Eureka Consol. Mining Co., 158 U. S. 150, 39 L. Ed. 929, 15 Sup. Ct. 772; Woodmanse & Hewitt Mfg. Co. v. Williams, 68 Fed. 489, 15 C. C. A. 520; Richardson v. D. M. Osborne & Co., 82 Fed. 95 (acquiescence in open and notorious infringement for sixteen years); Meyrowitz Mfg. Co. v. Eccleston, 98 Fed. 437; National Cash Register Co. v. Union etc. Co., 143 Fed. 342, 346; Brown & Sharpe Mfg. Co. v. Coates Clipper Mfg. Co., 195 Fed. 84; notes to Taylor v. Sawyer Spindle Co., 22 C. C. A. 211, and Richardson v. D. M. Osborn & Co., 36 C. C. A. 613; Wilcox & White Co. v. Farrand Organ Co., 139 Fed. 46.

51 Accounting refused: McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828; Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co., 174 Fed. 658, 662, 98 C. C. A. 412; Marconi Wireless Tel. Co. v. National Electric S. Co., 213 Fed. 815, 862; A. R. Mosler & Co. v. Lurie, 209 Fed. 364, 370, 126 C. C. A. 290. Preliminary injunction refused: Price v. Joliet Steel Co., 46 Fed. 107; Empire Cream Separator Co. v. Sears, Roebuck & Co., 157 Fed. 238, 246; L. H. Gilmer Co. v. Geisel, 168 Fed. 313.

such deceitful acts or silence of the patentee, and by such facts and circumstances as practically amount to an equitable estoppel, will warrant no such action. 7,52 order to warrant a dismissal there must be unusual conditions and extraordinary circumstances.<sup>53</sup> The defense is more properly applicable to an application for special relief. The fact that the defendant's trespass has been long continued is no reason why it should not be finally enjoined.<sup>54</sup> If the complainant has been diligent in suing other infringers, or even if he has been conducting a single test case before proceeding against others, the defense of laches will not prevail. He is not obliged to sue everyone at once.<sup>55</sup> Whether there is laches or not is to be determined on the facts of each case, 56 and should usually be left to final hearing and not tested by The court may act on its own motion and demurrer.57

52 Ide v. Trorlicht etc. Carpet Co., 115 Fed. 137, 148, 53 C. C. A. 341; Huntington Dry Pulv. Co. v. Virginia etc. Chemical Co., 130 Fed. 558; Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 287, 97 C. C. A. 446; Byerley v. Sun Co., 181 Fed. 138; Welsbach Light Co. v. Cohn, 181 Fed. 122; Valvona-Marchiony Co. v. Marchiony, 207 Fed. 380; Marconi Wireless Tel. Co. v. National Elec. Signaling Co., 213 Fed. 815, 849; Aiken v. Riter & Conley Mfg. Co., 205 Fed. 531; Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203 (delay of seven years); Kittle v. Hall, 29 Fed. 508 (delay of seven years); Drum v. Turner, 219 Fed. 188, 135 C. C. A. 74.

- 53 A. R. Mosler & Co. v. Lurie, 209 Fed. 364, 370, 126 C. C. A. 290.
  54 Brush Electric Co. v. Electric Imp. Co. 45 Fed. 241. Stearns-
- 54 Brush Electric Co. v. Electric Imp. Co., 45 Fed. 241; Stearns-Rogers Mfg. Co. v. Brown, 114 Fed. 939, 945, 52 C. C. A. 559.
- 55 Stearns-Rogers Mfg. Co. v. Brown, *supra*; Timolat v. Franklin Boiler Works Co., 122 Fed. 69, 58 C. C. A. 405; Plecker v. Poorman, 147 Fed. 528; Hurd v. James Goold Co., 197 Fed. 756; Tompkins v. St. Regis Paper Co., 236 Fed. 221, 149 C. C. A. 411.
- 56 Kittle v. Hall, 29 Fed. 508; A. R. Mosler & Co. v. Lurie, 209
  Fed. 364, 126 C. C. A. 290; General Electric Co. v. Yost Electric Mfg.
  Co., 208 Fed. 719, 723; Valvona-Marchiony Co. v. Marchiony, 207
  Fed. 380, 386.
- 57 Fichtel v. Barthel, 173 Fed. 489, 491; Marconi Wireless Tel. Co. v. New England Nav. Co., 191 Fed. 194; Bragg Mfg. Co. v. City of Hartford, 56 Fed. 292, 294.

determine the matter on demurrer or plea if the laches are apparent on the face of the bill.<sup>58</sup> If suit is begun within six years, laches need not be negatived by the bill,<sup>59</sup> and poverty or inability to bring suit sooner is a good reply to the defense.<sup>60</sup>

§ 1991. (§ 572a.) Restraining Order.—Three varieties of injunction may be granted: 1. A temporary restraining order, usually accompanying an order to show cause; 2. A preliminary injunction; 3. The final injunction which is the object of the suit and which is usually granted by an interlocutory decree accompanied by an order of reference to compute damages.

The Restraining Order.—Under the new equity rule No. 73, such an order can be granted without notice only if returnable within ten days, and upon a showing of immediate and irreparable loss to the applicant before the matter can be heard upon notice.<sup>61</sup>

- § 1992. (§ 573.) Preliminary Injunction.—The bill of complaint usually contains a prayer for a preliminary injunction. The motion may be made upon the bill alone, but is usually supported by affidavits. 62 As a
- 58 Woodmanse & Hewitt Mfg. Co. v. Williams, 68 Fed. 489, 494, 15 C. C. A. 520.
- 59 Thomson-Houston Electric Co. v. Electrose Mfg. Co., 155 Fed.543; National Cash Register Co. v. Union etc. Co., 143 Fed. 342, 346.
- 60 New York Phonograph Co. v. Edison, 136 Fed. 600, 607; affirmed, New York Phonograph Co. v. National Phonograph Co., 144 Fed. 404, 75 C. C. A. 382; Davis v. A. H. Reid Creamery etc. Co., 187 Fed. 157.
- 61 Such a case is Thullen v. Triumph Electric Co., 212 Fed. 143, 128 C. C. A. 655. As to the practice under the former equity rules, see Ryan v. Seaboard & R. R. Co., 89 Fed. 385; Seiler v. Fuller etc. Mfg. Co., 102 Fed. 344, 42 C. C. A. 386. Such an order is of little weight when a motion is made to set it aside: Richards v. Meissner, 158 Fed. 109.
- 62 F. C. Austin Mfg. Co. v. American Wellworks, 121 Fed. 76, 77, 57 C. C. A. 330.

general rule, it is said: "The purpose of the interlocutory writ is not to conclude the question of right, but to protect against material injury during the litigation. In patent cases, to warrant the writ, not only must the infringement be without reasonable doubt, but the rights of the patentee must be clear. Failing prior adjudication in favor of the validity of the patent, there must be shown such continued public acquiescence in the exclusive right asserted as raises a presumption of validity; a presumption not arising from the letters patent, unless accompanied by public acquiescence."63 This rule is not inflexible, however. If the infringement is clear, and the validity of the patent not seriously attacked, the mere issuance of letters may support the injunction.64 Where the validity of a patent has been sustained by prior adjudication, the only question open on a motion for preliminary injunction is the question of infringement, the consideration of other defenses being postponed until final hearing.65 This rule, also, is subject

- 63 Standard Elevator Co. v. Crane Elevator Co., 56 Fed. 718, 6 C. C. A. 100. Public acquiescence sufficient: Stevens v. Keating, 2 Phill. 333; Orr v. Littlefield, 1 Wood & M. 13, Fed. Cas. No. 10,590; Winchester Repeating Arms Co. v. Buengar, 199 Fed. 786. An interference suit between the same parties decided in complainant's favor by the patent office is conclusive as to priority: Peck v. Lindsay, 2 Fed. 688; Smith v. Halkyard, 16 Fed. 414; but the defendant is still free to raise the defense that the patent is invalid: Turner Brass Works v. Appliance Mfg. Co., 164 Fed. 195, 196; Perfection Cooler Co. v. Rose Mfg. Co., 175 Fed. 120; and so of a decision of the court of appeals of the District of Columbia: Scott v. Laas, 150 Fed. 764, 30 C. C. A. 500. See, also, Holliday v. Pickhardt, 12 Fed. 147.
- 64 Chester Forging etc. Co. v. Tindel-Morris Co., 165 Fed. 899, 91 C. C. A. 577; Standard Typewriter Co. v. Standard Folding Typewriter Sales Co., 181 Fed. 500, 104 C. C. A. 248; Fuller v. Gilmore, 121 Fed. 129; Palmer v. Wilcox Mfg. Co., 141 Fed. 378; McMaster v. Daugherty Mfg. Co., 219 Fed. 219, 135 C. C. A. 117.
- 65 Edison Electric Light Co. v. Beacon Vacuum P. & E. Co., 54 Fed. 678; Parker v. Brant, 1 Fish. Pat. Cas. 58, Fed. Cas. No. 10,727; Potter v. Fuller, 2 Fish. Pat. Cas. 251, Fed. Cas. No. 11,327 (upon

to exceptions. Where the new evidence is of such a character that if it had been introduced in the former case, it probably would have led to a different conclusion, the equity court may go behind the record and consider all the facts. 66 The burden is on the defendant to estab-

motion for preliminary injunction, prior adjudication would be overruled with great reluctance); Robertson v. Hill, 6 Fish. Pat. Cas. 465, Fed. Cas. No. 11,925; Green v. French, 4 Ban. & A. 169, Fed. Cas. No. 5757; Mallory Mfg. Co. v. Hickok, 20 Fed. 116; Cary v. Lovell Mfg. Co., 24 Fed. 141; Cary v. Domestic Spring Bed Co., 27 Fed. 299; Seibert Cylinder Oil Cup Co. v. Michigan Lubricator Co., 34 Fed. 33; Putnam v. Keystone Bottle Stopper Co., 38 Fed. 234; Brush Electric Co. v. Accumulator Co., 50 Fed. 833; New York Filter Mfg. Co. v. Jackson, 91 Fed. 422; New York Filter Mfg. Co. v. Loomis-Manning Filter Co., 91 Fed. 421; Duff Mfg. Co. v. Norton, 92 Fed. 921 (prior adjudication that complainant was entitled to a preliminary injunction may be sufficient); Hatch Storage Battery Co. v. Edison Storage Battery Co., 100 Fed. 975, 41 C. C. A. 133; American Sulphite Pulp Co. v. Burgess Sulphite Fibre Co., 103 Fed. 975; Brill v. Peckham Mfg. Co., 129 Fed. 139; Acme etc. Appliance Co. v. Commercial etc. Co., 192 Fed. 321, 112 C. C. A. 573; Fireball Gas etc. Co. v. Commercial etc. Co., 198 Fed. 650, 117 C. C. A. 354; Interurban R'y etc. Co. v. Westinghouse El. etc. Co., 186 Fed. 166, 108 C. C. A. 298. It was said in Whittemore Bros. & Co. v. World Polish Mfg. Co., 159 Fed. 480, that an interlocutory decree was not sufficient basis for a preliminary injunction. This is believed to be The issues are fought out prior to interlocutory decree, and the final decree on the coming in of the master's report only goes to the matter of damages. Where validity is established by an action at law and infringement is clear, it is error to refuse a preliminary injunction: Sherman, Clay & Co. v. Searchlight Horn Co., 214 Fed. 99, 130 C. C. A. 575. A preliminary injunction will not be denied because the patent has but a short time to run, when title has been established: Electric Storage Battery Co. v. Buffalo Electric C. Co., 117 Fed. 314. On the general subject of preliminary injunction, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.

66 Edison Electric Light Co. v. Beacon Vacuum P. & E. Co., 54 Fed. 678; Parker v. Brant, 1 Fish. Pat. Cas. 58, Fed. Cas. No. 10,727 ("the considerations which would justify a judge at this stage of an equity case in renewing the discussion of a patentee's title after

lish this, and every reasonable doubt must be resolved against him.<sup>67</sup> Again, where the prior litigation was the result of collusion,<sup>68</sup> or if the decree was by default,<sup>69</sup> the judgment is not conclusive.

If the right of the complainant or the infringement by the defendant is doubtful, preliminary injunction will in general be denied.<sup>70</sup> In some cases, however, a tempo-

solemn hearing and judgment at law should be such as, if presented to his view after a trial at law, would have induced him to set aside the verdict''); Brill v. Peckham Mfg. Co., 129 Fed. 139. See, also, Lockwood v. Faber, 27 Fed. 63.

- 67 Edison Electric Light Co. v. Beacon Vacuum P. & E. Co., 54 Fed. 678; Cohen v. Stephenson & Co., 142 Fed. 467, 73 C. C. A. 583; Gamewell Fire Alarm Tel. Co. v. Hackensack Imp. Commission, 199 Fed. 182.
- 68 Western Electric Co. v. Anthracite Tel. Co., 100 Fed. 301; Societe Anonyme du Filtre etc. v. Allen, 84 Fed. 812; Wilson v. Consolidated Store Service Co., 88 Fed. 286, 31 C. C. A. 533; Bowers Dredging Co. v. New York Dredging Co., 77 Fed. 980 (compromise decree); De Ver Warner v. Bassett, 7 Fed. 468, 19 Blatchf. 145 (decree by consent); Earll v. Rochester etc. R. Co., 157 Fed. 241 (decree by consent).
- 69 American Electrical Novelty Co. v. Newgold, 99 Fed. 567. This is said to be the rule in the second circuit: Victor Talking Machine Co. v. Leed & Catlin Co., 180 Fed. 778. But see McWilliams Mfg. Co. v. Blundell, 11 Fed. 419, citing Orr v. Littlefield, 1 Wood. & M. 13, Fed. Cas. No. 10,590; Potter v. Fuller, 2 Fish. Pat. Cas. 251, Fed. Cas. No. 11,327. It would seem that infringers permitting decrees to be taken against them without contest is strong proof of acquiescence, in the absence of collusion.
- 70 Plympton v. Malcolmson, L. R. 20 Eq. 37; Blakey v. National Mfg. Co., 95 Fed. 136, 37 C. C. A. 27; Sprague Electric R'y & Motor Co. v. Nassau El. R'y Co., 95 Fed. 821, 37 C. C. A. 286; Geo. A. Macbeth Co. v. Lippincott Glass Co., 54 Fed. 167; Norton Door Check & Spring Co. v. Hall, 37 Fed. 691; Armat Moving Picture Co. v. Edison Mfg. Co., 125 Fed. 939, 60 C. C. A. 380; Newhall v. McCabe Hanger Mfg. Co., 125 Fed. 919, 60 C. C. A. 629; Marvel Co. v. Pearl, 114 Fed. 946; Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 106 Fed. 175; Union Switch & Signal Co. v. Philadelphia etc. R. Co., 75 Fed. 1004; Consolidated Fastener Co. v. Columbian Fast-

rary injunction has been granted, although the right was doubtful, upon the ground that the granting of it would injure the defendant less than the withholding it would injure complainant.<sup>71</sup> This same principle prevents relief in some instances where the right is not doubtful, where the injury to the defendant by a preliminary injunction will far outweigh any advantage to the complainant therefrom.<sup>72</sup> In such cases, the defendant is generally compelled to give a bond to keep an account of sales.<sup>73</sup>

ener Co., 73 Fed. 828; Johnson v. Aldrich, 40 Fed. 675; Hall Signal Co. v. General R'y Signal Co., 153 Fed. 907, 82 C. C. A. 653; St. Louis Street Flushing Machine Co. v. Sanitary Street etc. Co., 161 Fed. 725, 88 C. C. A. 585; Hildreth v. Norton, 159 Fed. 428, 86 C. C. A. 408; Sharp v. Bellinger, 155 Fed. 139; Johns-Pratt Co. v. Sachs Co., 155 Fed. 129; Lovell-McConnell Mfg. Co. v. Automobile etc. Mfg. Co., 193 Fed. 658; Hurd v. James Goold Co., 203 Fed. 998, 122 C. C. A. 298.

71 Sargent v. Seagrave, 2 Curt. 553, Fed. Cas. No. 12,365 ("the court looks to the particular circumstances to see what degree of inconvenience would be occasioned to one party or the other, by granting or withholding the injunction"; injunction granted, though right doubtful); Irwin v. Dane, 4 Fish. Pat. Cas. 359, Fed. Cas. No. 7081; Richards v. Meissner, 158 Fed. 109.

72 This is said to be the rule in the third circuit: Electric Smelting etc. Co. v. Carborundum Co., 189 Fed. 710; Gillette Safety Razor Co. v. Durham etc. Razor Co., 197 Fed. 574; and the rule in the first circuit appears to be that a preliminary injunction will not be issued unless the damage to the complainant is irreparable: Silver & Co. v. J. P. Eustis Mfg. Co., 130 Fed. 348. See an elaborate note on the comparative injury rule in Kryptok Co. v. Stead Lens Co, (190 Fed. 767, 111 C. C. A. 495); as reported in 39 L. R. A. (N. S.) 1. On principle, however, it would seem that inconvenience or even serious injury to a defendant is no reason for withholding an injunction against him, when the court is satisfied that he is a thief: General Electric Co. v. Wise, 119 Fed. 922, 928.

73 Potter v. Whitney, 1 Low. 87, 3 Fish. Pat. Cas. 77, Fed. Cas. No. 11,341; National Cash Register Co. v. Navy Cash-Register Co., 99 Fed. 565 (patent would expire in four days); In re Chicago Sugar Ref. Co., 87 Fed. 750, 31 C. C. A. 221 (preliminary injunction is

Although it is often said that the granting or refusing of a preliminary injunction is a matter of discretion, and no right of appeal from such orders was permitted at one time, yet the discretion is a judicial one, and if abused, the lower court will be reversed.<sup>74</sup>

matter of discretion); Overweight etc. Co. v. Cahill & Hall El. Co., 86 Fed. 338; Westinghouse Air-Brake Co. v. Burton Stock Car Co., 77 Fed. 301, 23 C. C. A. 174; Southwestern Brush E. L. & P. Co. v. Louisiana Electric Light Co., 45 Fed. 893; Hurlburt v. Carter, 39 Fed. 802; Hoe v. Boston Daily Advertiser Corp., 14 Fed. 914; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 157 Fed. 677, 85 C. C. A. 349; Karfiol v. Rothner, 151 Fed. 777 (where patent had only short time to run): Interurban R'y & T. Co. v. Westinghouse etc. Mfg. Co., 186 Fed. 166, 108 C. C. A. 298; or defendant may be ordered to keep account merely without giving bond: Gamewell Fire Alarm Tel. Co. v. Star Electric Co., 199 Fed. 185; New York Vitak Co. v. Lagergren, 166 Fed. 481; or complainant may be required to give a bond as condition for relief: Commercial Acetylene Co. v. Acme etc. Appliance Co., 188 Fed. 89; or injunction may be refused if defendant gives bond, and on his failure to do so, granted if complainant gives bond: City of Grand Rapids v. Warren Bros. Co., 196 Fed. 892, 116 C. C. A. 454.

74 Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493, 121 C. C. A. 615; Welsbach Light Co. v. Cosmopolitan etc. Light Co., 104 Fed. 83, 85, 43 C. C. A. 418; Fireball Gas etc. Co. v. Commercial etc. Co., 198 Fed. 650, 117 C. C. A. 354. It is proper to deny a preliminary injunction upon facts which would justify a decree for the complainant at final hearing: Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865; and compare the litigation over the Wright patents, where preliminary injunction was granted (Wright Co. v. Herring-Curtiss Co., 177 Fed. 257, and Wright Co. v. Paulhan, 177 Fed. 261; reversed, Wright Co. v. Herring-Curtiss Co., 180 Fed. 110, 103 C. C. A. 31; Wright Co. v. Paulhan, 180 Fed. 112, 103 C. C. A. 32), decree for complainant on final hearing (Wright Co. v. Herring-Curtiss Co., 204 Fed. 597; affirmed, Wright Co. v. Herring-Curtiss Co., 211 Fed. 654, 128 C. C. A. 158), the court saying that it agreed with the reasoning of the court below on the motion for preliminary injunction. See, also, Wirt v. Hicks, 46 Fed. 71 (demurrer overruled, the court saying that facts would justify final relief though insufficient for preliminary injunction).

§ 1993. (§ 573a.) Final Injunction.—The final injunction is the end and object of the suit. As the infringement of a patent is a constantly recurring grievance which cannot be adequately prevented but by an injunction, it is quite plain that if no other remedy could be given than an action at law for damages, the inventor would be ruined by the necessity for perpetual litigation.<sup>75</sup> A decree for damages and profits would fall far short of adequate redress. The complainant is entitled to an injunction as well as to an accounting, and the latter is but incidental to the former. 76 That the defendant has ceased infringing pending the suit will not prevent the granting of a final injunction,77 and although the patent may have expired pending suit, an injunction may be granted against the use of infringing devices made prior to its expiration;<sup>78</sup> although if they could be used so as not to infringe, such relief may be denied.<sup>79</sup> When an appeal is taken from a final decree granting or dissolving an injunction, the trial judge has power to suspend or restore the injunction pending appeal, upon terms.80

§ 1994. (§ 574.) Copyrights.—The principles governing the issuance of injunctions against the infringements of copyrights are similar to those relating to patents. A copyright gives an exclusive right which the owner is entitled to have protected by injunction.<sup>81</sup> It is not

<sup>75</sup> Story's Eq. Jur., § 931.

<sup>76</sup> Allington & Curtis Mfg. Co. v. Booth, 78 Fed. 878, 879, 24 C. C. A. 378.

<sup>77</sup> Western Electric Co. v. Capital Tel. & Tel. Co., 86 Fed. 769.

<sup>78</sup> American Sulphite Pulp Co. v. Crown-Columbia Pulp & Paper Co., 169 Fed. 140.

<sup>79</sup> Hall Signal Co. v. General R'y Signal Co., 171 Fed. 436.

<sup>80</sup> Equity Rule 74.

<sup>81</sup> Fishel v. Lueckel, 53 Fed. 499; Reed v. Holliday, 19 Fed. 325; Black v. Allen, 56 Fed. 764. As to scope of injunction, see Social Register Ass'n v. Murphy, 128 Fed. 117. Where some substantial

necessary that any actual damages be shown.<sup>82</sup> "Where the infringement is otherwise established, the intention is immaterial." Therefore an allegation of the defendants that they had no intention of infringing is not a defense.<sup>83</sup> Where the right to an injunction is established, an account of profits may be awarded as incidental thereto.<sup>84</sup> An author, however, who has pirated

use of copyrighted material can be shown, an injunction against the whole work will be given, unless the defendant can distinguish the infringing part from the non-infringing part, and thus free the latter: Park & Pollard Co. v. Kellerstrass, 181 Fed. 431; Frank Shepard Co. v. Zachary P. Taylor Pub. Co., 185 Fed. 941; West Publishing Co. v. Edward Thompson Co., 169 Fed. 833; West Publishing Co. v. Lawyers Co-op. Pub. Co., 79 Fed. 756, 35 L. R. A. 400, 25 C. C. A. 648. But if the infringing portion is readily ascertainable, the injunction may lie in the first instance only against the infringement: Farmer v. Elstner, 33 Fed. 494; List Publishing Co. v. Keller, 30 Fed. 772; Da Prato Statuary Co. v. Giuliani S. Co., 189 Fed. 90; and in Dam v. Kirke La Shelle Co., 166 Fed. 589, where an infringing play had been produced at great expense, the court gave defendant an opportunity to rewrite it so as to eliminate the infringing portion.

82 Fishel v. Lueckel, 53 Fed. 499; Reed v. Holliday, 19 Fed. 325; Black v. Allen, 56 Fed. 764.

83 Fishel v. Lueckel, 53 Fed. 499; Reed v. Holliday, 19 Fed. 325; nor is it a defense that defendants were not aware that matter copyrighted was protected by copyright: American Press Ass'n v. Daily Story Pub. Co., 120 Fed. 766; nor that defendant told his employees not to use copyrighted matter, if in fact they did: West Publishing Co. v. Edward Thompson Co., 169 Fed. 833.

84 Fishel v. Lueckel, 53 Fed. 499; Stevens v. Gladding, 58 U. S. (17 How.) 447, 15 L. Ed. 155; Baily v. Taylor, 1 Russ. & M. 73, Ames, Cases in Eq. Jur. 654. "In regard to the general question of the profits to be accounted for by the defendants, as to the volumes in question, the only proper rule to be adopted is to deduct from the selling price the actual and legitimate manufacturing cost. If the volume contains matter to which a copyright could not properly extend, incorporated with matter proper to be covered by a copyright, the two necessarily going together when the volume is sold, as a unit, and it being impossible to separate the profits on the one from the profits on the other, and the lawful matter being useless without the

a large part of his work from others is not entitled to have his copyright protected. An immoral production, of course, is not entitled to the protection of a court of equity, on a production the copyright of which was obtained by a breach of the author's contract with the defendant. As the right to a copyright is purely statutory, it is essential that the complainant comply substantially with the statute. The same principles relating to laches apply as in the case of patents. The complainant's delay must be such as to amount to an estoppel.

unlawful, it is the defendants who are responsible for having blended the lawful with the unlawful, and they must abide the consequences., on the same principle that he who has wrongfully produced a confusion of goods must alone suffer": Callaghan v. Myers, 128 U. S. 617, 32 L. Ed. 547, 9 Sup. Ct. 177, per Blatchford, J. Damages, as distinct from profits, cannot be decreed in a copyright case: Social Register Ass'n v. Murphy, 129 Fed. 148; Chapman v. Ferry, 12 Fed. 693. Right to account is incident to right to injunction: Belford v. Scribner, 144 U. S. 488, 36 L. Ed. 514, 12 Sup. Ct. 734; Falk v. Gast etc. Engraving Co., 54 Fed. 890, 4 C. C. A. 648; Sanborn Map & Publishing Co. v. Dakin Pub. Co., 39 Fed. 266. Account may be awarded under a general prayer for relief: Gilmore v. Anderson, 38 Fed. 846.

- 85 Edward Thompson Co. v. American Law Book Co., 122 Fed. 923, 59 C. C. A. 148. Also see this case for definition of what is fair use of an existing compilation; explained in Colliery Engineer Co. v. Ewald, 126 Fed. 843; Dun v. International Mercantile Agency, 127 Fed. 173.
  - 86 Glyn v. Western Feature Film Co., [1916] 1 Ch. 261.
  - 87 T. B. Harms etc. v. Stern, 231 Fed. 645, 145 C. C. A. 531.
- 88 American Trotting Register Ass'n v. Gocher, 70 Fed. 237; Osgood v. A. S. Aloe Instrument Co., 83 Fed. 470; Hoertel v. Raphael Tuck Sons Co., 94 Fed. 844. No injunction will issue till the copyright is obtained: New York Times Co. v. Star Co., 195 Fed. 110, 140; New York Times Co. v. Sun Printing etc. Ass'n, 204 Fed. 586, 123 C. C. A. 54.
- 89 Gilmore v. Anderson, 38 Fed. 846; West Publishing Co. v. Edward Thompson Co., 169 Fed. 833 (eighteen years' delay barred injunction, but accounting given); Patterson v. J. S. Ogilvie Pub. Co., 119 Fed. 451.

§ 1995. (§ 575.) Preliminary Injunctions.—In order that a preliminary injunction may issue to restrain the infringement of a copyright, both plaintiff's right and defendant's infringement must be clear. 90 "It is

90 In the following cases the right and the infringement were sufficiently clear to warrant the issuance of preliminary injunctions: Egbert v. Greenberg, 100 Fed. 447; Banks v. McDivitt, 13 Blatchf. 163, Fed. Cas. No. 961; Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3552; Shook v. Rankin, 3 Cent. L. J. 210, Fed. Cas. No. 12,805. the following cases either the right or the infringement was so doubtful that preliminary relief was denied: West Pub. Co. v. Lawyers' Co-op. Pub. Co., 53 Fed. 265 (alleged piracy of one hundred and sixty-three passages contained in plaintiff's law digest; preliminary injunction denied because to verify contention would require "a long, wearisome, and complicated comparison'); American Trotting Register Ass'n v. Gocher, 70 Fed. 237 (doubt as to whether complainant had complied with the copyright law); Worthington v. Batty, 40 Fed. 479; Scribner v. Stoddart, 19 Am. Law Reg. 433, Fed. Cas. No. 12,561; Hubbard v. Thompson, 14 Fed. 689; McNeill v. Williams, 11 Jur. 345, Ames, Cas. in Eq. Jur., 652. In Little v. Gould, 2 Blatchf. 165, Fed. Cas. No. 8394, Conkling, D. J., said: "But it is for the express purpose of resolving doubts with respect to the rights and responsibilities of parties, that courts are instituted; and, even on a motion of this nature, it is not every kind or degree of doubt that will absolve a judge from the responsibility of deciding questions presented for his consideration, much less from the labor of investigation and reflection. It must, at least, be a serious doubt, which remains after the faithful application of his faculties to its solution." In this case, the court held that the mere novelty of a question of law is not sufficient to warrant the withholding of temporary relief.

Preliminary injunction will not be granted unless piracy is clear: Colliery Engineer. Co. v. United Correspondence Schools Co., 94 Fed. 152; Hubges v. Belasco, 130 Fed. 388 (play); Dun v. International Mercantile Agency, 127 Fed. 173; American Mutoscope etc. Co. v. Edison Mfg. Co., 137 Fed. 262; and hence will not be granted against infringement on future numbers of a periodical which has not yet been published: Sweet v. G. W. Bromley & Co., 154 Fed. 754.

Preliminary injunction will not be granted unless complainant's title is clear: Lamb v. Grand Rapids etc. Co., 39 Fed. 474; Benton v. Van Dyke, 170 Fed. 203; Savage v. Hoffman, 159 Fed. 584; Nixon v.

proper for the court to consider the harm that would be done to the complainant by refusing such an order, in comparison with the damage that might be sustained by the defendant in consequence of granting the same. The ability of the defendant to respond to any damages that may be assessed on final hearing is also an important element, and in these respects there is no difference in the rule governing cases arising under patent and copyright laws and other equitable proceedings." <sup>91</sup>

§ 1996. (§ 575a.) Final Injunction and Accounting. Upon final hearing the same rule will be applied as to measuring the relative injury to the complainant and defendant. Where the publisher of a mercantile rating book infringed to a trifling extent upon his rival's book, but his book contained many more names and gave much more information, an injunction was refused.<sup>92</sup> The final decree may enjoin the entire work, with leave to apply for a modification upon proof that the offending

Doran, 168 Fed. 575; Ginn v. Apollo Pub. Co., 209 Fed. 713; or if originality is squarely contested: Hoffman v. Le Traunik, 209 Fed. 375.

Preliminary injunction refused, but defendant required to give a bond: Louis De Jonge & Co. v. Breuker & Kessler Co., 147 Fed. 763; Gopsill v. C. E. Howe Co., 149 Fed. 905; Sampson & Murdock Co. v. Seaver-Radford Co., 129 Fed. 761 (city directory); Troy Directory etc. Co. v. Boyd, 97 Fed. 586 (city directory).

- 91 Hanson v. Jaccard Jewelry Co., 32 Fed. 202, per Thayer, J. Sce, also, Scribner v. Stoddart, 19 Am. Law Reg. 433, Fed. Cas. No. 12,561.
- 92 Dun v. Lumbermen's Credit Ass'n, 209 U. S. 20, 14 Ann. Cas. 501, 52 L. Ed. 663, 28 Sup. Ct. 335; affirming 144 Fed. 83. Where a new compilation of laws ordered by the legislature was completed, and was claimed to be an infringement, the court required very clear proof of the right to relief, and dismissed the bill for failure to come up to the requirements: Howell v. Miller, 91 Fed. 129, 33 C. C. A. 407.

portions have been removed, 93 or may be addressed to the infringing portion alone. 94

Prior to 1909 damages in contradistinction from profits could not be allowed in a copyright case. Section 25 of the new act has made the rule the same as in patent cases.

On the accounting, the master should make proper deductions for the expenses of the defendant's publication, 96 but the complainant is entitled to all the defendant's profits, although they be made from a play and the complainant's work was a story. 97

§ 1997. (§ 576.) Analogous Rights; Literary Property.—"In analogy to the protection of copyrights, a jurisdiction has become well established by modern decisions to restrain the invasion or piracy of literary property in the product of intellectual labor, which still remains in the form of manuscript, or which, if printed, has not been published, and over which, as a consequence, no statutory copyright has been obtained; and

- 93 Williams v. Smythe, 110 Fed. 961; Social Register Ass'n v. Murphy, 128 Fed. 116.
- 94 Sampson & Murdock Co. v. Seaver-Radford Co., 140 Fed. 539,
  72 C. C. A. 55; West Publishing Co. v. Lawyers' Co-operative Pub. Co., 79 Fed. 756, 35 L. R. A. 400, 25 C. C. A. 648.
- 95 Chapman v. Ferry, 12 Fed. 693, 8 Sawy. 191; Social Register Ass'n v. Murphy, 129 Fed. 148. So far as West Publishing Co. v. Edward Thompson Co., 176 Fed. 833, 838, 100 C. C. A. 303, is to the contrary, it should be deemed erroneous, and the decision sustained on the theory that a court of equity may give damages instead of sending the complainant to his remedy at law. As to the burden of proof as to profits, see note to Westinghouse Electric & M. Co. v. Wagner etc. Mfg. Co., 225 U. S. 604, as reported in 41 L. R. A. (N. S.) 653.
- 96 Hartford Printing Co. v. Hartford etc. Pub. Co., 146 Fed. 332; Gilmore v. Anderson, 42 Fed. 267.
- 97 Dam v. Kirke La Shelle Co., 175 Fed. 902, 20 Ann. Cas. 1173,99 C. C. A. 392.

to restrain the invasion of a similar right which an artist has in his pictures and other original works of his creative art. This jurisdiction belongs to the state courts. It will be exercised to restrain the unauthorized publication of unpublished manuscript or printed matter in violation of the rights of the person entitled thereto; 98 the unauthorized publication, performance, representa-

98 Duke of Queensbury v. Shebbeare, 2 Eden, 329; Pope v. Curl, 2 Atk. 342; Southey v. Sherwood, 2 Mer. 435; Keene v. Wheatley, 9 Am. Law Reg. 63, Fed. Cas. No. 7644; Folsom v. Marsh, 2 Story, 100, Fed. Cas. No. 4901; Grigsby v. Breckinridge, 2 Bush, 480, 92 Am. Dec. 509; Bartlette v. Crittenden, 5 McLean, 32, Fed. Cas. No. 1076. The same principle applies to reports as to public improvements, etc., compiled for the benefit of customers. Delivery of such reports to customers under agreement that they shall be kept private is not a publication: F. W. Dodge & Co. v. Construction Information Co., 183 Mass. 62, 97 Am. St. Rep. 412, 66 N. E. 204. See, also, National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 60 L. R. A. 805, 56 C. C. A. 198 (news, market quotations, etc.); Illinois Commission Co. v. Cleveland Tel. Co., 119 Fed. 301, 56 C. C. A. 205; Sullivan v. Postal Tel. Cable Co., 123 Fed. 441; as to the application of the "clean hands" maxim, where the plaintiff's business is illegal, see 2 Pom. Eq. Jur., § 941, note (b).

It is not necessary that the work be original. A compilation will be protected: Vernon Abstract Co. v. Waggoner Title Co., 49 Tex. Civ. 144, 107 S. W. 919. An author may permit one or more persons to copy and use his production without losing his common-law rights: Frohman v. Ferris, 238 Ill. 430, 128 Am. St. Rep. 135, 43 L. R. A. (N. S.) 639, 87 N. E. 327; affirmed, Ferris v. Frohman, 223 U. S. 424, 56 L. Ed. 492, 32 Sup. Ct. 263; F. W. Dodge Co. v. Construction Information Co., 183 Mass. 62, 97 Am. St. Rep. 412, 60 L. R. A. 810, 66 N. E. 204. Author may restrain publication of his articles which he never published: Clemens v. Belford, 14 Fed. 728, 11 Biss. 459. The common-law right is perpetual: Bobbs-Merrill Co. v. Straus, 147 Fed. 15, 15 L. R. A. (N. S.) 766, 77 C. C. A. 607; Cordill v. Stewart, 1 Bell Com. 116n.; Eyre v. Higbee, 35 Barb. 502, 22 How. Pr. (N. Y.) 198, 207. It is a right to incorporeal property, is not dependent upon statute, and a foreigner who is not entitled to a statutory copyright will be protected in his common-law right prior to publication: Palmer v. De Witt, 47 N. Y. 532, 539, 7 Am. Rep. 480.

tion on the stage, or other similar uses of dramatic compositions which have not been 'published' by the author or proprietor;<sup>99</sup> the unauthorized publication, delivery, or other like use of lectures which have been delivered by the author, but not otherwise published;<sup>100</sup> the unau-

99 Palmer v. De Witt, 47 N. Y. 532, 7 Am. Rep. 480, 2 Sweeny, 530, 5 Abb. Pr., N. S., 130; Boucicault v. Fox, 5 Blatchf. 87, Fed. Cas. No. 1691; Keene v. Wheatley, 9 Am. Law Reg. 33, Fed. Cas. No. 7644. It has been held "that the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make from its having been retained in the memory of any of the audience": Keene v. Kimball, 16 Gray, 545, 77 Am. Dec. 426. But see Crowe v. Aiken, 4 Am. Law Rev. 450, Fed. Cas. No. 3441. Keene v. Kimball, however, is substantially overruled in Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480 and notes. A distinction is to be drawn between the use of the words of a play or opera, which will be enjoined: French v. Kreling, 63 Fed. 621 (Falka); Goldmark v. Kreling, 25 Fed. 349, 35 Fed. 661, 13 Sawy. 310 (Nanon); Chappell & Co. v. Fields, 210 Fed. 864, 127 C. C. A. 448; and the use of a new orchestration made up from a published piano score, which will not: Carte v. Ford, 15 Fed. 439 (Iolanthe); Mikado etc. Case (Carte v. Duff), 25 Fed. 183, 23 Blatchf. 347 (Mikado). Musical composition protected: Stern v. Carl Laemmle Music Co., 74 Misc. Rep. 262, 133 N. Y. Supp. 1082. Where the defendant is licensed to produce a play, but not to license others, a breach may be protected by injunction: Herne v. Liebler, 73 App. Div. 194, 76 N. Y. Supp. 762. Where unlawful use is shown, the owner is entitled to an accounting as well as an injunction: French v. Kreling, 63 Fed. 621. The author of an unpublished play has both playright and copyright. The right to produce publicly and the right to print and publish are separable. One may be lost, and not the other, and they may be assigned to different persons.

100 "Where persons are admitted, as pupils or otherwise, to hear public lectures, it is upon the implied confidence and contract that they will not use any means to injure or take away the exclusive right of the lecturer in his own lectures, whether that be to publication in print or oral delivery": Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480. See, also, Abernethy v. Hutchinson, 1 Hall & T.

thorized making, sale, or exhibition of copies of paintings, engravings, and other works of art, even though the originals may have been publicly exhibited;<sup>101</sup> and the unauthorized publication of private letters, whether

28, 40, 3 L. J. Ch. 209 (pupils may take notes for their own information, but may not publish them for profit); Keene v. Kimball, 16 Gray, 545, 17 Am. Dec. 426; Bartlette v. Crittenden, 5 McLean, 32, Fed. Cas. No. 1076. Injunction against stenographer taking down lecture and subsequently publishing: Nicols v. Pitman, 26 Ch. Div. 374; even though part of the lecture was reported in papers with consent of author, when attempt was made to publish the incomplete report as though it was the complete course: Drummond v. Altemus, 60 Fed. 338. Injunction against using paper read at medical congress to advertise defendant's tooth paste: Dentacure Co. v. New Jersey State Dental Society, 58 N. J. Eq. 582, 43 Atl. 1098; affirming New Jersey State Dental Soc. v. Dentacura Co., 57 N. J. Eq. 593, 41 Atl. 672.

101 Prince Albert v. Strange, 1 Macn. & G. 25, 1 Hall & T. 1, 2 De Gex & S. 652 (etching). In Pollard v. Photographic Co., 40 Ch. D. 345, there was an extreme application of the doctrine. Mrs. Pollard, the plaintiff, was photographed by defendant, and she paid for likenesses taken from the negative. Defendant made other likenesses of plaintiff from the negative, and exhibited and sold one in the form of a Christmas card. Plaintiff was granted an injunction. North, J., said: "The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only": Mansell v. Valley Printing Co., [1908] 1 Ch. 567; affirmed, [1908] 2 Ch. 441, 1 B. R. C. 187, note. What is such a public exhibition as will constitute a publication is discussed in Werckmeister v. American Lithographic Co., 134 Fed. 321, 68 L. R. A. 591, 69 C. C. A. 553; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 12 Ann. Cas. 595, 52 L. Ed. 208, 28 Sup. Ct. 72; Turner v. Robinson, 10 Ir. Ch. Rep. 121.

on literary topics, or on matters of private business, friendship, or family." 102

§ 1998. (§ 577.) Trade-marks. 103—"The function of a trade-mark is to indicate to the public the origin,

102 Pom. Eq. Jur., § 1353. This section of Pom. Eq. Jur. is cited to the effect that publication of private letters may be enjoined, in Barrett v. Fish, 72 Vt. 18, 82 Am. St. Rep. 914, 51 L. R. A. 754, 47 Atl. 174. "The restraint may be at the suit of the writer against the person written to, or his assigns, or a stranger, or at the suit of the person written to, or his personal representatives against a stranger": Pom. Eq. Jur., § 1353, note. In the following cases injunctions against the publication of letters were granted: Pope v. Curl, 2 Atk. 342 (letters of a literary man; suit against third party); Gee v. Pritchard, 2 Swanst. 402 (suit by writer against third party); Thompson v. Stanhope, Amb. 737 (suit by executor of writer against widow of the party who received the letters); Folsom v. Marsh, 2 Story, 100, Fed. Cas. No. 4901; Grigsby v. Breckinridge, 2 Bush, 480, 92 Am. Dec. 509. In a few cases it is held that injunction should be confined to the publication of letters possessing some literary value: Wetmore v. Scovell, 3 Edw. Ch. 515; Hoyt v. McKenzie, 3 Barb. Ch. 320; Lord & Lady Perceval v. Phipps, 2 Ves. & B. 19, 24. But these cases do not represent the general rule: Woolsey v. Judd, 4 Duer, 379. See, also, cases cited at beginning of note, and Folsom v. Marsh, 2 Story, 100, 110, Fed. Cas. No. 4901; Baker v. Libbie, 210 Mass. 599, Ann. Cas. 1912D, 551, 37 L. R. A. (N. S.) 944, 97 N. E. 109; Dock v. Dock, 180 Pa. St. 14, 57 Am. St. Rep. 617, note, 36 Atl. 411. The right of action is in the writer or his personal representatives, and not in the owner of the manuscript: Macmillan Co. v. Dent, [1906] 1 Ch. 101; affirmed, [1907] 1 Ch. 107 (Letters of Lamb). Unpublished letters may be used for the purpose of writing a biography, or for any other purpose, except for publications: Philip v. Pennell, [1907] 2 Ch. 577 (Letters of Whistler); Baker v. Libbie, supra.

103 See, also, Pom. Eq. Jur., § 1354. The leading cases on this subject were thus classified in the first edition of the present work. In the following cases injunctive relief was granted: Edelsten v. Edelsten, 1 De Gex, J. & S. 185; Hall v. Barrows, 4 De Gex, J. & S. 150; Moet v. Pickering, L. R. 6 Ch. D. 770; Hirst v. Denham, L. R. 14 Eq. 542; Radde v. Norman, L. R. 14 Eq. 348; Seixo v. Provezende, L. R. 1 Ch. App. 192; Collins Co. v. Cowen, 3 Kay & J. 428; Collins Co. v. Brown, 3 Kay & J. 423; Wotherspoon v. Currie, L. R.

manufacture or ownership of articles to which it is ap-

5 H. L. (Eng. & Ir. App. Cas.) 508; Orr Ewing & Co. v. Johnston, L. R. 13 Ch. Div. 434, 7 App. Cas. (H. L.) 219 (relief may be granted before any purchaser is actually misled); Rogers v. Nowell, 3 De Gex, M. & G. 614; Upmann v. Elkan, L. R. 7 Ch. App. 130, 12 Eq. 140 (injunction against forwarding agents); Bourne v. Swan & Edgar, L'd, [1903] 1 Ch. 211, 223; Walton v. Crowley, 3 Blatchf. 440, Fed. Cas. No. 17,133; Hostetter v. Vowinkle, 1 Dill. 329, Fed. Cas. No. 6714; Taylor v. Carpenter, 3 Story, 458, Fed. Cas. No. 13,784; Gannert v. Rupert, 127 Fed. 962, 62 C. C. A. 594; Delaware & Hudson Canal Co. v. Clark, 80 U. S. 311, 20 L. Ed. 581; Woodward v. Lazar, 21 Cal. 448, 82 Am. Dec. 751; Derringer v. Plate, 29 Cal. 292, 87 Am. Dec. 170; Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204; Bradley v. Norton, 33 Conn. 157, 87 Am. Dec. 200; Boardman v. Meriden Brittannia Co., 35 Conn. 402, 95 Am. Dec. 270; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Russia Cement Co. v. Le Page, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304; Filley v. Fassett, 44 Mo. 168, 100 Am. Dec. 275; Congress etc. Spring Co. v. High Rock etc. Co., 45 N. Y. 291, 6 Am. Rep. 82; Taylor v. Carpenter, 2 Sand. Ch. 603, 11 Paige, 292, 42 Am. Dec. 114; Gillott v. Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553, 47 Barb. 455; Godillot v. Harris, 81 N. Y. 263; Coats v. Holbrook, 2 Sand. Ch. 583; Gourand v. Trust, 6 Thomp. & C. 133, 3 Hun, 627; Selchow v. Baker, 93 N. Y. 59, 45 Am. Rep. 169; American Solid Leather Button Co. v. Anthony, 15 R. I. 338, 2 Am. St. Rep. 898, 5 Atl. 626. See, also, Ohio Baking Co. v. National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116 (trade-mark registered under federal law protected in state as common-law trademark); General Electric Co. v. Re-new Lamp Co., 121 Fed. 164 (injunction against selling reconstructed electric lamps bearing plaintiff's trade-mark); National Biscuit Co. v. Swick, 121 Fed. 1007; Liggett & M. Tobacco Co. v. Reid Tobacco Co., 104 Mo. 53, 24 Am. St. Rep. 313, 15 S. W. 843; W. A. Gaines & Co. v. E. Whyte Grocery, F. & W. Co., 107 Mo. App. 507, 81 S. W. 648.

In the following cases relief was refused, either because the symbol did not amount to a technical trade-mark, because the imitation did not infringe, or because some element prescribed by statute was absent: Amoskeag Mfg. Co. v. Trainer, 101 U. S. 55, 25 L. Ed. 995; Goodyear Co. v. Goodyear Rubber Co., 128 U. S. 598, 32 L. Ed. 535, 9 Sup. Ct. 166; Moorman v. Hoge, 2 Sawy. 78, Fed. Cas. No. 9783; Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76; Chovnski v. Cohen, 39 Cal. 501, 2 Am. Rep. 476; Ball v. Siegel, 116 Ill. 137, 56 Am. Rep.

plied,<sup>104</sup> and thereby secure to its owner all benefit resulting from his identification by the public with the article bearing it. Where a trade-mark is infringed, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is on this ground that a court of equity protects trademarks."<sup>105</sup> The basis of the right is a property right in the manufacturer or vendor to have his trade protected.<sup>106</sup> Although there is also a right in the public

766, 4 N. E. 667; Weener v. Brayton, 152 Mass. 101, 8 L. R. A. 640, 25 N. E. 46; Ames v. King, 2 Gray, 379; McCartney v. Garnhart, 45 Mo. 593, 100 Am. Dec. 397; Smith v. Woodruff, 48 Barb. 438; Taylor v. Gillies, 59 N. Y. 331, 17 Am. Rep. 333; Enoch Morgan's Sons Co. v. Troxell, 89 N. Y. 292, 42 Am. Rep. 294; Raggett v. Findlater, L. R. 17 Eq. 29; Cope v. Evans, L. R. 18 Eq. 138; Escourt v. Escourt etc. Co., L. R. 10 Ch. App. 276 (right to relief lost by delay).

In the following cases relief was refused because both parties were entitled to use the trade-mark: Coffeen v. Brunton, 5 McLean, 256, Fed. Cas. No. 2947; Caswell v. Hazard, 121 N. Y. 492, 18 Am. St. Rep. 833, 24 N. E. 707.

In Chadwick v. Covell, 151 Mass. 190, 21 Am. St. Rep. 442, 6 L. R. A. 839, 23 N. E. 1068, it was held that an injunction will not issue to restrain the use of a trade-mark after the death of the original proprietor.

To the effect that intentional fraud is not an essential element of relief, see Coffeen v. Brunton, 4 McLean, 516, Fed. Cas. No. 2946; Williams v. Brooks, 50 Conn. 278, 47 Am. Rep. 642; Pratt's Appeal, 117 Pa. St. 401, 2 Am. St. Rep. 676, 11 Atl. 878; Bourne v. Swan & Edgar, Ltd., [1903] 1 Ch. 211, 223. Nor is it necessary that anyone be actually deceived: Bourne v. Swan & Edgar, Ltd., [1903] 1 Ch. 211, 223.

104 The trade-mark must be affixed to the goods themselves: Covert v. Bernat, 156 Mo. App. 687, 138 S. W. 103.

105 Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651, 656.

106 Leather Cloth Co. v. American Leather Cloth Co., 4 De Gex, J. & S. 137, 141; affirmed, 11 H. L. Cas. 523; American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281, 284, 50 L. R. A. 609, 43 C. C. A. 233; Commonwealth v. Kentucky D. & W. Co., 132 Ky. 521, 136 Am. St. Rep. 186, 18 Ann. Cas. 1156, 21 L. R. A. (N. S.) 30, 116

to be protected from fraud,<sup>107</sup> this in itself would not give a remedy to an individual. Infringement of a trade-mark is a branch of unfair competition in trade,<sup>108</sup> but there are certain characteristics of trade-marks which should be noted.

"In theory a technical trade-mark, like a patent right, is a species of property, and when it is invaded, or appropriated, the owner thereof is entitled not only to protection from further trespass, but to the recovery of the profits issuing therefrom, as incident to and a part of his property right. In suits for unfair competition, on the other hand, the complaint is not of an appropriation of a property right, but of a tort committed by the defendant in that his conduct has been unlawful by reason of the consequential injury to the plaintiff." 109

A trade-mark must not be descriptive, 110 gen-

S. W. 766. But see, for a criticism of this view, Pom. Eq. Jur., § 1354. That there is no property in a trade-mark except in connection with an existing business, and that the right to protection grows out of the use of the mark, and not from its mere adoption, see Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 60 L. Ed. 713, 36 Sup. Ct. 357; Joseph Schlitz Brewing Co. v. Houston Ice & Brewing Co., 241 Fed. 817, 154 C. C. A. 519.

107 Avenarius v. Kornely, 139 Wis. 247, 121 N. W. 336.

108 G. & C. Merriam Co. v. Saalfield, 198 Fed. 369, 117 C. C. A. 245. It is proper to join in the same action causes of action for infringement of trade-mark and for unfair competition: G. Heileman Brewing Co. v. Independent Brewing Co., 191 Fed. 489, 112 C. C. A. 133.

109 P. E. Sharpless Co. v. Lawrence, 213 Fed. 423, 426, 130 C. C. A. 59; Apollo Bros. v. Perkins, 207 Fed. 530, 125 C. C. A. 192; Hanover Star Milling Co. v. Allen & Wheeler Co., 208 Fed. 513, 125 C. C. A. 515.

110 Ault & Wiborg Co. v. Cheshire, 191 Fed. 741; Lawrence v. P. E. Sharpless Co., 203 Fed. 762; William Wrigley, Jr., & Co. v. Grove Co., 183 Fed. 99, 105 C. C. A. 391; John T. Dyer Quarry Co. v. Schuylkill Stone Co., 185 Fed. 557; Kellogg Toasted Corn Flake Co. v. Quaker Oats Co., 235 Fed. 657, 149 C. C. A. 77; New York

eric<sup>111</sup> or geographical,<sup>112</sup> for anyone has a right to describe his product or the place of origin truthfully. Nor can a color<sup>113</sup> or a numeral<sup>114</sup> unaccompanied by anything further, nor a mere form or shape,<sup>115</sup> be a valid trade-mark. No one by using his own name as a mark can prevent another of the same name<sup>116</sup> or one closely

& New Jersey Lubricant Co. v. Young, 77 N. J. Eq. 321, 140 Am. St. Rep. 560, 77 Atl. 344. Use of name which is descriptive in foreign language: Italian Swiss Colony v. Italian Vineyard Co., 158 Cal. 252, 32 L. R. A. (N. S.) 439 and note, 110 Pac. 913. Corruption or misspelling a descriptive name: Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 55 L. Ed. 536, 31 Sup. Ct. 456; Kirstein v. Cohen, 39 Can. Sup. Ct. 286, 9 Ann. Cas. 763 and note.

111 Travelers' Ins. Machine Co. v. Travelers' Ins. Co. of Hartford, 142 Ky. 523, 134 S. W. 877; A. J. Reach Co. v. Simmons Hardware Co., 155 Mo. App. 412, 135 S. W. 503.

112 Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 45 L. Ed. 365, 21 Sup. Ct. 270, note; Pocono Pines Assembly v. Miller, 229 Pa. St. 33, 77 Atl. 1094; American Wine Co. v. Kohlman, 158 Fed. 830; Apollo Bros. v. Perkins, 207 Fed. 530, 125 C. C. A. 192; Manitou Springs Mineral Water Co. v. Schueler, 239 Fed. 593, 152 C. C. A. 427; Dyment v. Lewis, 144 Iowa, 509, 6 L. R. A. (N. S.) 73 and note, 123 N. W. 244. But a geographical name will be protected as against one who has no right to use it at all: Modesto Creamery v. Stanislaus Creamery Co., 168 Cal. 289, 142 Pac. 845; or who is guilty of fraud: W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 100 Me. 461, 4 L. R. A. (N. S.) 960, 62 Atl. 499.

113 Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, L. R. A. 1915F, 1107, 128 C. C. A. 203; J. A. Scriven Co. v. Morris, 154 Fed. 914; Re L. E. Waterman Co., 34 App. Cas. (D. C.) 185, 18 Ann. Cas. 1033.

114 Dennison Mfg. Co. v. Scharf Tag etc. Co., 135 Fed. 625, 68 C. C. A. 263; Goldsmith Silver Co. v. Savage, 211 Fed. 751; Humphreys' Homeopathic Medicine Co. v. Hilton, 60 Fed. 756.

115 Merriam v. Famous Shoe etc. Co., 47 Fed. 411.

116 Walter Baker & Co. v. Gray, 192 Fed. 921, 52 L. R. A. (N. S.) 899, 113 C. C. A. 117 and note; International Silver Co. v. Rogers, 72 N. J. Eq. 933, 129 Am. St. Rep. 722, 67 Atl. 105; Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510, 121 C. C. A. 200; Stix, Baer & Fuller Dry Goods Co. v. American Piano Co., 211 Fed.

similar<sup>117</sup> from using his name on his goods or in a partnership or corporation.<sup>118</sup> Where during the life of a patent the name of the article has been used to designate it, upon the expiration of the patent the name becomes public property,<sup>119</sup> and the obtaining of a trade-mark for the name during the life of the patent will not protect it thereafter.<sup>120</sup> A trade-mark gives the owner no monopoly of the goods. Unless they are protected by patent or copyright, anyone is at liberty to copy them.<sup>121</sup> An owner may apply more than one

271, 127 C. C. A. 639; Marshall Engine Co. v. New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548.

117 Warner Bros. Co. v. Wiener, 214 Fed. 30, 130 C. C. A. 424.

118 Aetna Mill & Elevator Co. v. Kramer Milling Co., 82 Kan. 679, 28 L. R. A. (N. S.) 934, note, 109 Pac. 692; L. E. Waterman Co. v. Modern Pen Co., 193 Fed. 242, 235 U. S. 88, 59 L. Ed. 142, 35 Sup. Ct. 91; Stix, Baer & Fuller Dry Goods Co. v. American Piano Co., 211 Fed. 271, 127 C. C. A. 639; Bristol Co. v. Graham, 199 Fed. 412, 117 C. C. A. 644. Defendant allowed to use plaintiff's name while selling goods manufactured by him: Edison v. Mills Edisonia, 74 N. J. Eq. 521, 70 Atl. 191; case where court thought defendant was acting fraudulently: National Distilling Co. v. Century etc. Cigar Co., 183 Fed. 206, 105 C. C. A. 638. See, also, post, § 580.

119 Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 41 L. Ed. 118, 16 Sup. Ct. 1002; G. & C. Merriam Co. v. Ogilvie, 159 Fed. 638, 14 Ann. Cas. 796, 16 L. R. A. (N. S.) 549, note, 88 C. C. A. 596; Marshall Engine Co. v. New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548; De Long Hook & Eye Co. v. American Pin Co., 200 Fed. 66; but see, distinguishing the Singer case, Prestolite Co. v. Davis, 215 Fed. 349, 131 C. C. A. 491; Searchlight Gas Co. v. Prest-O-lite Co., 215 Fed. 692, 131 C. C. A. 626.

120 Jenkins Bros. v. Kelly etc. Co., 212 Fed. 328; Avenarius v. Kornely, 139 Wis. 247, 121 N. W. 336; Bristol Co. v. Graham, 199 Fed. 412, 117 C. C. A. 644. See Yale & Towne Mfg. Co. v. Worcester Mfg. Co., where bill for infringement was dismissed (195 Fed. 528, 115 C. C. A. 491), and plaintiff thereafter permitted to recover on theory of unfair competition (205 Fed. 952).

121 Warren Bros. Co. v. Barber Asphalt Paving Co., 145 Mich. 79, 12 L. R. A. (N. S.) 339, note, 108 N. W. 652; and see Bamforth v. Douglass Post Card etc. Co., 158 Fed. 355.

trade-mark to the same article.<sup>122</sup> The test is whether the public is confused, or whether he uses the mark unfairly.<sup>123</sup>

A trade-mark will not expire by lapse of time. It is good until abandoned.<sup>124</sup> A mark may belong to different persons in different countries,<sup>125</sup> and be good in one country and invalid in another.<sup>126</sup> The right to protection grows out of the use of the mark, and not from its mere adoption; the owner cannot, in a market which he has never entered, enjoin the use of a mark which designates the latter's product.<sup>127</sup>

§ 1999. (§ 577a.) Same; Registration. — A trademark used in interstate or foreign traffic may be registered under the federal statutes. The same right is

122 Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 24, 104 C. C. A. 464; Dixie Cotton Felt Mattress Co. v. Stearns & Foster Co., 185 Fed. 431, 107 C. C. A. 501.

123 Thus a plaintiff was refused relief where it appeared that he marked his goods with one brand where there was no competition, and with another when he had to sell at cut rates: Independent Baking Powder Co. v. Boorman, 175 Fed. 448.

124 Leidersdorf v. Flint, 8 Biss. 327, Fed. Cas. No. 8219. As to laches, see post, § 577d.

125 Richter v. Reynolds, 59 Fed. 577, 8 C. C. A. 220; Baglin v. Cusenier Co., 221 U. S. 580, 55 L. Ed. 863, 31 Sup. Ct. 669; Rey v. Lecouturier, [1908] 2 Ch. 715, [1910] App. Cas. 262. See note on right to trade mark or name in limited locality where it is used by another in a different locality, Eastern Outfitting Co. v. Manheim, 59 Wash. 428, 35 L. R. A. (N. S.) 251, 110 Pac. 23.

126 Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 45 L. Ed. 60, 21 Sup. Ct. 7.

127 Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 60 L. Ed. 713, 36 Sup. Ct. 357, holding that where two parties independently employ the same mark on goods of the same class, in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appear that the second user took the mark to get the benefit of plaintiff's reputation, or to forestall the extension of his trade, or the like: Kaufman v. Kaufman, 223 Mass. 104, 111 N. E. 691.

given by many states so as to cover intrastate business. Registration in itself confers no right to the mark. 128 It merely affords proof as to the date of adoption and use. 129 If a common-law mark is carried back of the registration, the owner of the registered mark can obtain no relief, and may in his turn be enjoined. Under the last federal statute, a mark that has been in use for ten years may be registered although it would not have been good as a common-law mark. 130 A registered trade-mark cannot be used by anyone else, even with words showing a distinct origin. 131 In the event of infringement, the comparison is to be made with the registered mark; and not with a mark theretofore used by the A substantial copy is an infringement. plaintiff. 132 The mark need not be taken in its entirety. 133

128 Sarrazin v. W. R. Irby Cigar etc. Co., 93 Fed. 624, 627, 46 L. R. A. 541, 35 C. C. A. 496; Waukesha Hygeia Mineral Springs Co. v. Hygeia etc. Water Co., 63 Fed. 438, 11 C. C. A. 277; Revere Rubber Co. v. Consolidated etc. Pad Co., 139 Fed. 151; Grocers' Supply Co. v. Dupuis, 219 Mass. 576, 107 N. E. 389.

129 Hennessy v. Braunschweiger & Co., 89 Fed. 664, 668; Avenarius v. Kornely, 139 Wis. 247, 121 N. W. 336; Dodge Mfg. Co. v. Sewall & Day Cordage Co., 142 Fed. 288; even if registration is invalid: American Stove Co. v. Detroit Stove Works, 31 App. Cas. (D. C.) 304. The registered owner has the option to proceed under his common-law rights: Stephano Bros. v. Stamatopoulos, 238 Fed. 89, L. R. A. 1917C, 1157, 151 C. C. A. 165.

130 Act of Feby. 20, 1905, amended 36 Stats. at Large, 918; Thaddeus Davids Co. v. Davids, 178 Fed. 801, 102 C. C. A. 249; 190 Fed. 285, 233 U. S. 461, Ann. Cas. 1915B, 322, 58 L. Ed. 1046, 34 Sup. Ct. 648; Apollo Bros. v. Perkins, 207 Fed. 530, 125 C. C. A. 192; Rogers v. International Silver Co., 30 App. Cas. (D. C.) 97; Worster Brewing Corp. v. Rueter & Co., 30 App. Cas. (D. C.) 428.

131 Baglin v. Cusenier Co., 221 U. S. 580, 55 L. Ed. 863, 31 Sup. Ct. 669.

132 Caffarelli Bros. v. Western Grocer Co., 102 Tex. 104, 127 S. W. 1018, affirming Western Grocer Co. v. Caffarelli Bros. (Tex. Civ.) 108 S. W. 413.

133 De Voe Snuff Co. v. Wolff, 206 Fed. 420, 124 C. C. A. 302; Avenarius v. Kornely, 139 Wis. 247, 121 N. W. 336; McGrew Coal An action upon a registered trade-mark may be brought either in the state or federal courts.<sup>134</sup> In the case of a common-law trade-mark, the federal courts have no jurisdiction, except where there is diversity of citizenship and the jurisdictional amount in controversy.<sup>135</sup>

§ 2000. (§ 577b.) Same; Infringement.—The intent of the defendant is immaterial, <sup>136</sup> and actual deception is unnecessary. The test is whether the ordinary public is likely to be deceived, and the intelligence required of the purchaser will be that of the ultimate purchaser of that kind of goods. <sup>137</sup> The infringement must consist in affixing the mark to the goods. Using the mark as a

Co. v. Menefee, 162 Mo. App. 209, 144 S. W. 869; W. A. Gaines & Co.v. Turner-Looker Co., 204 Fed. 553, 123 C. C. A. 79.

134 Re Keasbey & Mattison Co., 160 U. S. 221, 40 L. Ed. 402, 16 Sup. Ct. 273.

135 See Stephano Bros. v. Stamatopoulos, 238 Fed. 89, L. R. A. 1917C, 1157, 151 C. C. A. 165.

136 Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 34 L. Ed. 997, 11 Sup. Ct. 396; Thomas G. Plant Co. v. May Mercantile Co., 153 Fed. 229; Western Grocer Co. v. Caffarelli Bros. (Tex. Civ.), 108 S. W. 413; George G. Fox Co. v. Glynn, 191 Mass. 344, 114 Am. St. Rep. 619, 9 L. R. A. (N. S.) 1096 and note, 78 N. E. 89; Gorham Mfg. Co. v. Schmidt, 196 Fed. 955; O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 158 C. C. A. 37; Wood v. Wood, 78 Or. 181, Ann. Cas. 1918A, 226, L. R. A. 1916C, 251, 151 Pac. 969.

137 Gannert v. Rupert, 127 Fed. 962, 964, 62 C. C. A. 594; G. Heileman Brewing Co. v. Independent Brewing Co., 191 Fed. 489, 112 C. C. A. 133; Yale & Towne Mfg. Co. v. Worcester Mfg. Co., 205 Fed. 952; Caffarelli Bros. v. Western Grocer Co., 102 Tex. 104, 127 S. W. 1018; De Voe Snuff Co. v. Wolff, 206 Fed. 420, 124 C. C. A. 302; Stephano v. Stamatopoulos, 199 Fed. 451; Stephano Bros. v. Stamatopoulos, 238 Fed. 89, L. R. A. 1917C, 1157, 151 C. C. A. 165; Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 206 Fed. 611, 617, 124 C. C. A. 409; S. R. Feil Co. v. John E. Robbins Co., 220 Fed. 650, 136 C. C. A. 258; Viavi Co. v. Vimedia Co., 245 Fed. 289, 157 C. C. A. 481.

letter-head, on cards, or as a sign for business may be unfair competition, but is not infringement. The merk must be used by the two persons on the same class of goods, 139 for the same mark may belong to two persons when used for distinct articles. The extent of the competition is not important, and it is no defense that the defendant's business is small, so that plaintiff is not injured. 141

§ 2001. (§ 577c.) Same; Preliminary Injunction.— The complainant should be diligent in applying for a preliminary injunction. The doctrine of laches is strictly applied in such cases. 142 The usual rule also applies that if there is any doubt either of complainant's title or defendant's infringement, the relief will be denied. 143 The complainant must show that he is the owner and entitled to exclusive use. 144 The solvency of the defendant is a circumstance which the court will consider, 145 or the fact that plaintiff has an established

- 139 Virginia Baking Co. v. Southern Biscuit Works, 111 Va. 227,
  30 L. R. A. (N. S.) 167 and note, 68 S. E. 261; Atlas Mfg. Co. v.
  Street & Smith, 204 Fed. 398, 47 L. R. A. (N. S.) 1002 and note, 122
  C. C. A. 568. See Lawrence v. P. E. Sharpless Co., 203 Fed. 762.
- 140 "Ideal" as mark for pens: Waterman v. Shipman, 130 N. Y. 301, 29 N. E. 111; as mark for hair-brushes: Hughes v. Alfred H. Smith Co., 205 Fed. 302.
- 141 Garcia v. Garcia, 197 Fed. 637; Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 24, 33, 104 C. C. A. 464.
- 142 Stirling Silk Mfg. Co. v. Sterling Silk Co., 59 N. J. Eq. 394, 398, 46 Atl. 199.
- 143 Anargyros & Co. v. Anargyros, 167 Fed. 753, 93 C. C. A. 241;
   Taylor Provision Co. v. Gobel, 180 Fed. 938.
- 144 A. Stein & Co. v. Liberty Garter Mfg. Co., 198 Fed. 959; Rorke v. Societe des Huiles d'Olive de Nice, 14 App. Div. 173, 43 N. Y. Supp. 548; affirmed, Societe des Huiles D'Olive de Nice v. Rorke, 158 N. Y. 677, 52 N. E. 1126.
- 145 Richmond Hosiery Co. v. Julius Kayser & Co., 204 Fed. 778, 123 C. C. A. 590; American Cereal Co. v. Eli Pettijohn Cereal Co.,

<sup>138</sup> New York Mackintosh Co. v. Flam, 198 Fed. 571.

trade and that the defendant's use is recent, so that an injunction will cause him no serious inconvenience. 

The giving of a bond may be required as a condition for granting or withholding the relief. 

147

- § 2002. (§ 577d.) Same; Laches.—Laches is usually fatal to a preliminary injunction motion,<sup>148</sup> but will not bar final injunction unless it amounts to an abandonment or estoppel.<sup>149</sup> Accounting may be refused on account of laches.<sup>150</sup> There can be no laches without knowledge of the infringement.<sup>151</sup> Where laches amounting to acquiescence appears, the plaintiff will only be entitled to a decree that defendant mark his goods so as to show origin.<sup>152</sup>
- § 2003. (§ 577e.) Same; Clean Hands.—Relief will be denied if the plaintiff is using his mark in an *ultra* vires or unlawful business, 153 or if he makes lying or
- 76 Fed. 372, 374, 22 C. C. A. 236; H. Mueller Mfg. Co. v. A. Y. McDonaly & Morrison Mfg. Co., 132 Fed. 585.
- 146 Carroll v. Ertheiler, 1 Fed. 688. See Read v. Richardson, 45 L. T. (N. S.) 54.
- <sup>147</sup> Coca Cola Co. v. Nashville Syrup Co., 200 Fed. 153; Coane v. Netter, 188 Fed. 681.
- 148 Stirling Silk Mfg. Co. y. Sterling Silk Co., 59 N. J. Eq. 394,
  398, 46 Atl. 199; Edward & John Burke v. Bishop, 144 Fed. 838, 75
  C. C. A. 666; Von Mumm v. Steinmetz, 137 Fed. 168.
- 149 Sheffield-King Milling Co. v. Sheffield Mill etc. Co., 105 Minn. 315, 127 Am. St. Rep. 574, 117 N. W. 447; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, and note on general topic in 45 L. Ed. 60, 21 Sup. Ct. 7.
  - 150 Edward & John Burke v. Bishop, 175 Fed. 167.
- 151 Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 24, 104 C. C. A. 464.
  - 152 Dietz v. Horton Mfg. Co., 170 Fed. 865, 96 C. C. A. 41.
- 153 Pocono Pines Assembly v. Miller, 229 Pa. 33, 77 Atl. 1094. See Searchlight Gas Co. v. Prest-O-lite Co., 215 Fed. 692, 131 C. C. A. 626 (no defense that plaintiff is violating Sherman Act).

deceitful statements as to the goods.<sup>154</sup> Yet to warrant this defense, mere puffing is not sufficient,<sup>155</sup> and the false statements must not be extrinsic to the mark.<sup>156</sup>

§ 2004. (§ 577f.) Same; Accounting.—In case of infringement, plaintiff is entitled to profits as incident to and part of his property rights, <sup>157</sup> and he need not show any damage to himself. <sup>158</sup> The usual rules apply as to the computation of net profits and the proper deductions. <sup>159</sup> Where a defendant acted innocently and

154 Clinton E. Worden & Co. v. California Fig Syrup Co., 187 U. S. 516, 47 L. Ed. 282, 23 Sup. Ct. 161; Moxie Nerve Food Co. v. Modox Co., 152 Fed. 493 (relief granted when plaintiff discontinued advertisements), 153 Fed. 487; Nashville Syrup Co. v. Coca Cola Co., 215 Fed. 527, 132 C. C. A. 39 (no deception); New York & New Jersey Lubricant Co. v. Young, 77 N. J. Eq. 321, 140 Am. St. Rep. 560, 77 Atl. 344.

155 Holeproof Hosiery Co. v. Wallach Bros., 172 Fed. 859, 97
C. C. A. 263; Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 4 L. R. A.
(N. S.) 447, 106 N. W. 595.

156 See notes to Johnson & Johnson v. Seabury & Johnson, 67
Atl. 36, 12 L. R. A. (N. S.) 1201; Nelson v. J. H. Winchell & Co.,
89 N. E. 180, 23 L. R. A. (N. S.) 1150.

157 Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S.
251, 60 L. Ed. 629, 36 Sup. Ct. 269; P. E. Sharpless Co. v. Lawrence,
213 Fed. 423, 130 C. C. A. 59; J. F. Rowley Co. v. Rowley, 193 Fed.
390, 113 C. C. A. 386; G. & C. Merriam Co. v. Saalfield, 198 Fed. 369,
376, 117 C. C. A. 245.

158 Modesto Creamery v. Stanislaus Creamery Co., 168 Cal. 289, 142 Pac. 845.

159 Nelson v. J. H. Winchell & Co., 203 Mass. 75, 23 L. R. A. (N. S.) 1150, note, 89 N. E. 180; W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 100 Me. 461, 4 L. R. A. (N. S.) 960, 62 Atl. 499; Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 60 L. Ed. 629, 36 Sup. Ct. 269 (where defendant is not an innocent infringer, and there is difficulty in apportioning the profits attributable to use of plaintiff's mark, burden of proof is not on plaintiff to show the portion). No deduction should be made for a part of the general expenses, where no extra expense was incurred by reason of the sale of the goods in question: Regis v. H. A. Jaynes & Co., 191 Mass. 245, 77 N. E. 774.

ceased infringement as soon as he had actual notice, an accounting of profits may be refused. 160

§ 2005. (§ 578.) Unfair Competition.—It is not essential that a party have a technical trade-mark in order to be entitled to the protection of equity. When one imitates the goods, form of packages, labels, or name of his business competitor in such a way as to deceive the public, he may be enjoined at the suit of such competitor. The ground for this jurisdiction is the general one of the prevention of fraud. We have already seen that

160 Slazenger Bros. v. Spalding & Bro., [1910] 1 Ch. 257; Reading Stove Works etc. v. S. M. Howes Co., 201 Mass. 437, 21 L. R. A. (N. S.) 979, 87 N. E. 751.

161 The principle is well stated by Mr. Justice Brown in Coats v. Merrick Thread Co., 149 U. S. 562, 37 L. Ed. 847, 13 Sup. Ct. 966: "There can be no question of the soundness of the plaintiff's proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such a manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals." Competition in itself is favored by the law and any resulting injury therefrom is deemed injuria sine damno: Brown Chemical Co. v. Meyers, 139 U. S. 540, 544, 35 L. Ed. 247, 11 Sup. Ct. 625; and see Viavi Co. v. Vimedia Co., 245 Fed. 289, 157 C. C. A. 481; Lapointe Mach. Tool Co. v. J. N. Lapointe Co., 115 Me. 472, 99 Atl. 348; but in order to suppress fraud, the courts have been obliged to extend the scope of the law applicable to cases of unfairness in trade: Church & Dwight Co. v. Russ, 99 Fed. 276, 278.

162 "The essential nature of all trade-mark suits is the same, whether they rest upon infringement or unfair competition. At the foundation of the law lies the rule that every person should so use his own property as not to injure the property of another. The essence of the wrong consists in the sale of the goods of one person as those of another. It is only when this false representation is

this is one of the reasons given for the protection of trade-marks, but in those cases there is the added element of the protection of an exclusive right. In the class of cases we are now considering, there is no exclusive right in the sense in which we speak of such a right in regard to trade-marks. Courts in speaking of these cases generally classify them as instances of unfair competition. An actual fraudulent intention, al-

directly or indirectly made that a court of equity will grant relief'': Heublein v. Adams, 125 Fed. 782, per Colt, Cir. J. Continuing, the learned judge says: "Every trade-mark case is based upon fraud, actual or constructive. In technical trade-mark cases fraud is presumed, while in cases of unfair competition the plaintiff must prove a fraudulent intention, or show facts and circumstances from which it may reasonably be inferred." The distinction made here practically amounts to this: that in cases of technical trade-marks the real wrong consists in a violation of an exclusive right; in cases of unfair competition, it consists in deception. It would seem more accurate to say that in cases of technical trade-marks it will be presumed that the infringement will work a fraud, while in cases of unfair competition this must be proved. An actual fraudulent intention is not necessary in either class of cases: See cases cited in succeeding note. The distinction between the exclusive right and the other right is explained in Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 34 L. Ed. 997, 11 Sup. Ct. 396. A clear statement is found in the opinion of Sanborn, Cir. J., in Shaver v. Heller & Merz Co., 108 Fed. 821, 48 C. C. A. 48: "The contention of counsel for the appellants here is a confusion of the bases of two classes of suits,-those for infringements of trade-marks, and those for unfair competition in trade. Suits of the former class rest on the ownership of the trade-marks. Suits of the latter class are founded upon the damage to the trade of the complainants by the fraudulent passing of the goods of one manufacturer for those of another. the former, title to the trade-marks is indispensable to a good cause of action; in the latter, no proprietary interest in the words, names, or means by which the fraud is perpetrated is requisite to maintain a suit to enjoin it. It is sufficient that the complainant is entitled to the custom-the good-will-of a business, and that this good-will is injured, or is about to be injured, by the palming off of the goods of another as his." See, also, John T. Dyer Quarry Co. v. Schuvlkill Stone though generally present, is not essential. The injury is the same whatever the motive may be. The wrong consists in deceiving the public to the injury of the plaintiff. If the public is deceived and the plaintiff is injured as a result, the defendant's good intentions cannot excuse the wrong.

Co., 185 Fed. 557, 564; A. Leschen & Sons Rope Co. v. Fuller, 218 Fed. 786, 134 C. C. A. 570. The ultimate test is not whether the public is likely to be deceived, but whether the defendant is in effect palming off his goods as those of the complainant, or his business as complainant's business: Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510, 121 C. C. A. 200; Samson\_Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 608, L. R. A. 1915F, 1107, 128 C. C. A. 203; Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 461, 55 L. Ed. 536, 31 Sup. Ct. 456; Moline Plow Co. v. Omaha Iron Stove Co., 235 Fed. 519, 149 C. C. A. 65; O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 158 C. C. A. 37. Proof of actual deception is unnecessary: Forster Mfg. Co. v. Cutter-Tower Co., 211 Mass. 219, 97 N. E. 749; Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 101 C. C. A. 565; O'Connell v. National Water Co., 161 Fed. 545, 88 C. C. A. 487; Yale & Towne Mfg. Co. v. Worcester Mfg. Co., 205 Fed. 952.

163 The intention may be implied from the acts of the defend-"Such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act committed": Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 674, 45 L. Ed. 365, 21 Sup. Ct. 270; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. Ed. 247, 11 Sup. Ct. 625. "The law does not attempt to penetrate the secret motives or intent with which the act is done, but contents itself with the conclusion that the party intended the natural and probable consequences of the act": McCann v. Anthony, 21 Mo. App. 83, 90; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed. 869, 877, 23 C. C. A. 554; Bickmore Gall Cure Co. v. Karns, 134 Fed. 833, 67 C. C. A. 439. See Bissell Chilled Plow Works v. T. M. Bissell Plow Co., 121 Fed. 357; Von Faber v. Faber, 124 Fed. 603; O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 158 C. C. A. 37; Helmet Co. v. Wm. Wrigley, Jr., Co., 245 Fed. 824, 158 C. C. A. 164; Deister Concentrator Co. v. Deister Machine Co. (Ind. App.), 112 N. E. 906; Koebel v. Chicago Landlord's Protective Bureau, 210 Ill. 176, 102

§ 2006. (§ 579.) Same—Continued.—Unfair competition takes many forms. It may consist in the imitation of the color, form or style of the boxes, bottles or packages used by a competitor.<sup>164</sup> It may be the designation.

Am. St. Rep. 154, 71 N. E. 362; Viano v. Biccigalupo, 183 Mass. 160, 67 N. E. 641. Even if the original use were innocent, a continuance after knowledge of similarity would be such fraud as would warrant relief: Northwestern Knitting Co. v. Garon, 112 Minn. 321, 128 N. W. 288. See Van Houten v. Hooton Cocoa & C. Co., 130 Fed. 600. The presumption may arise even where the proof is that specific instructions were given to salesmen not to misrepresent the origin of the goods: Enterprise Mfg. Co. v. Landers, etc., 131 Fed. 240, 241, 65 C. C. A. 587. Fraud will be implied despite the sworn protestation of the infringer: Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 206 Fed. 611, 124 C. C. A. 409.

164 Hygienic Fleeced Underwear Co. v. Way, 137 Fed. 592, 70 C. C. A. 553 (imitation of packages); Devlin v. McLeod, 135 Fed. 164; Bickmore Gall Cure Co. v. Karns, 134 Fed. 833, 67 C. C. A. 439; Drewry & Son v. Wood, 127 Fed. 887 (similar packages and labels); Scriven v. North, 124 Fed. 894 (imitation of packages); A. Bauer & Co. v. Distillerie De La Liqueur Benedictine, 120 Fed. 74, 56 C. C. A. 480 ("it is true that no one has a monopoly of form, nor has he a monopoly of color, of the shape of the letters, or geographical names, or of his own name, but one may not, by means lawful in themselves when devoted to a lawful end, perpetrate a fraud upon the public, or infringe the rights of another"); A. Bauer & Co. v. Order of Carthusian Monks, 120 Fed. 78, 56 C. C. A. 484 (imitation of bottles of a peculiar shape); A. Bauer & Co. v. Siegert, 120 Fed. 81, 56 C. C. A. 487 (imitation of bottles and name); Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 Fed. 657 (imitation of name and package); Keuffel & Esser Co. v. H. S. Crocker Co., 118 Fed. 187 (use of similar names, same form of package, and same color of wrapping); C. F. Simmons Medicine Co. v. Simmons, 81 Fed. 163; New England Awl etc. Co. v. M. A. & N. Co., 168 Mass. 154, 60 Am. St. Rep. 377, 46 N. E. 386 (imitation of packages); Alexander v. Morse, 14 R. I. 153, 51 Am. Rep. 369; Forster Mfg. Co. v. Cutter-Tower Co., 211 Mass. 219, 97 N. E. 749 (package); Holeproof Hosiery Co. v. Fitts, 167 Fed. 378 (imitation of name, guaranty card and box); William Edge & Sons, Ltd., v. William Nicolls & Sons, Ltd., [1911] App. Cas. 693 (package); H. E. Winterton Gum Co. v. Autosales Gum & Chocolate Co., 211 Fed. 612, 128 C. C. A.

nation of an article by a name similar to that used by a competitor, although the name is not such as can be a technical trade-mark. It may be such a close imita-

212 (cartons and boxes); Coca Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164; Joseph Schlitz Brewing Co. v. Houston Ice & Brewing Co., 241 Fed. 817, 154 C: C. A. 519 (similarity in color of bottles did not warrant injunction); O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 158 C. C. A. 37; Helmet Co. v. Wm. Wrigley, Jr., Co., 245 Fed. 824, 158 C. C. A. 164 (imitation of package). But see Viavi Co. v. Vimedia Co., 245 Fed. 289, 157 C. C. A. 481.

Mere use of same numbers or letters to denote quality does not constitute unfair competition: Stevens Linen Works v. William & John Don & Co., 121 Fed. 171; Vacuum Oil Co. v. Climax Refining Co., 120 Fed. 254; Dennison Mfg. Co. v. Scharf Tag, Label & Box Co., 135 Fed. 625, 68 C. C. A. 263; National Washboard Co. v. Goldstein, 198 Fed. 68, 117 C. C. A. 176; Moline Plow Co. v. Omaha Iron Stove Co., 235 Fed. 519, 149 C. C. A. 65; Rocky Mountain Bell Telephone Co. v. Utah Independent Telephone Co., 31 Utah, 377, 8 L. R. A. (N. S.) 1153 and note, 88 Pac. 26; and see Newport Sand Bank Co. v. Monarch Sand Mining Co., 144 Ky. 7, 34 L. R. A. (N. S.) 1040, 137 S. W. 784.

Relief refused: Samson Cordage Works v. Puritan Cordage Mills, 197 Fed. 205, 211 Fed. 603, L. R. A. 1915F, 1107, 128 C. C. A. 203; and see A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 201 U. S. 166, 50 L. Ed. 710, 26 Sup. Ct. 425, a technical trademark case, where the court refused to say whether a colored strand in rope could be protected on theory of unfair competition: Diamond Match Co. v. Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59 (two-colored tip to match); Goldsmith Silver Co. v. Savage, 211 Fed. 751 (numeral on label).

165 Globe-Wernicke Co. v. Brown, 121 Fed. 185 (injunction against use of word "elastic" as applied to bookcases); Draper v. Skerrett, 116 Fed. 206; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722 (Dr. Drake's German Croup Remedy); Bates Mfg. Co. v. Bates Numbering Machine Co., 172 Fed. 892 (Bates Numbering Machines); Jacobs v. Beecham, 221 U. S. 263, 55 L. Ed. 729, 31 Sup. Ct. 555 (Beacham's Pills); George Frost Co. v. E. B. Estes & Sons, 156 Fed. 677 (Velvet Grip Garters); Zittlosen Mfg. Co. v. Boss, 219 Fed. 887, 135 C. C. A. 551 ("Easy Emptying" as applied to lawn mowers); Standard Paint Co. v. Rubberoid Roofing Co., 224 Fed. 695, 140 C. C. A. 235 ("Rubberoid"); Saalfield Pub. Co. v.

tion of the article itself as to color, size, or lettering as to deceive purchasers. 166 In all these cases the ques-

G. & C. Merriam Co., 238 Fed. 1, 151 C. C. A. 77; O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 158 C. C. A. 37; White Studio v. Dreyfoos, 221 N. Y. 46, 116 N. E. 796; Westcott Chuck Co. v. Oneida Nat. Chuck Co., 199 N. Y. 247, 139 Am. St. Rep. 907, 20 Ann. Cas. 858, 92 N. E. 639. Where the public gave a slang name to complainant's product but he did not advertise it under that name, and there was no effort on defendant's part to substitute, he would not be restrained from use of such word: Denver Chemical Mfg. Co. v. Lilley, 216 Fed. 869, 133 C. C. A. 73 ("Denver Mud" for Antiphlogistine); Coca Cola Co. v. Branham, 216 Fed. 264 ("Koke" for Coca Cola). The use of a word which has become generic will not be enjoined where there is no attempt to deceive: La Republique Francaise v. Saratoga Vichy Spring Co., 191 U. S. 427, 48 L. Ed. 247, 24 Sup. Ct. 145; Kellogg Toasted Corn Flake Co. v. Quaker Oats Co., 235 Fed. 657, 149 C. C. A. 77. For cases involving the use of trade names, see section 580.

166 Globe-Wernicke Co. v. Brown & Besley, 121 Fed. 90, 57 C. C. A. 344 (defendant placed files on the market so like plaintiff's in name, size and color as to mislead ordinary customers); Enterprise Mfg. Co. v. Landers, 124 Fed. 923 (affirmed 131 Fed. 240, 65 C. C. A. 587); Scriven v. North, 134 Fed. 366, 67 C. C. A. 348; Edison Mfg. Co. v. Gladstone (N. J. Eq.), 58 Atl. 391. In a few cases retailers have been enjoined from selling another article when complainant's is called for, thus passing off another article as complainant's; Samuel Bros. & Co. v. Hostetter Co., 118 Fed. 257, 55 C. C. A. 111; N. K. Fairbanks Co. v. Dunn, 126 Fed. 227. See Walter Baker & Co. v. Slack, 130 Fed. 514, 65 C. C. A. 138; and compare Walter Baker & Co. v. Gray, 192 Fed. 921, 931, 113 C. C. A. 117, and note to 52 L. R. A. (N. S.) 899.

A distinction is to be observed between a copying of the mechanical and functional construction of an unpatented article, which is permissible: Pope Automatic Merchandising Co. v. McCrum-Howell Co., 191 Fed. 979, 40 L. R. A. (N. S.) 463, 112 C. C. A. 391; Marvel Co. v. Pearl, 133 Fed. 160, 66 C. C. A. 226; John H. Rice & Co. v. Redlich Mfg. Co., 202 Fed. 155, 44 L. R. A. (N. S.) 1057, 122 C. C. A. 442; Bender v. Enterprise Mfg. Co., 156 Fed. 641, 13 Ann. Cas. 649, 17 L. R. A. (N. S.) 448, note, 84 C. C. A. 353; Rathbone, Sard & Co. v. Champion Steel Range Co., 189 Fed. 26, 31, 37 L. R. A. (N. S.) 258, 110 C. C. A. 596; Edward Hilker Mop Co. v. United States Mop Co., 191 Fed. 613, 112 C. C. A. 176; Keystone Type Foundry v.

tion is whether the similarity is such as to cause confusion and to deceive the public into taking other goods than those of plaintiff. If this confusion and deception will result, equity will generally grant an injunction.

Portland Publishing Co., 180 Fed. 301, 186 Fed. 690, 108 C. C. A. 508; Keystone Type Foundry v. National Compositype Co., 183 Fed. 891; and a copying of the general form and appearance unnecessarily: George G. Fox Co. v. Hathaway, 199 Mass. 99, 24 L. R. A. (N. S.) 900, 85 N. E. 417; Rushmore v. Manhattan Screw etc. Works, 163 Fed. 939, 19 L. R. A. (N. S.) 269, 90 C. C. A. 299; Baldwin v. Grier Bros. Co., 215 Fed. 735; Margarete Steiff v. Bing, 215 Fed. 204. Even where the object is not covered by any copyright, it may not be reproduced by some mechanical process, the work being of inferior character, if it is held out to be the plaintiff's product. See E. P. Dutton & Co. v. Cupples, 117 App. Div. 172, 102 N. Y. Supp. 309; Fonotipia v. Bradley, 171 Fed. 951.

It is usually held that a third person has the right to make repair parts for a well-known article and to label them with its name, in order to indicate what it is for: Wagner Typewriter Co. v. F. S. Webster Co., 144 Fed. 405; Bender v. Enterprise Mfg. Co., 156 Fed. 641, 13 Ann. Cas. 649, 17 L. R. A. (N. S.) 448, 84 C. C. A. 353; Edison Mfg. Co. v. Gladstone (N. J. Eq.), 58 Atl. 391.

167 "It is not necessary that the resemblance should be such as would deceive first or intelligent purchasers. It is sufficient if it be calculated to deceive the unwary, the incautious, or the ignorant purchaser. Neither need the resemblance be so great that one would be deceived who should see the labels placed side by side. If an ordinary purchaser, looking at the article offered to him, would naturally be led, from the label attached to it, to suppose it to be the product of a rival manufacturer, and would purchase it in that belief, the court will enjoin the use of such article as fraudulent": Cauffman v. Schuler, 123 Fed. 205, 206. Compare Allen B. Wrisley Co. v. Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54, where it is said that there is no wrong when a person using ordinary care would not be deceived. A party using similar devices is obliged only to take such care as the use of such devices and the space in which they are used will allow: Coats v. Merrick Thread Co., 149 U. S. 562, 37 L. Ed. 847, 13 Sup. Ct. 966. In the following case it was held that the imitation was not such as to warrant an injunction: Gail v. Wackerbarth, 28 Fed. 286.

Following out the equitable maxim that equity aids the vigilant, relief will not be given to protect careless and negligent purchasers:

§ 2007. (§ 579a.) Same; Labels.—Under the federal statute, labels may be registered in the patent office. But many labels are protected only under the rules of unfair competition. The infringing label may imitate the name of the complainant 168 or his product, 169 some

American Tobacco Co. v. Globe Tobacco Co., 193 Fed. 1015, 1018; Joseph Schlitz Brewing Co. v. Houston Ice & Brewing Co., 241 Fed. 817, 154 C. C. A. 519. The liability of the ultimate consumer to be deceived is the test to be held in mind; Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, L. R. A. 1915F, 1107, 128 C. C. A. 203; Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164; O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 158 C. C. A. 37; and the class and cost of the goods and the character of the customer must be taken into consideration. Thus where customer's were experts and the defendant stamped its name on its goods, held there was no unfair competition; Westcott Chuck Co. v. Oneida Nat. Chuck Co., 122 App. Div. 260, 106 N. Y. Supp. 1016; whereas if the customers are ignorant, slight resemblances may make the competition unfair; H. E. Winterton Gum Co. v. Autosales Gum & Chocolate Co., 211 Fed. 612, 128 C. C. A. 212; Enoch Morgan's Sons Co. v. Troxell, 23 Hun (N. Y.), 632, 636. The fact that careful purchasers may not be deceived goes only to the measure of damages; Howard Dustless Duster Co. v. Carleton, 219 Fed. 913.

If the deception is the result of the defendant's conduct, the ultimate consumer will be protected, although the dealers knew the origin: Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 723, 119 C. C. A. 164; Wm. Wrigley, Jr., Co. v. L. P. Larson, Jr., Co., 195 Fed. 568; Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37, 83 C. C. A. 149; New England Awl & Needle\* Co. v. Marlborough Awl etc. Co., 168 Mass. 154, 155, 60 Am. St. Rep. 377, 46 N. E. 386; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed. 869, 878, 23 C. C. A. 554. But defendant must be responsible or, as it is sometimes said, the goods must themselves speak the fraud; Rathbone, Sard & Co. v. Champion Steel Range Co., 189 Fed. 26, 37 L. R. A. (N. S.) 258, 110 C. C. A. 596; Hill Bread Co. v. Goodrich Baking Co. (N. J. Eq.), 89 Atl. 863. The manufacturer is not responsible for the fraud of the retailer or the lying language of salesmen: H. E. Winterton Gum Co. v. Autosales Gum etc. Co., 211 Fed. 612, 128 C. C. A. 212.

168 Mellwood Distilling Co. v. Harper, 167 Fed. 389 (Mellwood and Mill Wood).

169 A. Bauer & Co. v. Order of Carthusian Monks, 120 Fed. 78,
56 C. C. A. 484 (Chartreuse and Chasseurs); Metcalfe v. Brand, 86
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characteristic device or catchword,<sup>170</sup> or the general appearance of his label.<sup>171</sup> The resemblance may not be so close as to make it difficult to distinguish the two by comparison, for this is what seldom occurs in fact. The customer remembers some characteristic about the label, more likely some catch-word than the name of the maker, and having seen that, thinks of nothing else.<sup>172</sup>

§ 2008. (§ 579b.) Same; Refilling.—Another means of unfair competition consists in refilling the complainant's packages with defendant's product. In many cases this is fraud, pure and simple. But such use

Ky. 331, 9 Am. St. Rep. 282, 5 S. W. 773 (Lexington Mustard); Lanahan v. John Kissel & Son, 135 Fed. 899 (Hunter Whiskey, with a white label, and "White Label Hunter Whiskey").

170 Bluthenthal v. Mohlmann, 49 Fla. 275, 38 South. 709 (Old Joe and Old Geo.); Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511 ("She" in stock label for eigars); Johnson & Johnson v. Seabury & Johnson, 69 N. J. Eq. 696, 61 Atl. 5 (Red Cross on druggists' supplies). Compare Bear Lithia Springs Co. v. Great Bear Spring Co., 71 N. J. Eq. 595, 71 Atl. 383 (black bear and polar bear dissimilar).

171 Victor Talking Machine Co. v. Armstrong, 132 Fed. 711; Ohio Baking Co. v. National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116; Cauffman v. Schuler, 123 Fed. 205; National Water Co. v. O'Connell, 159 Fed. 1001; National Water Co. v. Hertz, 177 Fed. 607; R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co., 151 Fed. 819; Notaseme Hosiery Co. v. Straus, 201 Fed. 99, 119 C. C. A. 134, 209 Fed. 495; Standard Table Oil Cloth Co. v. Trenton Oil Cloth & Linoleum Co., 71 N. J. Eq. 555, 63 Atl. 846. But see Viavi Co. v. Vimedia Co., 245 Fed. 289, 157 C. C. A. 481.

172 Luyties Bros. v. E. Zimmermann & Co., 149 App. Div. 542, 133 N. Y. Supp. 997; and see Bates Mfg. Co. v. Bates Numbering Machine Co., 172 Fed. 892, 897.

173 Using Hostetter Bitters Bottles for a spurious bitters: Hostetter Co. v. William Schneider etc. Liquor Co., 107 Fed. 705; even though the complainant's labels were not used: Hostetter Co. v. Gallagher Stores, 142 Fed. 208. Using glasses furnished by complainant and marked "Moxie" for the sale of a competing beverage; Moxie Co. v. Bagoian, 197 Fed. 680. Sale of liquors in bulk with empty bottles of complainant: Hennessy v. Wine Growers' Ass'n, 212 Fed. 308.

will be forbidden, even though the product is free to the world, unless the complainant's marks are obliterated from the container.<sup>174</sup>

(§ 579c.) Same; Name of Play or Book.— § 2009. The name itself, apart from subject matter, is not protected by copyright, 175 nor is it a trade-mark, 176 for it is the name of the article itself and not a mark of the owner. Yet there is a growing disposition to protect names on the theory of unfair competition. 177 It was suggested in the Glaser case that if the second author put his name to the work, there could be no unfair competition; but although this may be true of a book, yet in the case of a play, the authorship is in many instances unknown to the general public, who rely upon the title alone. Not only may an absolute piracy be enjoined.<sup>178</sup> but in several instances the use of the name. though applied to an entirely different production, was prohibited.179

174 Prest-O-lite Co. v. Davis, 215 Fed. 349, 131 C. C. A. 491; Searchlight Gas Co. v. Prest-O-lite Co., 215 Fed. 692, 131 C. C. A. 626; Prest-O-lite Co. v. Heiden, 219 Fed. 845, L. R. A. 1915F, 945, 135 C. C. A. 515.

175 Glaser v. St. Elmo Co., 175 Fed. 276, 278; Atlas Mfg. Co. v. Street & Smith, 204 Fed. 398, 403, 47 L. R. A. (N. S.) 1002, 122 C. C. A. 568; Harper v. Ranous, 67 Fed. 904 (Trilby).

176 Black v. Ehrich, 44 Fed. 793, 794.

177 See dictum in Munro v. Tousey, 129 N. Y. 38, 14 L. R. A. 245, 29 N. E. 9, that plaintiff might have exclusive right to "Old Sleuth" as title of a work of fiction; and see, especially, Saalfield Pub. Co. v. G. & C. Merriam Co., 238 Fed. 1, 151 C. C. A. 77 (publisher of "Webster's Dictionary" in competition with successor of original publisher must use distinguishing notice).

178 Ferris v. Frohman, 223 U. S. 424, 56 L. Ed. 492, 32 Sup. Ct. 263; Aronson v. Fleckenstein, 28 Fed. 75; Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177.

179 Shook v. Wood, 32 Leg. Int. 264 (Two Orphans); Frohman v. Payton, 34 Misc. Rep. 275, 68 N. Y. Supp. 849 (L'Aiglon); Frohman v. Morris, 68 Misc. Rep. 461, 123 N. Y. Supp. 1090

§ 2010. (§ 579d.) Same; Geographical Names.—There is, in general, no exclusive right to the use of a geographical name when it is descriptive of the place of origin. It may, however, acquire a secondary meaning, which will be protected either absolutely or to the extent of compelling the second user to differentiate his product. If the word is fanciful, so that no one would suppose that it was used descriptively, an exclusive right may be obtained. If the use by the complainant deceives the public as to origin, however, the principle of unclean hands may be applied. If the complainant uses a mark which is descriptive, and the defendant uses it falsely, he may be restrained.

(Chanticlere); Outcault v. Lamar, 135 App. Div. 110, 116, 119 N. Y. Supp. 930 (Buster Brown). Hopkins Amusement Co. v. Frohman, 202 Ill. 541, 67 N. E. 391, came up on demurrer. The court refused to admit that Frohman had any exclusive right to "Sherlock Holmes," but overruled the demurrer because the complaint set up fraudulent acts. See Klaw v. General Film Co., N. Y. L. J., March 4, 1915, injunction against calling a photo play, "A Fool There Was," which was not the same play as complainant's. 180 Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 45 L. Ed. 365 and note, 21 Sup. Ct. 270.

181 La Republique Francaise v. Saratoga Vichy Spring Co., 191
U. S. 427, 435, 48 L. Ed. 247, 24 Sup. Ct. 145; Apollo Bros. v. Perkins, 207 Fed. 530, 125 C. C. A. 192; Zittlosen Mfg. Co. v. Boss, 219 Fed. 887, 135 C. C. A. 551; Williams v. Mitchell, 106 Fed. 168, 171, 45 C. C. A. 265; Manitou Springs Mineral Water Co. v. Schueler, 239 Fed. 593, 152 C. C. A. 427; Dyment v. Lewis, 144 Iowa, 509, 26
L. R. A. (N. S.) 73, 123 N. W. 244; and see C. A. Briggs Co. v. National Wafer Co., 215 Mass. 100, Ann. Cas. 1914C, 926, 102 N. E. 87.

182 Anheuser-Busch Brewing Ass'n v. Fred Miller Brewing Co., 87 Fed. 864 (Budweiser Beer); Julius Kayser & Co. v. Italian Silk Underwear Co., 160 App. Div. 607, 146 N. Y. Supp. 22 (Italian silk); Fleischmann v. Schuckmann, 62 How. Pr. (N. Y.) 92 (Vienna Bread); International Cheese Co. v. Phenix Cheese Co., 118 App. Div. 499, 103 N. Y. Supp. 362 (Philadelphia cream cheese); Wertheimer v. Batcheller Importing Co., 185 Fed. 850 (Riz de Java).

183 Rosenthal v. Blatt, 80 N. J. Eq. 90, 83 Atl. 387 (London Shop).

184 City of Carlsbad v. Kutnow, 68 Fed. 794, 71 Fed. 167, 18

§ 2011. (§ 579e.) Same; Advertising.—Although the courts still recognize the right of a tradesman to make false statements concerning the quality of his wares, in reliance on the maxim caveat emptor, yet they will interfere to protect the property rights of a competitor. Thus children of the original proprietor or persons connected with a business may go into business on their own account and advertise their former connection or relationship, may even claim that the success of the old business was due to their efforts, but must not leave it to be inferred that they are the successors. 185 Where the copyright on Webster's Dictionary had expired, the court enjoined a competing house from advertising that it was the original publisher and at the same time enjoined the original publisher from advertising that it had the exclusive right to the use of the name of the book. 186 Where the defendant has a right to manufacture the same identical article as the complainant, he may copy the cuts from the latter's catalog, if they truthfully describe his own productions. 187

It is necessary for a complainant to show that advertisements or circulars reached the ultimate purchaser.

C. C. A. 24; and see National Water Co. v. Hertz, 177 Fed. 607; Chancellor etc. of Oxford University v. Wilmore-Andrews Publishing Co., 101 Fed. 443 (Oxford Bibles).

185 Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U. S.
554, 559, 52 L. Ed. 616, 28 Sup. Ct. 350; White v. Trowbridge, 216
Pa. St. 11, 64 Atl. 862; Stix, Baer & Fuller Dry Goods Co. v. American Piano Co., 211 Fed. 271, 127 C. C. A. 639; Chickering v. Chickering & Sons, 215 Fed. 490, 131 C. C. A. 538.

186 Ogilvie v. G. & C. Merriam Co., 149 Fed. 858; G. & C. Merriam Co. v. Ogilvie, 159 Fed. 638, 14 Ann. Cas. 796, 16 L. R. A. (N. S.) 549, 88 C. C. A. 596; Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co., 166 Fed. 26, 92 C. C. A. 60.

187 Cobbett v. Woodward, L. R. 14 Eq. 407; Collender v. Griffith, 11 Blatchf. 212, Fed. Cas. No. 3000; Van Kannel Revolving Door Co. v. American Revolving Door Co., 215 Fed. 582, 131 C. C. A. 650; Hamilton Mfg. Co. v. Tubbs Mfg. Co., 216 Fed. 401, 411; and see Viavi Co. v. Vimedia Co., 245 Fed. 289, 157 C. C. A. 481.

Lying circulars which were put in the boxes or cartons but were removed by the jobbers will not be enjoined. 188

- § 2012. (§ 579f.) Same; Accounting.—The scope of the accounting follows the usual rules. It is a matter within the discretion of the trial court, and in general will not be disturbed. According to the facts of each case, the accounting may be only as to such sales as a complainant lost by reason of defendant's sales, 189 may be as to all the profits, 190 or may be denied entirely. 191 Complainant cannot recover damages, under the familiar rule as to unliquidated torts. 192 Laches will often bar the right to an accounting. 193
- § 2013. (§ 580.) Trade-names.—Where one adopts a trade-name so similar to that of another that confusion
- 188 Edward Hilker Mop Co. v. United States Mop Co., 191 Fed. 613, 112 C. C. A. 176; G. W. Cole Co. v. American Cement etc. Co., 130 Fed. 703, 708, 65 C. C. A. 105.
- <sup>189</sup> Rushmore v. Badger Brass Mfg. Co., 198 Fed. 379, 117 C. C. A. 255.
- 190 Notaseme Hosiery Co. v. Straus, 215 Fed. 361, 131 C. C. A. 503; Wolf Bros & Co. v. Hamilton-Brown Shoe Co., 206 Fed. 611, 124 C. C. A. 409; especially if it is hard to separate the items.
- 191 J. F. Rowley Co. v. Rowley, 193 Fed. 390, 113 C. C. A. 386, as where amount is trifling; Keystone Type Foundry v. Portland Publishing Co., 180 Fed. 301; G. & C. Merriam Co. v. Ogilvie, 170 Fed. 167, 95 C. C. A. 423; and compare G. & C. Merriam Co. v. Saalfield, 198 Fed. 369, 117 C. C. A. 245.
- 192 L. Martin Co. v. L. Martin & Wilckes Co., 75 N. J. Eq. 257, 20 Ann. Cas. 57, 21 L. R. A. (N. S.) 526, 72 Atl. 294; but see W. R. Lynn. Shoe Co. v. Auburn-Lynn Shoe Co., 100 Me. 461, 4 L. R. A. (N. S.) 960, 62 Atl. 499, 69 Atl. 569.
- 193 Consolidated Ice Co. v. Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506; Dr. Peter H. Fahrney & Sons Co. v. Ruminer, 153 Fed. 735, 82 C. C. A. 621; Jenkins Bros. v. Kelly & Jones Co., 212 Fed. 328; and see O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 158 C. C. A. 37; especially if the defendant was acting innocently; Worcester Brewing Corp. v. Rueter & Co., 157 Fed. 217, 84 C. C. A. 665.

is sure to result and the public will thereby be deceived, an injunction will issue at the suit of the party who first adopted the name. 194 It is beyond the scope of this treatise to discuss in detail what may be appropriated as a trade-name. It is sufficient to state that such a

194 Walter v. Ashton, [1902] 2 Ch. 282; Janney v. Pan-Coast Ventilator & Mfg. Co., 128 Fed. 121 (semble); Elgin Nat. Watch Co. v. Loveland, 132 Fed. 41; Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 50 Am. St. Rep. 57, 30 L. R. A. 182, 42 Pac. 142 ("Mechanics" Store" infringed by "Mechanical Store"); Koebel v. Chicago Landlords' Protective Bureau, 210 Ill. 176, 102 Am. St. Rep. 154, 71 N. E. 362 (name "Landlords' Pro. Bureau" infringed by "Landlords' Pro. Department"); Great Hive of L. of M. v. Supreme Hive of L. of M., 135 Mich. 392, 97 N. W. 779, 99 N. W. 26 (injunction against benefit society, extending into field in competition with society of similar name); Rickard v. Caton College Co., 88 Minn. 242, 92 N. W. 958; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722 (semble); Cady v. Schultz, 19 R. I. 193, 61 Am. St. Rep. 763, 29 L. R. A. 524, 32 Atl. 915. See, also, Saalfield Pub. Co. v. G. & C. Merriam Co., 238 Fed. 1, 151 C. C. A. 77 (publisher of "Webster's Dictionary" in competition with successor of original publisher must use distinguishing notice). In Chadron Opera House Co. v. Loomer, 71 Neb. 785, 99 N. W. 649, it is said that a plaintiff, in order to establish his right "must make it appear with at least reasonable certainty that his adoption of the name was prior in time to that of his adversary; that he adopted and made use of it in such manner as would reasonably apprise the public that he intended it as a distinctive appellation for his trade, commodity, or place of business; and that it was not, at the time of his attempted appropriation of it, in common or general use in connection with like businesses, commodities, buildings, or localities." An injunction has been denied where the similarity has been merely in the part of the name descriptive of the business: Industrial Mut. Deposit Co. v. Central Mutual Deposit Co., 112 Ky. 937, 23 Ky. Law Rep. 2247, 66 S. W. 1032. Also, where the name had a well-defined meaning when adopted by plaintiff; Grand Lodge A. O. U. W. v. Graham, 96 Iowa, 592, 31 L. R. A. 133, 65 N. W. 837. Where a rival wrongfully uses a trade-name, a purchaser may be restrained from selling the goods in such manner as to deceive customers into believing the goods to be those of complainant: Walter Baker & Co. v. Slack, 130 Fed. 514, 65 C. C. A. 138.

name must not so closely resemble another's name as to be calculated to deceive.<sup>195</sup> The name of a person may become so associated with his goods that one of the same name, coming into the business later, will not be allowed to use even his own name without distinguishing his wares; and if he attempts to do so, he will be restrained by a court of equity.<sup>196</sup> As in all cases of

195 "It is true that a man cannot appropriate a geographical name, but neither can he a color, or any part of the English language, or even a proper name, to the exclusion of others whose names are like his. Yet a color, in connection with a sufficiently complex combination of other things, may be recognized as saying so circumstantially that the defendant's goods are the plaintiff's as to pass the injunction line. So, although the plaintiff has no copyright on the dictionary, or any part of it, he can exclude the defendant from a part of the free field of the English language, even from the mere use of generic words, unqualified and unexplained, when they would mislead the plaintiff's customers to another shop. . . . And so, we doubt not, may a geographical name acquire a similar association, with a similar effect": American Waltham Watch Co. v. United States Watch Co., 173 Mass. 85, 73 Am. St. Rep. 263, 43 L. R. A. 826, 53 N. E. 141, per Holmes, J.; Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641.

196 L. E. Waterman Co. v. Modern Pen Co., 235 U. S. 88, 59 L. Ed. 142, 35 Sup. Ct. 91; J. & P. Coats, Ltd., v. John Coates Thread Co., 135 Fed. 177; Ball v. Best, 135 Fed. 434; Wm. Rogers Co. v. International Silver Co., 118 Fed. 133, 55 C. C. A. 83; Chickering v. Chickering & Sons, 120 Fed. 69, 56 C. C. A. 475, 215 Fed. 490, 131 C. C. A. 538; Royal Baking Powder Co. v. Royal, 122 Fed. 337, 58 C. C. A. 499 ("Whatever injury results to the complainant company from the honest and fair use by the defendant of his own name in his own business is a damage which must be endured. It is a natural consequence of the adoption of the name of a person as a trade and corporate name. But the defendant must not use his name in the business in which complainant has embarked, without using every means reasonably possible to distinguish his business from that of the complainant, and his goods from those made by it''); Von Faber v. Faber, 124 Fed. 603; Walter Baker & Co. v. Sanders, 80 Fed. 889, 26 C. C. A. 220; Van Stan's Stratena Co. v. Van Stan, 209 Pa. St. 564, 103 Am. St. Rep. 1018, 58 Atl. 1064; International Silver Co. v. Wm. H. Rogers Corp., 67 N. J. Eq. 646, unfair competition, an actual fraudulent intent is unnecessary. 197

§ 2014. (§ 581.) Corporate Names.—The right of one corporation or an individual to enjoin another from using a similar corporate name depends largely upon the form of the statutes. When there are no statute provisions as to the choice of names, and parties organize a corporation under general laws, they choose a name at their peril. If they take one so like that of an existing corporation as to be misleading, and calculated to deceive the public, they may be enjoined, if there is no language in the statute to the contrary. On the

110 Am. St. Rep. 506, 3 Ann. Cas. 804, 60 Atl. 187. See, also, Guth v. Guth Chocolate Co., 224 Fed. 932, 140 C. C. A. 410; Wood v. Wood, 78 Or. 181, Ann. Cas. 1918A, 226, L. R. A. 1916C, 251, 151 Pac. 969. Compare Meneely v. Meneely, 3 Thomp. & C. 540, 1 Hun, 367. In Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 49 L. Ed. 972, 25 Sup. Ct. 608 (overruling 122 Fed. 348, 58 C. C. A. 510), it was held that the use by a party named Remington of the name "Remington-Sholes Co.," in the manufacture of type-writers is not calculated to deceive purchasers of "Remington" typewriters, and will not be enjoined.

197 Bissell Chilled Plow Works v. T. M. Bissell Plow Co., 121 Fed. 357; Von Faber v. Faber, 124 Fed. 603; Koebel v. Chicago Landlord's Protective Bureau, 210 Ill. 176, 102 Am. St. Rep. 154, 71 N. E. 362; Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641.

198 The language here used is practically the same as that used by Holmes, J., in a dictum in American Order of Scottish Clans v. Merrill, 151 Mass. 558, 8 L. R. A. 320, 24 N. E. 918. In support of the text, see Van Houten v. Hooton Cocoa & C. Co., 130 Fed. 600; J. & P. Coats, Ltd., v. John Coates Thread Co., 135 Fed. 177; Selchow v. Chaffee & Selchow Mfg. Co., 132 Fed. 996; Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879; International Com. Y. W. C. A. v. Young Women's Christian Ass'n, 194 Ill. 194, 56 L. R. A. 888, 62 N. E. 551; Lamb Knit Goods Co. v. Lamb Glove & Mitten Co., 120 Mich. 159, 44 L. R. A. 841, 78 N. W. 1072 (injunction because confusion exists, although defendant is in another town); International Silver Co. v. Wm. H. Rogers Corp., 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 3 Ann. Cas. 804, 60 Atl. 187; Eureka

other hand, where the language of the statute makes the certificate of the state official conclusive, and perhaps where the defendant is organized under special act, there is no redress. <sup>199</sup> In some instances injunctions have been granted at the suit of foreign corporations, restraining domestic corporations from using similar names. <sup>200</sup> It would seem that such relief should be freely granted at the suit of a domestic against a foreign corporation doing business within the state. <sup>201</sup>

Fire Hose Co. v. Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561; Glucose Sugar Ref. Co. v. American Glucose etc. Co. (N. J. Eq.), 56 Atl. 861; Edison Storage Battery Co. v. Edison Automobile Co., 67 N. J. Eq. 44, 56 Atl. 861; St. Patrick's Alliance v. Byrne, 59 N. J. Eq. 26, 44 Atl. 716; Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 679, 27 L. R. A. 42, 39 N. E. 490; Armington v. Palmer, 21 R. I. 109, 79 Am. St. Rep. 786, 43 L. R. A. 95, 42 Atl. 308; Aiello v. Montecalfo, 21 R. I. 496, 44 Atl. 931; Celluloid Mfg. v. Cellonite Mfg. Co., 32 Fed. 94; Finney's Orchestra v. Finney's Famous Orchestra, 161 Mich. 289, 28 L. R. A. (N. S.) 458, note, 126 N. W. 198; Morton v. Morton, 148 Cal. 142, 1 L. R. A. (N. S.) 660, 82 Pac. 664; Bear Lithia Springs Co. v. Great Bear Spring Co., 71 N. J. Eq. 595, 71 Atl. 383. Compare Keystone Oil & Mfg. Co. v. Buzby, 219 Fed. 473, 135 C. C. A. 185; Michigan Sav. Bank v. Dime Sav. Bank, 162 Mich. 297, 139 Am. St. Rep. 558, 127 N. W. 364. Relief was refused in Nebraska Loan & Trust Co. v. Nine, 27 Neb. 507, 20 Am. St. Rep. 686, 43 N. W. 348, because the proof failed to show that there would be any material interference with business. The suit was to restrain the use of the name of a loan and trust company by parties about to organize a corporation in a city one hundred miles away.

199 American Order of Scottish Clans v. Merrill, 151 Mass. 558,
8 L. R. A. 320, 24 N. E. 918; Paulino v. Portuguese Ben. Ass'n, 18
R. I. 165, 20 L. R. A. 272, 26 Atl. 36.

200 Philadelphia Trust, S. D. & Ins. Co. v. Philadelphia Trust Co., 123 Fed. 534; Red Polled Cattle Club v. Red Polled Cattle Club, 108 Iowa, 105, 78 N. W. 803; United States Light & Heating Co. v. United States Light & Heating Co. of N. Y., 181 Fed. 182, 184; Modern Woodmen of America v. Hatfield, 199 Fed. 270; General Film Co. of Mo. v. General Film Co. of Me., 237 Fed. 64, 150 C. C. A. 266.

201 American Clay Mfg. Co. of Pa. v. American Clay Mfg. Co. of

A corporation cannot restrain absolutely an individual from using his own name in his business or that of a corporation of which he is a member, but may require some accompanying explanation.<sup>202</sup> Relief will be given in the case of a fraternal or social organization.<sup>203</sup> It is not necessary that any money damage be shown. The element of competition must, however, in all cases be made to appear. If the business of the two corpora-

N. J., 198 Pa. St. 189, 47 Atl. 936; International Trust Co. v. International Loan & Trust Co., 153 Mass. 271, 10 L. R. A. 758, 26 N. E. 693 (under statute prohibiting foreign corporation from doing business in state under name previously in use by domestic corporation).

202 Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 52 L. Ed. 481 and note, 28 Sup. Ct. 288; Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U. S. 554, 52 L. Ed. 616, 28 Sup. Ct. 350; L. E. Waterman Co. v. Modern Pen Co., 235 U. S. 88, 59 L. Ed. 142, 35 Sup. Ct. 91; Rowley v. J. F. Rowley Co., 161 Fed. 94, 88 C. C. A. 258; David E. Foutz Co. v. S. A. Foutz Stock Food Co., 163 Fed. 408; Williams Soap Co. v. J. B. Williams Soap Co., 193 Fed. 384, 387, 113 C. C. A. 310; Chickering v. Chickering & Sons, 215 Fed. 490, 131 C. C. A. 538; Knabe Bros. Co. v. American Piano Co., 229 Fed. 23, 143 C. C. A. 325; Lapointe Mach. Tool Co. v. J. N. Lapointe Co., 115 Me. 472, 99 Atl. 348; L. Martin Co. v. L. Martin & Wilckes Co., 75 N. J. Eq. 39, 71 Atl. 409; J. I. Case Plow Works v. J. I. Case Threshing Machine Co., 162 Wis. 185, 155 N. W. 128, 129. But see S. F. Myers Co. v. Tuttle, 183 Fed. 235, and Garcia v. Garcia, 197 Fed. 637, where the court thought defendant was acting fraudulently. 203 Talbot v. Independent Order of Owls, 220 Fed. 660, 136 C. C. A. 268; Grand Lodge K. P. of N. & S. A. v. Grand Lodge K. P., 174 Ala. 395, 56 South. 963; Benevolent & Protective Order of Elks v. Improved Benevolent & P. Order of Elks of the World, 205 N. Y. 459, Ann. Cas. 1913E, 639, L. R. A. 1915B, 1074, 98 N. E. 756; Creswill v. Grand Lodge K. of P., 133 Ga. 837, 134 Am. St. Rep. 231, 18 Ann. Cas. 453, 67 S. E. 188 (reversed on account of laches. 225 U. S. 246, 56 L. Ed. 1074, 32 Sup. Ct. 822); Cape May Yacht Club v. Cape May Yacht & Country Club, 81 N. J. Eq. 454, 86 Atl. 972; State Council of J. O. U. A. M. v. National Council J. O. U. A. M., 71 N. J. Eq. 433, 64 Atl. 561; Emory v. Grand United Order of Odd Fellows, 140 Ga. 423, 78 S. E. 922; Daughters of Isabella v. National Order, 83 Conn. 679, Ann. Cas. 1912A, 822, 78 Atl. 333.

tions is dissimilar,<sup>204</sup> or if the two articles do not compete,<sup>205</sup> there can be no unfair competition.

§ 2015. (§ 582.) Application of "Clean Hands" Maxim.—It is a well-established maxim that he who comes into equity must come with clean hands. applies strongly to parties seeking relief against the infringement of trade-marks and against unfair competition. One seeking relief against the frauds of others. must himself be free from fraud. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. Accordingly, it is held that "it is essential that the plaintiff should not in his trade-mark, or in his advertisements and business, be himself guilty of any false or misleading representation; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity; that where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained."206 Thus, relief has been denied

204 Simplex Automobile Co. v. Kahnweiler, 162 App. Div. 480, 147 N. Y. Supp. 617; Deister Concentrator Co. v. Deister Mach. Co. (Ind. App.), 112 N. E. 906.

205 Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173, 90 N. E. 449; Perkins v. Apollo Bros., 197 Fed. 476. If the rights of the complainant are not interfered with, he cannot complain of a deception upon the public; Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510, 514, 121 C. C. A. 200. If there is no fraud, and defendant is selling his goods where complainant's goods are unknown, there is no unfair competition: Hanover Star Milling Co. v. Allen & Wheeler Co., 208 Fed. 513, 125 C. C. A. 515.

206 Clinton E. Worden & Co. v. California Fig Syrup Co., 187
 U. S. 516, 47 L. Ed. 282, 23 Sup. Ct. 161, per Shiras, J. See, also,

to parties seeking an injunction against the use of the words "fig syrup" when it has appeared that figs constituted a very small if any part of plaintiff's compound

Pidding v. How, 8 Sim. 477; Leather Cloth Co. v. American Leather Cloth Co., 4 De Gex, J. & S. 136, 11 H. L. Cas. 523; Perry v. Truefitt, 6 Beav. 66; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. Ed. 706, 2 Sup. Ct. 436 (medicine manufactured by complainant in New York; trade-mark declared it was manufactured by another person in Massachusetts); Krauss v. Jos. R. Peebles' Sons Co., 58 Fed. 585 (liquor sold by plaintiff as "Pepper Whisky" was in fact a mixture); Clotworthy v. Schepp, 42 Fed. 62 (no protection for "fruit puddine" when preparation contains no fruit); Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397 (use of words "East Indies" to denote a medicine not used there and the formula of which was not obtained there, will not be protected); Prince Mfg. Co. v. Prince's Metallic Paint Co., 135 N. Y. 24, 17 L. R. A. 129, 31 N. E. 990 (false representation as to place where ore was obtained): Fetridge v. Wells, 13 How. Pr. 385 (use of name "Balm of a Thousand Flowers" not protected when liquid is not an extract nor distillation of flowers); C. F. Simmons Med. Co. v. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Palmer v. Harris, 60 Pa. St. 156, 100 'Am. Dec. 557; Heath v. Wright, 3 Wall. Jr. 141, Fed. Cas. No. 6310 (injunction to protect quack patent medicine refused). See, also, Memphis Keeley Institute v. Leslie E. Keeley Co., 155 Fed. 964, 16 L. R. A. (N. S.) 921, 84 C. C. A. 112 (Gold Cure); Paris Medicine Co. v. W. H. Hill Co., 102 Fed. 148, 42 C. C. A. 227 (Bromo-Quinine, where there was no bromide); Hazlett v. Pollack Stogie Co., 195 Fed. 28, 36 L. R. A. (N. S.) 632, 115 C. C. A. 30 (personal representative of one who had a right to use his own name as a trade-name leads the public to believe that the originator of the business is still alive, the personality of such originator being a factor in the creation and retention of the good-will); Bear Lithia Springs Co. v. Great Bear Spring Co., 71 N. J. Eq. 595, 71 Atl. 383 (misrepresentations as to curative value of plaintiff's mineral water). If the false representations or improper conduct are quite distinct from the cause of action, relief may be granted. Thus it was no defense to an action for unfairly competing in sales of patent medicine that the plaintiff, a corporation, had no right to practice medicine: World's Dispensary Medical Ass'n v. Pierce, 203 N. Y. 419, 96 N. E. 738; and see Talbot v. Independent Order of Owls, 220 Fed. 660, 136 C. C. A. 268. In the following cases statements calculated to make the public believe an article to be patented, when in fact

bearing that name.<sup>207</sup> Other instances of the application of the principle will be found in the notes.

§ 2016. (§ 583.) Exclusive Franchises.—An injunction is the appropriate remedy to protect a party in the enjoyment of an exclusive franchise against continuous encroachments. "Such continuous encroachments constitute a private nuisance which courts of equity will abate by injunction. The jurisdiction rests on the firm and satisfactory ground of its necessity to avoid a ruinous multiplicity of suits, and to give adequate protection to the plaintiff's property in his franchise." To

it was not, were held sufficient to bar relief; Flavel v. Harrison, 10 Hare, 467; Cheavin v. Walker, L. R. 5 Ch. D. 850. But in other cases, under somewhat different conditions, the opposite conclusion has been reached: Marshall v. Ross, L. R. 8 Eq. 651 (word "patent" as applied to "patent thread" had become a word of art); Ford v. Foster, L. R. 7 Ch. 611. It has been held that a mere false or exaggerated statement in advertising a manufactured article tending to recommend its use to the public will not deprive a plaintiff of his right to an injunction: Curtis v. Bryan, 2 Daly, 312; especially where the representations had been discontinued prior to the bringing of the suit; George G. Fox Co. v. Best Baking Co., 209 Mass. 251, 95 N. E. 747; Siegert v. Gandolfi, 149 Fed. 100, 79 C. C. A. 142. See, also, Dixon Crucible Co. v. Guggenheim, 2 Brewst. 321. For further illustrations, see 2 Pom. Eq. Jur., 4th ed., § 934, notes 10 and (1); 1 Pom. Eq. Jur., § 402, n.

207 Clinton E. Worden & Co. v. California Fig Syrup Co., 187 U. S. 516, 47 L. Ed. 282, 23 Sup. Ct. 161.

208 Walker v. Armstrong, 2 Kan. 198. The text is cited in Bartlesville Electric Lt. & P. Co. v. Bartlesville I. R'y Co., 26 Okl. 453, 29 L. R. A. (N. S.) 77, 109 Pac. 228; and quoted in Memphis Street R'y Co. v. Rapid Transit Co., 133 Tenn. 99, Ann. Cas. 1917C, 1045, L. R. A. 1916B, 1143, 179 S. W. 635. The reasons for the exercise of the jurisdiction are well stated by Shaw, J., in Boston & Lowell R. Corp. v. Salem & Lowell R. Co., 2 Gray, 1, 27: "It is a right or title, which, if it exist at all, is purely a statute right. It is created by law, it exists only in contemplation of law, it is invisible, intangible and incapable of a physical possession, and depends on the law for its protection. If the right exists and has been

be entitled to relief, a plaintiff need show only that he is entitled to a franchise and that there is continuous interference therewith by the defendant.<sup>209</sup> It is not neces-

invaded, the appropriate and specific remedy, that which shall prevent the continuing invasion, is by injunction, and this can be afforded only in equity. . . . An injunction will generally be granted to secure the enjoyment of a statute privilege, of which the party is in actual possession, unless the right is doubtful. . . . In regard to the limited equity jurisdiction of this court, it is proper to state, that if the plaintiffs are disturbed in the enjoyment of their franchise or incorporeal right, such a disturbance is technically a nuisance." See, also, St. Louis R. Co. v. Northwestern etc. R. Co., 69 Mo. 65 (proof of injury is not essential); Raritan & D. B. R. Co. v. Delaware & R. C. Co., 18 N. J. Eq. 546; Newburgh & C. Turnpike Road v. Miller, 5 Johns. Ch. 101; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884.

209 The text is quoted in Memphis Street R'y Co. v. Rapid Transit Co., 133 Tenn. 99, Ann. Cas. 1917C, 1045, L. R. A. 1916B, 1143, 179 S. W. 635. See City of Bessemer v. Bessemer City Water Works, 152 Ala. 391, 44 South. 663. The amount of damage is of no importance: Nittany Valley R. Co. v. Empire Steel & Iron Co., 218 Pa. 224, 67 Atl. 349; but the damages must be in the nature of an abuse of the franchise and not merely incidental: Birmingham Traction Co. v. Southern Bell T. & T. Co., 119 Ala. 144, 24 South. 731. order to establish his right, plaintiff must show not only a grant from the proper authority, but also the fulfillment of all obligations imposed upon him by the act granting the franchise as conditions precedent. Thus relief was conditioned upon prompt taking of condemnation proceedings: Fayetteville St. R'y v. Aberdeen etc. R. R. Co., 142 N. C. 423, 9 Ann. Cas. 683, 55 S. E. 345. And there may be implied obligations, the fulfillment of which are necessary before relief will be granted: Montana Water Co. v. City of Billings, 214 Fed. 121. Thus, in a Kansas case, it is said: "There is, however, an implied obligation imposed upon the grantee of a ferry franchise by his acceptance of the grant, to furnish the necessary means of transit for travelers. His privileges are granted for the benefit of the traveling public, and until he is prepared to serve them he has acquired no right to prohibit others from doing so": Walker v. Armstrong, 2 Kan. 198. The exclusive franchises which are protected by injunction are many. In the following cases relief was granted:

For the protection of a ferry franchise.—Walker v. Armstrong, 2 Kan. 198; Chard v. Stone, 7 Cal. 117; City of New York v. Starin, sary that the plaintiff first establish his right at law.<sup>210</sup> In some instances injunctions have been granted to parties having an exclusive right, to restrain another claim-

106 N. Y. 1, 12 N. E. 631; Patterson v. Wollman, 5 N. D. 608, 33
L. R. A. 536, 67 N. W. 1040; Vallejo Ferry Co. v. Vallejo, 146 Cal. 392, 80 Pac. 514; Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255, 131 Pac. 864.

For the protection of a toll bridge.—The Binghamton Bridge, 3 Wall. 51, 18 L. R. A. 137; Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35.

For the protection of a turnpike.—Newburgh & C. Turnpike Road v. Miller, 5 Johns. Ch. 101; Croton Turnpike Co. v. Ryder, 1 Johns. Ch. 611; Ames, Cas. in Eq. Jur., 611.

For the protection of an exclusive right to supply gas.—New Orleans Gas-Light Co. v. Louisiana Light etc. Co., 115 U. S. 650, 29 L. Ed. 516, 6 Sup. Ct. 252; Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138; Elizabethtown Gaslight Co. v. Green, 46 N. J. Eq. 118, 18 Atl. 844; affirmed, 49 N. J. Eq. 329, 24 Atl. 560.

For the protection of an exclusive railroad franchise.—Boston & Lowell R. Corp. v. Salem & Lowell R. Co., 2 Gray, 1; St. Louis R. Co. v. Northwestern etc. R. Co., 69 Mo. 65; Raritan & D. B. R. Co. v. Delaware & R. C. Co., 18 N. J. Eq. 546; Nittany Valley R. Co. v. Empire Steel & Iron Co., 218 Pa. 224, 67 Atl. 349; Fayetteville St. R'y v. Aberdeen etc. R. R. Co., 142 N. C. 423, 9 Ann. Cas. 683, 55 S. E. 345.

For the protection of an exclusive right of a public weigher.—Davidson v. Sadler, 23 Tex. Civ. App. 600, 57 S. W. 54.

For the protection of a market franchise.—Wilcox v. Steel, [1904] 1 Ch. 212.

For the protection of waterworks.—Mercantile Trust & Deposit Co. v. Columbus, 161 Fed. 135.

For the protection of the right to appropriate water.—Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 Pac. 412.

210 Nittany Valley R. Co. v. Empire Steel & Iron Co., 218 Pa. 224, 67 Atl. 349; Moor v. Veazie, 31 Me. 360 ("Where a state has the right to make the grant, and it has been made, and the required conditions have been performed, it has been held to be equivalent to a determination at law that the right exists"). For early English cases contra, see Whitechurch v. Hide, 2 Atk. 391; Ames, Cas. in Eq. Jur., 661, 663; Anonymous, 2 Ves. 414.

ing the exclusive right from setting it up, the ground of the jurisdiction being the removal of a cloud upon the title to the franchise.<sup>211</sup> It is sometimes held that an exclusive right conferred by statute must yield to the public use, upon just compensation being paid therefor. In cases where the defendant is authorized to take advantage of the eminent domain laws, the injunction should be limited so as to remain in force only until compensation is paid.<sup>212</sup>

§ 2017. (§ 584.) Same—Continued.—It is not necessary, "to entitle the owner to relief in equity, that the franchise should be an exclusive franchise in the sense that the grant of another similar franchise to be exercised and enjoyed at the same place would be void." The theory is "that the defendant, who has no franchise, is acting in violation of law in operating . . . without authority from the sovereign power, and that the owner of the franchise may complain of and restrain such illegal acts when they result in injury to his franchise, which, in the eye of the law, is property. As to the one who is invading his rights without legal sanction, the franchise is an exclusive franchise, although the owner of it might not be entitled to any protection as against the granting of a similar franchise to another." 213

<sup>211</sup> People's Electric L. & P. Co. v. Capital Gas & E. L. Co., 25 Ky. Law Rep. 327, 75 S. W. 280 (the cloud is "preventing it from selling, pledging or mortgaging its stock, or selling its bonds, in consequence of which it has been unable to erect its electric plant, or to enjoy the franchise granted it by the city of Frankfort"); Citizens' Gaslight Co. v. Louisville Gas Co., 81 Ky. 263.

<sup>212</sup> Nashville, M. & S. Turnpike Co. v. Davidson County, 106Tenn. 258, 61 S. W. 68.

<sup>213</sup> Patterson v. Wollman, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040, and cases cited. The text is cited in Bartlesville Electric Lt. & P. Co. v. Bartlesville I. R'y Co., 26 Okl. 453, 29 L. R. A. (N. S.) 77, 109 Pac. 228; Millville Gas Light Co. v. Vineland Light & Power Co., 72 N. J. Eq. 305, 65 Atl. 504; and quoted in Citizens'

When it is sought to cancel the franchise for breach of conditions, equity will be quick to seize an opportunity to save a forfeiture, and will enjoin proceedings, if a waiver can be inferred,<sup>214</sup> or will grant a preliminary injunction to preserve the status until the rights of the parties can be determined by a plenary suit,<sup>215</sup>

Electric I. Co. v. Lackawanna & W. V. P. Co., 255 Pa. 145, 99 Atl. 462; Memphis St. R'y Co. v. Rapid Transit Co., 133 Tenn. 99, Ann. Cas. 1917C, 1045, L. R. A. 1916B, 1143, 179 S. W. 635 (injunction by street railway against unlicensed "jitneys"). See Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884; Green v. Ivey, 45 Fla. 338, 33 South. 711; Tugwell v. Eagle Pass Ferry Co., 74 Tex. 480, 9 S. W. 120, 13 S. W. 654. See, also, McInnis v. Pace, 78 Miss. 550, 29 South. 835 (ferry); Cauble v. Craig, 94 Mo. App. 675, 69 S. W. 49 (ferry); Midland Terminal & Ferry Co. v. Wilson, 28 N. J. Eq. 537 (ferry); Smith v. Harkins, 3 Ired. Eq. 613, 44 Am. Dec. 83 (exclusive in grantee unless legally and duly ordered otherwise by the public authorities); Appeal of Douglass, 118 Pa. St. 65, 12 Atl. 834 ("the grant of the ferry franchises, without its being exclusive in terms, is the grant of the exclusive privilege, as against one having no such grant''); Twin Village Water Co. v. Damariscotta Water Co., 98 Me. 325, 56 Atl. 1112; Pennsylvania R. Co. v. National R. Co., 23 N. J. Eq. 441; Merchants' etc. Telephone Co. v. Citizens' Tel. Co., 123 Ky. 90, 93 S. W. 642. Right of street railway to object to another company without a franchise constructing railway on same street; Central Crosstown R'y Co. v. Metropolitan St. R'y Co., 16 App. Div. 229, 44 N. Y. Supp. 752; Hamilton G. & C. Traction Co. v. Hamilton & L. Electric Transit Co., 69 Ohio St. 402, 69 N. E. 991; Northern Cent. R'y Co. v. Harrisburg & M. Electric R'y Co., 177 Pa. St. 142, 34 L. R. A. 572, 35 Atl. 624. But the plaintiff must show that the damage to it differs in kind from that of public generally, or else the action must be brought either by the city or the people: Empire City Subway Co. v. Broadway & 7th Ave. R'y Co., 87 Hun, 279, 33 N. Y. Supp. 1055; affd. no op. 159 N. Y. 555, 54 N. E. 1092; Philadelphia W. & B. R. Co. v. Wilmington City R'y Co., 8 Del. Ch. 134, 38 Atl. 1067; New Hartford Water Co. v. Village Water Co., 87 Conn. 183, 87 Atl. 358; North Shore Electric Light & Power Co. v. Port Jefferson Electric Lt. Co., 151 App. Div. 63, 135 N. Y. Supp. 824.

214 Seattle R. & S. R'y Co. v. Seattle, 216 Fed. 694.

215 North Jersey Street R'y Co. v. Board of Street & Water Commissioners of City of Newark, 73 N. J. Eq. 106, 67 Atl. 691;

but it must appear that the plaintiff is in actual enjoyment of the franchise, and that its right is not seriously disputed.<sup>216</sup> Even though it be ultimately proved that there is a right to cancel, equity may still give the holder of the franchise an opportunity to make reparation,<sup>217</sup> or may protect the bondholders by compelling the city to pay for the physical assets.<sup>218</sup>

Knickerbocker Trust Co. v. Kalamazoo, 182 Fed. 865; Point Pleasant Elec. Light & Power Co. v. Borough of Bay Head, 62 N. J. Eq. 296, 49 Atl. 1108.

216 Millville Gas Light Co. v. Vineland Light & Power Co., 72 N. J. Eq. 305, 65 Atl. 504; Nittany Valley R. Co. v. Empire Steel & Iron Co., 218 Pa. 224, 67 Atl. 349.

217 Asbury Park & S. G. R'y Co. v. Township Committee of Neptune Township, 73 N. J. Eq. 323, 67 Atl. 790.

218 Mercantile Trust & Deposit Co. v. Columbus, 161 Fed. 135,. in which the court recognizes the rule as laid down in Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156, 33 L. Ed. 573, 10 Sup. Ct. 316, that the bondholders are only entitled to the rights of the corporation itself, but distinguishes that case because the bondholders here had done all they reasonably could to make the waterworks satisfactory.

## CHAPTER XXVIII.

## INJUNCTION AGAINST INTERFERENCE WITH FREEDOM OF TRADE OR EMPLOYMENT; COMBINATIONS, STRIKES, BOYCOTTS, ETC.

## ANALYSIS.

- § 585. The nature of the problem.
- § 586. The tort question stated.
- § 587. Right based on contract.
- § 588. Same—Liability not dependent upon personal malice.
- § 589. Same—Justification for causing a breach of contract.
- § 590. Same—The basis of equitable relief.
- § 591. Right based on expectation of contract—The right of probable expectancy—A property right.
- § 592. Justification—A counter right—Trade competition— Economic self-advancement.
- § 593. Justification, continued—End and means.
- § 594. Interference with the right to contract by unlawful means—Coercion.
- § 595. Unlawful means—Picketing.
- § 596. Unlawful means—Picketing, continued—Intimidation by reason of numbers.
- § 597. Unlawful means Picketing, continued Persistent arguing—Abusive epithets.
- § 598. Unlawful means—Picketing, continued—Blocking entrances.
- § 599. Unlawful means—Fines and expulsion.
- § 600. Lawful means in the competitive struggle—Persuasion
  —Offer of economic advantage.
- § 601. Motive in this branch of the law.
- § 602. Lawful means—Primary strike and primary boycott— The right of the employer against his own employees.
- § 603. The primary strike and the primary boycott, and kindred forms of economic pressure, as methods of influencing one person to the injury of another.
- § 604. The primary strike, primary boycott, and kindred forms of economic pressure, continued When justified.

- § 605. Justification, continued—The closed shop.
- § 606. The secondary boycott and the sympathetic strike.
- § 607. Same, continued—The status of the law.
- § 608. What constitutes a threat of boycott?
- § 609. One law for labor and capital-Blacklisting.
- § 610. Combination and conspiracy as factors.
- § 611. Combinations in restraint of interstate commerce.
- § 612. Attempts at monopoly, and combinations in restraint of trade.
- § 613. The procedural basis of equitable jurisdiction.
- § 614. Where act enjoined is a crime.
- § 615. Freedom of speech—Publication of libel.
- § 616. Preliminary injunction.

§ 2018. (§ 585.) The Nature of the Problem.¹—So far as purely equitable considerations are concerned, the questions here presented are neither new nor complicated. There is involved simply the prevention by injunction of the commission of a threatened tort or a continuance of tortious acts. The cases in the main fall naturally into the class where the complainant, if he were left to his legal remedy, would suffer irreparable damage, or be compelled to resort to a multiplicity of actions at law to secure even a semblance of adequate relief. However, back of the equitable considerations there is a problem in the law of torts both new and com-

1 The following Law Review articles will be found of special value to the investigator of this growing subject: "Some of the Rights of Traders and Laborers," Edw. F. McClennen, 16 H. L. R. 237; "Tort Because of Wrongful Motive of the Actor," James Barr Ames, 18 H. L. R. 411; "Interference With Contracts and Business in New York," E. W. Huffcut, 18 H. L. R. 423; "The Closed Market and the Union Shop," Wm. Draper Lewis, 18 H. L. R. 444; "Crucial Issues in Labor Litigation," Jeremiah Smith, 20 H. L. R. 253; "Motive as an Element in Torts in the Common Law and in the Civil Law," 22 H. L. R. 501; "The Respective Rights of Capital and Labor in Strikes," 5 Illinois Law Rev. 453.

The author is indebted for the substance of this chapter to Professor William G. Hale, of the University of Illinois.

plicated, for it runs the whole gamut of the struggle for commercial and industrial survival and supremacy of individuals and classes and is dependent for its correct solution upon social and economic considerations. The courts have thus been required to face such questions as the nature and extent of the capitalists' rights in the management of his business and of the workingman's property in his labor; to decide how far the employer shall be protected in his right to have labor and custom flow to him free from the interference of third parties and how far the laborer shall be protected from similar interference in his contract of employment or his right to secure employment; to determine what limits shall be placed upon individuals and combinations of individuals in seeking their economic advancement at the expense of their fellows. All these and other problems have come before the courts in rapid succession. At the bottom, therefore, the problem is one of substantive right and primarily a branch of the law of torts.

§ 2019. (§ 586.) The Tort Question Stated.—In this particular class of torts, as in all others, it is necessary, first, to determine the nature and extent of the complainant's right, and, second, the considerations underlying the question of justification. It is thought that the solution of the particular controversy will be found to turn upon three factors: (1) The character of the alleged right; (2) the means used in causing the injury complained of; and (3) the motive of those against whom the relief is sought.

The right involved may be either (1) a right based on a valid subsisting contract, i. e., a right of A to have B left free to perform a contract then existing between A and B, or (2) a right of freedom to contract, appropriately termed a right of "probable expectancy," i. e., a right on the part of A to have B left free to form a

contract with A. The contract may be one for a definite period or terminable at will. It may relate either to employment or the sale of chattels or lands; in fact, to anything which is the subject of contract.

(§ 587.) Right Based on Contract. — The early law recognized as a wrong to the master the act of enticing away a servant. "It is clear," said the court in Hart v. Aldredge,2 "that a master may maintain an action against anyone for taking and enticing away his servant upon the ground of the interest which he has in his service and labor." To bring himself within the operation of this rule, the defendant need only employ the servant with a knowledge that he was the servant of another.3 In other words, the inducement offered the servant to leave his master need in no event be coercive. The principle involved in these early cases has from time to time been given a more extended application, beginning with the leading case of Lumley v. Gye,4 and the case of Bowen v. Hall,5 until it may be stated to-day that "it is a violation of a legal right to interfere with contractual relations if there be no justification."6 The generally accepted modern American rule has been stated in similar terms. A distinguished judge of the New Jersev equity court has recently said that "the disruption of a contract relation to the injury of one of the contracting parties is now generally recognized as actionable in the absence of sufficient justification, and the question in every case seems to turn on justification alone." There is thus a clear recognition of a legal

<sup>2 (1774)</sup> Cowp. 54.

<sup>3</sup> Blake v. Langdon, (1795) 6 Term Rep. 221.

<sup>4 2</sup> E. C. & B. 216.

<sup>5 6</sup> Q. B. D. 333.

<sup>6</sup> Quinn v. Leathem, [1901] App. Cas. 495.

<sup>7</sup> Stevenson, V. C., in Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 763, 53 Atl. 230.

right in parties to a contract to have the contractual relation, whether it be one between employer and employee or customer and dealer, safeguarded from outside disruption. The violation of the right consists in inducing a breach of the contract by influencing the conduct of one of the parties with knowledge of the contract and without justification. Moreover, it is immaterial by what means the result is accomplished. Mere persuasion will suffice. There are, however, some American

8 Temperton v. Russel, [1893] 1 Q. B. D. 715, 730; Exchange Telegraph Co. v. Gregory & Co., [1896] 1 Q. B. D. 147 (contract covering stock exchange information); National Phonograph Co. v. Edison Co., L. R. [1908] 1 Ch. 335 (see opinion by Joyce, J., for unusual views on the question of the nature of the contract); Angle v. Chicago etc. R'y Co., 151 U. S. 1, 38 L. Ed. 55, 14 Sup. Ct. 240 (a leading case); Dr. Miles Medical Co. v. John D. Park & Sons Co. (1911), 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. 376 (no action for causing a breach of contract, void as against public policy); Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co. (1908), 159 Fed. 824, 86 C. C. A. 648 (contract for the purchase of hooks and machines); Mottey, Green & Co. v. Detroit Steel & Spring Co., 161 Fed. 389 (A and B conspired to deprive the plaintiff of the benefit of a contract with A. Both were held liable to the plaintiff); Parkinson Co. v. Building Trades Council, 154 Cal. 581, 16 Ann. Cas. 1165, 21 L. R. A. (N. S.) 550, 98 Pac. 1027; Employing Printers' Club v. Doctor Blosser Co. (1905), 122 Ga. 509, 106 Am. St. Rep. 137, 2 Ann. Cas. 694, 69 L. R. A. 90, 50 S. E. 353; Doremus v. Hennessy (1898), 176 Ill. 608, 68 Am. St. Rep. 203, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524, citing Lumley v. Gye, supra, and Bowen v. Hall, supra, with approval (contract for laundry work); Legris v. Marcotte (1906), 129 Ill. App. 67; Knickerbocker Ice Co. v. Gardiner Dairy Co. (1908), 107 Md. 556, 16 L. R. A. (N. S.) 746, 69 Atl. 405 (contract for ice. The case contains an excellent review of the English and American authorities); May v. Wood (1898), 172 Mass. 11, 51 N. E. 191 (the actual decision turned on a question of pleading); Moran v. Dunphy (1901), 177 Mass. 485, 83 Am. St. Rep. 289, 52 L. R. A. 115, 59 N. E. 125; Tracey v. Osborne, 226 Mass. 25, 114 N. E. 959 (employer's contract to obtain labor from a certain union only); Noice v. Brown (1877), 39 N. J. L. 569; Jersey City Printing Co. v. Cassidy (1902), 53 Atl. 230, 63 N. J. Eq. 759. But see Van Horn v. Van Horn (1890), 52 N. J. L. 284, 10 courts which cling to the early law to the extent of requiring as a condition precedent to tort liability, and hence to equitable relief, the element of fraud or coercion in the defendant's conduct in bringing about a breach of the contract, in case it is not one for personal services.<sup>9</sup>

§ 2021. (§ 588.) Same — Liability not Dependent upon Personal Malice.—Liability for inducing a breach of contract is not dependent upon malice in fact. While it is often stated that the wrong consists of maliciously causing a breach of the contract, this means only that the defendant acted with knowledge of the contract and without legal justification. The defendant's conduct need not be characterized by personal malice, i. e., ill-will.<sup>10</sup>

L. R. A. 184, 20 Atl. 485, doubting the doctrine of Lumley v. Gye; Raycroft v. Tayntor (1896), 68 Vt. 219, 54 Am. St. Rep. 882, 33 L. R. A. 225, 35 Atl. 53; Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895, 56 L. R. A. 804, 40 S. E. 591; Thacker Coal Co. v. Burke (1906), 59 W. Va. 253, 8 Ann. Cas. 885, 5 L. R. A. (N. S.) 1091, 53 S. E. 161; Martens v. Reilly (1900), 109 Wis. 464, 84 N. W. 840. See, also, cases cited in note 16, infra.

9 Boyson v. Thorn (1893), 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492; Chambers v. Baldwin (1891), 91 Ky. 121, 34 Am. St. Rep. 165, 11 L. R. A. 545, 15 S. W. 57; Bourlier v. Macauley (1891), 91 Ky. 135, 34 Am. St. Rep. 171, 11 L. R. A. 550, 15 S. W. 60; Wolf & Sons v. New Orleans Tailor-made Pants Co. (1904), 113 La. 388, 67 L. R. A. 65, 37 South. 2; Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co. (1896), 138 Mo. 439, 60 Am. St. Rep. 560, 36 L. R. A. 804, 40 S. W. 93; Swain v. Johnson (1909), 151 N. C. 93, 28 L. R. A. (N. S.) 615, 65 S. E. 619; Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559; Beattie v. Callanan (1903), 82 App. Div. 7, 81 N. Y. Supp. 413; Roseneau v. Empire Circuit Co. (1909), 131 App. Div. 429, 115 N. Y. Supp. 511. For a full and critical review of the New York authorities, see "Interference With Business in New York," by E. W. Huffcutt, 18 Harvard Law Review, 423.

10 Lumley v. Gye, supra.

§ 2022. (§ 589.) Same—Justification for Causing a Breach of Contract.—While there seem to be no actual adjudications, there are judicial utterances which indicate that, within certain narrow limits, a justification for intentionally causing a breach of such contract may be established, and which further shed some light upon the extent of such justification. 11 These utterances furnish support for the statement that if the inducement consists merely in the giving of advice, the adviser mav justify by showing that he was acting under a moral duty to give the advice. It is said, for example, by Sterling, L. J., in Glamorgan Coal Co. v. Miners' Federation, 12 "that interference with contractual relations known to the law may in some cases be justified, is not, in my opinion, open to doubt; for example, I think that a father, who discovered that a child of his had entered into an engagement to marry a person of immoral character, would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not. . . . I conceive that circumstances might occur which would give rise to the same duty in the case of a contract of services." It is conceived that within reasonable limits a physician might for similar reasons justify advising a patient to break his contract.<sup>13</sup> On the other hand, it seems clear that certain factors which have been held sufficient to justify an interference with

<sup>11</sup> Parkinson Co. v. Building Trades Council, 154 Cal. 581, 16 Ann. Cas. 1165, 21 L. R. A. (N. S.) 550, 98 Pac. 1027.

<sup>12</sup> L. R. [1903] 2 K. B. 545, L R. App. Cas. 239.

<sup>13</sup> Without any discussion of this problem, judgment was given in a recent Illinois case for a defendant who caused the plaintiff's dismissal from school, the defendant at the time being under the impression that the plaintiff came from a home in which there was a contagious disease. The effort of the defendant was to protect the other children, including his own: See Legris v. Marcotte (1906), 129 Ill. App. 67.

the formation of a contract, i. e., with the so-called right of "probable expectancy," will not justify the disruption of an existing contract, no matter how mild the means. It has been held, for example, that trade competition is not a justification. After B has entered A's employ or contracted to purchase goods from A, the competitive stage has passed, and C can no longer justify any interference with B on the ground that he is in competition with A for B's services or trade. It would doubtless also be conceded that if force, threat of force or fraud were used to induce the breach of the contract, no justification could be offered. The decisions dealing with interference with the probable expectancies of another (infra) fully support this conclusion.

§ 2023. (§ 590.) Same—The Basis of Equitable Relief.—This right to have one's contractual relations free from the disruptive influence of third parties has repeatedly been declared to be a property right, and thus entitled to the protection of the court of equity, provided the other grounds for equitable interposition are present. Add, as further elements, a threatened and unjustifiable violation of the right and circumstances which show the legal remedy to be inadequate, and a

14 Beekman v. Masters (1907), 195 Mass. 205, 122 Am. St. Rep. 232, 11 Ann. Cas. 332, 11 L. R. A. (N. S.) 201, 80 N. E. 817. Compare, however, Trade Disputes Act 1906, 6 Edw. VII, c. 47, § 3, which gives wide immunity to those engaged in the furtherance of a "trade dispute."

15 In Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 763, 53 Atl. 230, the court said "that the interest of an employer or employee in a contract for services is conceded"; and further: "Where defendants in combination or individually undertake to interfere with and disrupt existing contract relations between the employer and employee, it is plain that a property right is directly invaded." An injunction was granted restraining former employees, members of a union, from interfering with other men employed under contract, even by simple persuasion.

case for equitable relief is fully established. Many courts, indeed, seem to assume that an injunction should be granted as a matter of course when it is shown that contracts are about to be broken.<sup>16</sup>

§ 2024. (§ 591.) Right Based on Expectation of Contract—The Right of Probable Expectancy—A Property Right.—Somewhat akin to the right based on an exist-

16 Exchange Telegraph Co. v. Gregory & Co., [1896] 1 Q. B. D. 147; Read v. Society of Stone Masons, [1902] 2 K. B. D. 732; Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 2 K. B. D. 595 (act of the miners' union in ordering the members to observe a stop-day was an actionable wrong against the employers, as it procured a breach of contract without cause); National Phonograph Co. v. Edison Co., L. R. [1908] 1 Ch. 335 (a contract relative to the retail price of goods); Bitterman v. Louisville & Nashville R. R. Co. (1907), 207 U. S. 205, 12 Ann. Cas. 693, 52 L. Ed. 171, 28 Sup. Ct. 91 (injunction issued against ticket scalpers); New York Phonograph Co. v. Jones (1903), 123 Fed. 197; Wells & Richardson Co. v. Abraham, 146 Fed. 190; Hitchman Coal & Coke Co. v. Mitchell, 172 Fed. 963 (injunction against inducing, even by solicitation, workmen to join a union in violation of a contract not to join a labor union); Hitchman Coal & Coke Co. v. Mitchell, 202 Fed. 512; Underhill v. Murphy (1904), 117 Ky. 640, 111 Am. St. Rep. 262, 4 Ann. Cas. 780, 78 S. W. 482; Aberthaw Construction Co. v. Cameron (1907), 194 Mass. 208, 120 Am. St. Rep. 542, 80 N. E. 478; Beekman v. Marsters (1907), 195 Mass. 205, 122 Am. St. Rep. 232, 11 Ann. Cas. 332, 11 L. R. A. (N. S.) 201, 80 N. E. 817; New England Cement Gun Co. v. McGivern (1914), 218 Mass. 198, L. R. A. 1916C, 986, 105 N. E. 885; Jersey City Printing Co. v. Cassidy (1902), 63 N. J. Eq. 759, 53 Atl. 230; George Jonas Glass Co. v. Glass Blowers' Ass'n, 64 N. J. Eq. 644, 54 Atl. 567; George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n, 77 N. J. Eq. 219, 41 L. R. A. (N. S.) 445, 79 Atl. 262; American Law Book Co. v. Edward Thompson Co., 41 Misc. Rep. 396, 84 N. Y. Supp. 225 (injunction issued to prevent the defendant from inducing or attempting to induce subscribers for the plaintiff's publications to break their subscription contracts); Flaccus v. Smith, 199 Pa. St. 128, 85 Am. St. Rep. 779, 54 L. R. A. 640, 48 Atl. 894 (in this case the defendants were enjoined from inducing the plaintiff's apprentices to break their contracts not to join a union).

ing contract, although more flexible in its character, is the right that one has to have others left free, within certain limits, to form a contractual relation with him. It is fully recognized to-day, both in law and equity, that each party is entitled to have the other left free from unjustifiable interference in the exercise of this right. It is equally true both that the employer has a legal right to a free labor market and the laborer to a free employment market. Likewise, that seller and buver each may legally complain if the other is obstructed in his efforts to buy or sell. Vice-Chancellor Stevenson, of the New Jersey court, has aptly called this the right of "probable expectancy," "the right which every man has to earn his living or pursue his trade without undue interference." Speaking further of such right, this learned judge says: "As social and industrial life develops and grows more complex, these 'probable expectancies' are bound to increase. It would seem inevitable that courts of law, as our state of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue influence more of these 'probable expectancies.' . . . It will probably be found . . . that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants in respect to the merchandise market must be recognized to the same extent by courts of law and courts of equity, and protected by substantially the same rules. It is freedom in the market, freedom in the purchase and sale of things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on every side of the market."

This right, as such, has found recognition in the courts from the earliest times. In Garrett v. Taylor, 17 it was held that the plaintiff had a good cause of action

<sup>17 (1621)</sup> Cro. Jac. 567.

against the defendant for driving away the plaintiff's workmen and customers by threats to injure and vex them. In Keeble v. Hickeringill, 18 a plaintiff was allowed to recover against the defendant for frightening away, without justifiable excuse, wild ducks, which otherwise would have come to plaintiff's pond; and in Tarleton v. McGawley, 19 one who sought trade with certain natives was awarded damages against a rival trader who fired on a boatload of natives on their way to the plaintiff's ship, and who thus prevented plaintiff from securing their trade. The principle is too completely recognized to-day to justify further elaboration.

'Not only is the right recognized, but it is conceded to be a property right, and thus subject to the protection of the court of equity. 20

§ 2025. (§ 592.) Justification — A Counter Right — Trade Competition—Economic Self-advancement.—The right that one has to protection in his "probable expectancies" is, of course, not absolute. It is clear that not every interference with the formation of a contract will

<sup>18 (1804) 11</sup> East, 574.

<sup>19 [1804]</sup> Peake, 205.

<sup>20</sup> Sailors' Union v. Hammond Lumber Co., 156 Fed. 450, 85 C. C. A. 16; affirming Hammond Lumber Co. v. Sailors' Union, 149-Fed. 577; Delaware, L. & W. R. Co. v. Switchmen's Union, 158 Fed. 541; Mathews v. People, 202 III. 389, at p. 401, 95 Am. St. Rep. 241, 63 L. R. A. 73, 67 N. E. 28 ("It is now well settled that the privilege of contracting is both a liberty and a property right. . . . Labor is property"); O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 3 Ann. Cas. 966, 75 N. E. 108; Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 722, 44 N. E. 1077; Bogni v. Perotti (1916), 224 Mass. 152, L. R. A. 1916F, 831, 112 N. E. 853 (holding unconstitutional the Gompers' Model Anti-injunction Law, on the ground (among others), that it did not afford the right to labor, which is a property right, the equal protection of the law); Clarkson v. Laiblan, 178 Mo. App. 708, 161 S. W. 660; Davis v. Zimmerman, 91 Hun, 489, 36 N. Y. Supp. 303; New York Cent. Iron Works Co. v. Brennan (1907), 105 N. Y. Supp. 865, p. 869.

support an action by the injured person. It may well be that the invader of the complainant's trade or labor market is, himself, exercising certain rights at least equal in importance to those of the complainant and equally, for the public weal, to be conserved.

As early as 1410 this problem was presented to the courts in the case of the rival schoolmasters.<sup>21</sup> That the defendant's establishment of a school resulted in the loss of pupils to the plaintiff was held not to sustain a cause of action. In more recent years, Justice Holmes has lucidly presented the matter thus:<sup>22</sup> "It has been the law for centuries that a man may set up a business in a country town, too small to support more than one, although he expects and intends thereby to ruin someone already there, and succeeds in his intent. In such a case he is not held to act 'unlawfully and without justifiable cause.' . . . The reason, of course, is, that the doctrine has been generally accepted that competition is worth more to society than it costs."

The underlying principle of this justification is obviously not confined in its application to the competitive struggle between rival merchants or traders. In its broader aspects such a justification may well be classified under the more general appellation of "economic self-advancement." In this larger sense it applies even to the combat between employer and employee for a larger share of the profits of a business. "I have seen the suggestion made," says Justice Holmes, 4 "that the conflict between employers and employee is

<sup>21</sup> Anonymous, C. P., (1410) Year Book, Henry IV, Foilo 47, Placitum 21.

Vegelahn v. Guntner, 167 Mass. 92, 106, 57 Am. St. Rep. 443,
 L. R. A. 722, 44 N. E. 1077.

<sup>23</sup> The Respective Rights of Capital and Labor, 5 Ill. Law Rev. 453, 457.

<sup>24</sup> Vegelahn v. Guntner, 167 Mass. 92, 107, 57 Am. St. Rep. 443, 35 L. R. A. 722, 44 N. E. 1077.

not competition, but I venture to assume that none of my brethren would rely upon that suggestion. If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests. . . . One of the eternal conflicts out of which life is made up is that between the efforts of every man to get the most he can for his services and that of society, disguised under the name of capital, to get his services for the least possible return."<sup>25</sup>

§ 2026. (§ 593.) Justification, Continued—End and Means.—It must not be inferred from the preceding section that the defendant's justification is complete where it is made to appear that his purpose in causing the plaintiff's loss was the furtherance of his own competitive interests. The ultimate object sought is not the sole test of liability for interference with the probable expectancies of another. It is pertinent to inquire in each case into the defendant's immediate as well as ultimate purpose and to determine the extent of his immediate gain in his larger struggle. Not that the ultimate object is immaterial. In no event can it be left out of account. But, assuming that such object is wholly praiseworthy, the defendant's present harmful interference with others may fail of justification because it does not contribute with sufficient directness to that object. As regards the attainment of the ultimate and approved end, the immediate harm or threatened harm may become, as it were, only a means to an end, and, as indicated, an unjustifiable means.26

<sup>25</sup> Hammond, J., in Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 23 L. R. A. (N. S.) 1236, 85 N. E. 897, referring to a strike for higher wages, says: "The contest between them [i. e., the employer and the employee] is only competition on a wide basis."

<sup>26</sup> To illustrate: The A union may be demanding an increase of

Again, even the immediate attainment of a worthy end will not always relieve the defendant of liability. The question of means may still enter. The means used must in no event be inherently vicious. While competition may be recognized as warfare, nevertheless the courts rule out completely all weapons not furnished by the laws of trade. On the other hand, there is authority for the proposition that an unworthy object will not always legally condemn the defendant's acts. It is thought by some authorities that interference with the right of probable expectancy should never be held to .. support an action, no matter what the motive of the actor, so long as the means used are not per se unlawful or otherwise obviously extreme.<sup>27</sup> The question of legal liability in this class of cases finally resolves itself, therefore, into one of both means and motive, i. e., purpose sought to be achieved either mediately or immediately. or both.

The means with which the courts have had to deal may be classified as follows: (I) At one extreme are means confessedly tortious, such as (a) violence; (b) threatened violence, actual or implied; (c) fraud; (d) defamation,—and herewith of (1) picketing and the attendant activities associated with it, such as assembling in large numbers, blocking streets, sidewalks and entrances, following employees, verbal abuse, and persis-

wages from the employer, Z. To force compliance with their demand they may withdraw their services and their patronage from Z. This is permissible. But it does not follow that the union should be permitted to force X to withdraw patronage from Y in order to force Y in turn to withdraw patronage from Z, with the hope of thus forcing Z to yield. For a further development of this question see sections 605-607 (infra) on the secondary boycott, the sympathetic strike and the fight for the closed shop.

27 See sections dealing with the use of such means as simple persuasion, and the severance or threatened severance of trade relations.

tent and offensive efforts at argument; and (2) fines and expulsion. (II) At the other extreme are simple persuasion and the offer of pecuniary rewards; e. g., reduction of prices and payment of subsidies. (III) Intermediate of these two are threats of pecuniary loss; e. g., the threat to withdraw patronage from A in order to induce A to withdraw his patronage from B.

§ 2027. (§ 594.) Interference With the Right to Contract by Unlawful Means—Coercion.—Some means can, under no circumstances, be justified. "The trader is not a free lance; he may fight as a soldier but not as guerilla. . . . His weapons must be furnished by the laws of trade." Fraud in all its forms is not a legitimate weapon for use on a competitor. Likewise, actual coercion is universally condemned. The earliest utterances of the courts condemn without qualification the use of force and intimidation. Obviously, a trader should not be permitted to take or keep customers away from his rival by the use of actual violence. Nor any more should strikers be permitted to secure from their employer higher wages or shorter hours—things commendable in themselves—by burning his property or

Martell v. White (1904), 185 Mass. 255, 102 Am. St. Rep. 341,
 L. R. A. 260, 69 N. E. 1085.

<sup>29</sup> Blofeld v. Payne, (1833) 4 Barn. & A. 410; Riding v. Smith, (1876) L. R. 1 Exch. Div. 91; Standard Oil Co. v. Doyle, (1904), 118 Ky. 662, 113 Am. St. Rep. 331, 82 S. W. 271 (circulation of false reports about plaintiff's oil); Beattie v. Callanan, 67 App. Div. 14, 73 N. Y. Supp. 518 (injunction issued included a prohibition against the use of fraud); W. P. Davis Mach. Co. v. Robinson, 41 Misc. Rep. 329, 84 N. Y. Supp. 837; Huskie v. Griffin, 75 N. H. 345, 139 Am. St. Rep. 718, 27 L. R. A. (N. S.) 966, 74 Atl. 595; Transportation Co. v. Standard Oil Co., 50 W. Va. 611, at 622, 88 Am. St. Rep. 895, 56 L. R. A. 804, 40 S. E. 591 (the defendant falsely represented the plaintiff's pipe-line to be unsafe).

<sup>30</sup> Garrett v. Taylor, (1620) Cro. Jac. 567 (keeping laborers and customers away by means of mayhem); Tarleton v. McGawley, (1804) Peake, 205 (keeping native customers away by firing on them).

keeping other employees away with club or gun. It is equally clear that actual threats of violence belong in the same class.31 But when specific conduct other than violence and actual threats of violence is presented, a conflict at once arises in the determination of what acts will be treated as unduly coercive. The term "coercion" is in its nature indefinite. As a matter of law nothing more than a general test can be laid down. For such a test it is suggested in Jersey City Printing Co. v. Cassidy,32 that the conduct in question should be examined in the light of its effect upon "the reasonably prudent, reasonably courageous, and not unreasonably sensitive man." If it would deter such a person from bestowing his labor or trade where he otherwise would have bestowed it, the law condemns the conduct as coercive. In contrast with this test, however, a more individual or personal test is approved by a recent

31 Wabash R. Co. v. Hannahan (1903), 121 Fed. 563, 569; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500; National Telephone Co. v. Kent, 156 Fed. 173 (injunction against intimidation and violence); Iron Molders' Union v. Allis-Chalmers Co. (1908), 166 Fed. 45, 20 L. R. A. (N. S.) 315, 91 C. C. A. 631 (strikers must not coerce others by violence or threats of violence); Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219, 8 L. R. A. (N. S.) 460, 86 Pac. 806; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Karges Furniture Co. v. Amalgamated Woodworkers Local Union, 165 Ind. 421, 6 Ann. Cas. 829, 2 L. R. A. (N. S.) 788, 75 N. E. 877 (picketing becomes unlawful if force is used); Ideal Mfg. Co. v. Wayne Circuit Judge, 139 Mich. 92, 102 N. W. 372; Ideal Mfg. Co. v. Ludwig, 149 Mich. 133, 119 Am. St. Rep. 656, 112 N. W. 723; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106; Ex parte Heffron, 179 Mo. App. 639, 162 S. W. 652; Connett v. United Hatters of North America, 76 N. J. Eq. 202, 74 Atl. 188; Herzog v. Fitzgerald (1902), 74 App. Div. 110, 77 N. Y. Supp. 366; New York Central Iron Works Co. v. Brennan (1907), 105 N. Y. Supp. 865.

<sup>32 63</sup> N. J. Eq. 759, 53 Atl. 230.

writer: "What might intimidate one person would have no effect on another, because all are not alike strong and courageous. Yet the strong and the weak, the brave and the timid are alike entitled to the protection of the law.''33 It should be pointed out also, in this connection. that violence and threats of violence are not the only methods resorted to that in the eyes of the law should be branded as coercive. It has been well said, for example, that "the anathemas of a secret organization of men combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body are quite as dangerous and generally altogether more effective than acts of violence."34 Each case must, therefore, turn finally upon its own peculiar facts. In general, it can be said only that acts of molestation unduly coercive are not lawful, and cannot be justified even though the end sought may in itself be entirely commendable.35

<sup>33</sup> Martin, "The Modern Law of Trades Unions," 236; Franklin Union v. People, 220 Ill. 355, 380, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001, 77 N. E. 176; Searle Mfg. Co. v. Terry, 56 Misc. Rep. 265, 106 N. Y. Supp. 438; American Steel & Wire Co. v. Wire Drawers' etc. Unions, 90 Fed. 608 (conduct condemned on the ground that it would deter "timid but willing workmen").

<sup>34</sup> State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

<sup>35</sup> The following authorities are intended to give a hasty survey of particular kinds of conduct that have been condemned as coercive. For a more detailed treatment of the subject and further authorities, see the following sections, infra; § 595, Picketing; § 596, Intimidation by Reason of Size of Patrol; § 597, Persistent Arguing—Epithets; § 599, Fines and Expulsion; § 598, Blocking Ingress and Egress.—Mackall v. Ratchford, 82 Fed. 41 (marching in highway near plaintiff's mine, early and late, two hundred strong); Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155, at 173 (definition); Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor, 156 Fed. 809 (patroling with a banner containing such words as "Don't disgrace your sex—keep away," etc. Held, such acts are calculated to coerce girls of ordinary moral force); Kolley v. Robinson, 187 Fed. 415, 109 C. C. A. 247 (abuse

§ 2028. (§ 595.) Unlawful Means — Picketing. — Whether picketing or patroling is unlawful must turn in the last analysis upon the answer to the question, "Is it coercive? Some courts in dealing with the problem have adopted the simple solvent of condemning and enjoining all picketing. The courts which adopt this

as bad as physical violence); Alaska S. S. Co. v. International Longshoremen's Ass'n (1916; Dist. Ct., Wash.), 236 Fed. 964; Sparks v. McCreary, 156 Ala. 382, 384, 22 L. R. A. (N. S.) 1224, 47 South. 332 (driving away plaintiff's customers by threatening to have them prosecuted); Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219, 8 L. R. A. (N. S.) 460, 86 Pac. 806; Sherry v. Perkins (1888), 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307 (carrying banners enjoined where it was part of a general scheme of intimidation); Vegelahn v. Guntner (1896), 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 722, 44 N. E. 1077 (moral intimidation is sufficient—actual violence need not be included); Pratt Food Co. v. Bird (1907), 148 Mich. 631, 118 Am. St. Rep. 601, 112 N. W. 701 (threatening prosecution of plaintiff's customers); Escanaba Mfg. Co. v. Trades & Labor Council. 160 Mich. 656, 125 N. W. 709 (the defendants were enjoined from loitering around plaintiff's place of business with intent to interfere with or intimidate employees of the plaintiff to induce them to quit work and from obstructing the business of the plaintiff); Baltic Mining Co. v. Houghton Circuit Judge, 177 Mich. 632, 144 N. W. 209 (parading near the premises of plaintiff so as to impede or intimidate workers, or loitering near the premises or the homes of the workers, is improper); Berry Foundry Co. v. International Molders' Union, 177 Mo. App. 84, 164 S. W. 245; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230 (the following of a workman through the streets with cries of "scab" is unduly coercive and illegal, but social ostracism is not); Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n, 59 N. J. Eq. 49, 46 Atl. 208; George Jonas Glass Co. v. Glass Blowers' Ass'n, 64 N. J. Eq. 644, 54 Atl. 567; George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n, 72 N. J. Eq. 653, 66 Atl. 953; Martin v. McFall (1903), 65 N. J. Eq. 91, 55 Atl. 465 (injunction against "rendering it difficult or uncomfortable for such willing workmen to work"); Rogers v. Evarts, 17 N. Y. Supp. 264 (persuasion or entreaty may be so persistent as to constitute coercion); Davis v. Zimmerman, 91 Hun, 489. 36 N. Y. Supp. 303; W. P. Davis Mach. Co. v. Robinson, 41 Misc. alternative do so upon the theory, apparently, that picketing is of necessity coercive, a constant menace to the willing worker, and, therefore, that "peaceful picketing," so called, exists and can exist only in name, not in reality.<sup>36</sup>

Rep. 329, 84 N. Y. Supp. 837 (injunction against the use of threats, intimidation, force, fraud, including the congregating in crowds and interfering with the plaintiff's employees and calling them "scabs"); New York Central Iron Works Co. v. Brennan (1909), 116 N. Y. Supp. 457; Jones v. Maher, 62 Misc. Rep. 388, 116 N. Y. Supp. 180; affirmed, 141 App. Div. 919, 125 N. Y. Supp. 1126 (intimidation includes verbal abuse); Longshore Printing Co. v. Howell, 26 Or. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547; Wick China Co. v. Brown, 164 Pa. St. 449, 30 Atl. 261 (opprobrious epithets); O'Neil v. Behanna, 182 Pa. St. 236, 61 Am. St. Rep. 702, 38 L. R. A. 382, 37 Atl. 843 (new men met at the station and followed to lodging-houses and called "scabs" and "black-legs"; St. Johnsbury etc. R. R. Co. v. Hunt (1882), 55 Vt. 570, 45 Am. Rep. 639 (causing arrest of plaintiff's engineer); State v. Stewart (1887), 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; Boutwell v. Marr (1896), 71 Vt. 1, 76 Am. St. Rep. 746, 43 L. R. A. 803, 42 Atl. 607 (fines and penalties are a species of coercion and hence wrongful).

36 Picketing has been forbidden by statute in some states: See Alabama, Colorado and Washington; Hardie-Tynes Mfg. Co. v. Cruise, 189 Ala. 66, 66 South. 657 (interpreting statute); Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (two judges dissenting); Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219, 8 L. R. A. (N. S.) 460, 86 Pac. 806; Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424, 13 Ann. Cas. 54, 14 L. R. A. (N. S.) 1018, 83 N. E. 940 (but see Beaton v. Tarrant (1902), 102 Ill. App. 124; Piano & Organ Workers' International Union v. Piano & Organ Supply Co., 124 Ill. App. 353); Vegelahn v. Guntner (1896), 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 722, 44 N. E. 1077, Holmes, J., dissenting (patrol of two men enjoined); Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13 ("To picket the plaintiff's premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation. . . . It makes no difference that the picketing is done ten or one thousand feet away from the premises. . . . Threats in language are not the only threats recognized by the law. Covert and unspoken threats may be just as effective as The vast majority of the courts, however, concede that peaceful and non-coercive picketing is entirely possible, and hold, accordingly, that so long as the activities of those on patrol do not go beyond the securing of information and simple persuasion in the attempt to influence prospective customers and employees (not under contract) no injunction will issue.<sup>37</sup> But when

spoken threats. . . . It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce''); Ideal Mfg. Co. v. Wayne Circuit Judge (1905), 139 Mich. 92, 102 N. W. 372; In re Langell (1913), 178 Mich. 305, 50 L. R. A. (N. S.) 412, 144 N. W. 841 (picket of one man illegal. Dissenting opinion discussing meaning of "picketing"); George Jonas Glass Co. v. Glass Blowers' Ass'n, 64 N. J. Eq. 640, 54 Atl. 565, 566 (the court raised but did not decide the question as to whether peaceful picketing is proper, saying: "The difficulty in such cases is that the picketing is usually done by persons who are ignorant of the line where persuasion ends and intimidation begins, . . . who are enthusiastic about getting results without care as to means''); Connett v. United Hatters of North America, 76 N. J. Eq. 202, 74 Atl. 188 (employees have the right to strike but not to interfere in the slightest degree with the efforts of the employer to fill their places); Jensen v. Cooks & Waiters' Union, 39 Wash. 531, 4 L. R. A. (N. S.) 302, 81 Pac. 1069; St. Germain v. Bakery etc. Union, 97 Wash. 282, L. R. A. 1917F, 824, 166 Pac. 665.

37 United States v. Kane (1885), 23 Fed. 748; American Steel & Wire Co. v. Wire Drawers' etc. Unions (1898), 90 Fed. 608; Allis-Chalmers Co. v. Reliable Lodge, 111 Fed. 264 (defendants only enjoined from picketing for purposes of coercion); Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155; affirmed, Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45, 20 L. R. A. (N. S.) 315, 91 C. C. A. 631 (also deals with the question as to what constitutes intimidation); Pope Motor Car Co. v. Keegan, 150 Fed. 148; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500; Iron Molders' Union v. Allis-Chalmers Co. (1908), 166 Fed. 45, 20 L. R. A. (N. S.) 315, 91 C. C. A. 631 (persuasion even by several pickets should not be enjoined); Tri-City Central Trades Council v. American Steel Foundries (1916), 238 Fed. 728, 151 C. C. A. 578; Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336, 127 Am. St. Rep. 235, 17 L. R. A. (N. S.) 848, 62 S. E. 236; Beaton v. Tarrant,

these limitations have been exceeded, so that the patrol becomes in fact coercive and intimidating, it is unlawful

102 Ill. App. 124 (picketing in such manner as to intimidate a reasonable and prudent man will be enjoined); Christensen v. Kellogg etc. Supply Co., 110 Ill. App. 61; Piano & Organ Workers' International Union v. Piano & Organ Supply Co. (1906), 124 Ill. App. 353 (all picketing not enjoined, but injunction did include all persuasion that was not peaceable; but compare Franklin Union v. People (1906), 220 Ill. 355, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001, 77 N. E. 176, and Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424, 13 Ann. Cas. 54, 14 L. R. A. (N. S.) 1018, 83 N. E. 940); Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 6 Ann. Cas. 829, 2 L. R. A. (N. S.) 788, 75 N. E. 877 (picketing without force or intimidation is lawful); Iverson v. Dilno, 44 Mont. 270, 119 Pac. 719 (no injunction against simply carrying a banner, advising public that plaintiff is unfair); Ex parte Heffron, 179 Mo. App. 639, 162 S. W. 652 (injunction held too broad); Berry Foundry Co. v. International Molders' Union, 177 Mo. App. 84, 164 S. W. 245; Empire Theater Co. v. Cloke (1917), 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107; Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n, 59 N. J. Eq. 49, 46 Atl. 208 (only such picketing as is intimidating is unlawful. Each case must depend upon its own facts, consider size of guard, extent of occupation of street, what the picketers say and do, etc.); Rogers v. Evarts, 17 N. Y. Supp. 264; Sun Printing & Publishing Ass'n v. Delaney, 48 App. Div. 623, 62 N. Y. Supp. 750; Krebs v. Rosenstein (1900), 31 Misc. Rep. 661, 66 N. Y. Supp. 42; Levy v. Rosenstein (1900), 66 N. Y. Supp. 101; Foster v. Retail Clerks' International Protective Ass'n, 39 Misc. Rep. 48, 78 N. Y. Supp. 860; Mills v. United States Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185 (asserting, however, that strikers have no right to occupy the street and arrest the course of employees, be the insistence ever so polite); Butterick Pub. Co. v. Typographical Union, 50 Misc. Rep. 1, 100 N. Y. Supp. 292; Searle Mfg. Co. v. Terry (1905), 56 Misc. Rep. 265, 106 N. Y. Supp. 438; Jones v. Molier, 62 Misc. Rep. 388, 116 N. Y. Supp. 180; Everett Woddey Co. v. Richmond Typographical Union, 105 Va. 188, 8 Ann. Cas. 798, 5 L. R. A. (N. S.) 792, 53 S. E. 273. The doctrine of the text is affirmed by the "Clayton Act" (Oct. 15, 1914, c. 323, § 20, 38 Stat. 738); Stephens v. Ohio State Telephone Co., 240 Fed. 759 (Dist. Ct., N. D., Ohio, 1917; adopting as the test of "peaceful" picketing, conduct which would be lawful if no strike existed).

and may be curbed by injunction. Such is the case, for example, where the pickets resort to violence or threats of violence,<sup>38</sup> or where a threat of physical harm can be implied in the light of all the surrounding circumstances,<sup>39</sup> or, often, where the patrol consists of large numbers,<sup>40</sup> or is too persistent even in its efforts to persuade,<sup>41</sup> or indulges in abusive epithets, especially in public places,<sup>42</sup> or blocks the entrance to the employer's place of business.<sup>43</sup> All such abuses may be prevented by injunction.

§ 2029. (§ 596.) Unlawful Means — Picketing, Continued — Intimidation by Reason of Numbers. — The courts which take the view that picketing may be an instrument of peaceful persuasion and hence is not to be prohibited in toto are quite ready to concede that when

- 38 Iron Molders' Union v. Allis-Chalmers Co. (1908), 166 Fed. 45, 20 L. R. A. (N. S.) 315, 91 C. C. A. 631; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 6 Ann. Cas. 829, 2 L. R. A. (N. S.) 788, 75 N. E. 877.
- 39 United States v. Kane, 23 Fed. 748; Southern R'y Co. v. Machinists' Local Union, 111 Fed. 49 ("Where a crowd of strikers is collected around a non-union employee, it is idle for one joining the crowd to say that his purpose was peaceful persuasion. Neither the time nor the circumstances were such as to make such an appeal possible"). Where there have been some acts of violence, the fear of repetition, of course, arises: Rogers v. Evarts (1891), 17 N. Y. Supp. 264. In this case it is said further that "Wherever the strikers assume toward the employee an attitude of menace, their persuasion and entreaty with words, however smooth, may constitute intimidation."
- 40 Mackall v. Ratchford, 82 Fed. 41 (the defendants in large numbers, as many as two hundred, gathered and marched in the highway near the entrance to the plaintiff's mine. Held, that this procedure was unduly intimidating). See, also, § 596, infra.
- 41 Pope Motor Car Co. v. Keegan, 150 Fed. 148 (the "persuasion must be such as to persuade by reason and not compel by threat or violence or intimidation"). See, also, § 597, infra.

<sup>42</sup> See § 597, infra.

<sup>43</sup> See § 598, infra.

the patrol consists of large numbers it becomes per se intimidating; in other words, that by reason of numbers alone, it may become a standing menace to willing workmen and customers, reasonably calculated to influence them through an appeal to their fears, rather than their reason, and should then be enjoined.<sup>44</sup>

§ 2030. (§ 597.) Unlawful Means — Picketing, Continued—Persistent Arguing — Abusive Epithets. — Persistent attempts to argue with employees and customers against their will may become coercive. Strikers must not carry too far the attempt to influence even by argument the strike breakers, or those who wish to continue to work or establish trade relations with the employer.

44 United States v. Kane, 23 Fed. 748; Mackall v. Ratchford, 82 Fed. 41 (two hundred men gathering and marching in a highway, early and late. Such acts intimidate); American Steel & Wire Co. v. Wire Drawers' etc. Unions (1898), 90 Fed. 608 (congregating in large numbers will intimidate a timid but willing workman); United States v. Haggerty (1902), 116 Fed. 510 (congregating and camping near mines and homes of miners. Probably acts wrongful here also because done in the attempt to work up a sympathetic strike); Pope Motor Car Co. v. Keegan (1906), 150 Fed. 148; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155 (held, a group of five too large); Goldfield Consolidated Mines Co. v. Goldfield Miners' Union (1908), 159 Fed. 500; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Fed. 421, 6 Ann. Cas. 829, 2 L. R. A. (N. S.) 788, 75 N. E. 877; Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336, 127 Am. St. Rep. 235, 17 L. R. A. (N. S.) 848. 62 S. E. 236; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Ideal Mfg. Co. v. Ludwig (1907), 149 Mich. 133, 119 Am. St. Rep. 656, 112 N. W. 723 (gathering of a large crowd is inconsistent with peaceful persuasion. It is per se intimidating); Rogers v. Evarts (1891), 17 N. Y. Supp. 264 (picketing may be done in such numbers as to constitute intimidation); Butterick Pub. Co. v. Typographical Union, 50 Misc. Rep. 1, 100 N. Y. Supp. 292; Searle Mfg. Co. v. Terry, 56 Misc. Rep. 265, 106 N. Y. Supp. 438 (a reasonable patrol may be maintained); Everett Woddey Co. v. Richmond Typographical Union (1906), 105 Va. 188, 8 Ann. Cas. 798. 5 L. R. A. (N. S.) 792, 53 S. E. 273.

The time, place and persistency of their efforts may rob them of the character of simple persuasion. "Persuasion or entreaty" it is said "may be so persistent as to constitute intimidation." Likewise, abusive language is usually placed in the same category with violence, especially where it is at all extreme or persistent. 46

45 Rogers v. Evarts (1891), 17 N. Y. Supp. 264. See, also, Southern R'y Co. v. Machinists' Local Union (1901), 111 Fed. 49; Union Pacific R. Co. v. Ruef (1902), 120 Fed. 102; Piano & Organ Workers' International Union v. Piano & Organ Supply Co. (1906), 124 Ill. App. 353 (injunction covered "any persuasion that is not peaceable"); Frank v. Herold (1902), 63 N. J. Eq. 443, 52 Atl. 152 (see pages 445, 446, for a complete injunction, drastic in form); Jersey City Printing Co. v. Cassidy (1902), 63 N. J. Eq. 759, 53 Atl. 230 (the defendants were enjoined "from loitering or picketing in the streets near the premises of the complainant . . . with the intent to procure the personal molestation and annoyance of persons employed or willing to be employed by complainant . . . ''); George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n (1910), 77 N. J. Eq. 219, 41 L. R. A. (N. S.) 445, 79 Atl. 262 (the defendants were enjoined from addressing, against their will, persons willing to be employed); Mills v. United States Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185; Butterick Publishing Co. v. Typographical Union, 50 Misc. Rep. 1, 100 N. Y. Supp. 292 (" . . . arguments, reason and entreaty are proper weapons . . . but picketing, argument, reasoning, entreaty must not be so practiced or carried to such extremes as to become in effect intimidation, threats, coercion or force'').

46 Southern R'y Co. v. Machinists' Local Union (1901), 111 Fed. 49; Kolley v. Robinson, 187 Fed. 415, 109 C. C. A. 247 (abuse is as bad as physical violence); Jordahl v. Hayda (1902), 1 Cal. App. 696, 82 Pac. 1079; Piano & Organ Workers' International Union v. Piano & Organ Supply Co. (1906), 124 Ill. App. 353; Beaton et al. v. Tarrant (1902), 102 Ill. App. 124; Jersey City Printing Co. v. Cassidy (1902), 63 N. J. Eq. 759, 53 Atl. 230 (one hundred men following workmen through the streets with cries of "scab." Defendants were enjoined from using "violence, threats of violence, insults, indecent talk, abusive epithets practiced upon any persons without their consent with intent to coerce them . . ."); Frank v. Herold (1902), 63 N. J. Eq. 443, 52 Atl. 152 ("... these female operatives . . . have the right to walk the streets entirely un-

§ 2031. (§ 598.) Unlawful Means — Picketing, Continued—Blocking Entrance.—An actual blocking of the entrance to a merchant's store or an employer's place of business is obviously coercive and unlawful in its character, as it makes no appeal to the reason of the person sought to be influenced. It may have the desired effect either because of complete physical obstruction of the entrance or by making the journey of the employee or customer so difficult or embarrassing as to discourage him. Such conduct is often classed as a nuisance, and though primarily a public nuisance, as where it consists of obstructing the streets and sidewalks, yet it generally causes special damage to the plaintiff, and hence may be enjoined at his instance. Injunctions have frequently been granted to eliminate such methods.<sup>47</sup>

molested, without being jostled beyond what is necessary for the ordinary purposes of travel; without having faces made at them; without having epithets cast at them; or in fact anything done to make it disagreeable for them to go to and from their work." Complete injunction set out at pages 445, 446); George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n (1910), 77 N. J. Eq. 219, 41 L. R. A. (N. S.) 445, 79 Atl. 262; W. P. Davis Mach. Co. v. Robinson, 41 Misc. Rep. 329, 84 N. Y. Supp. 837; Butterick Publishing Co. v. Typographical Union, 50 Misc. Rep. 1, 100 N. Y. Supp. 292; Searle Mfg. Co. v. Terry, 56 Misc. Rep. 265, 106 N. Y. Supp. 438; Jones v. Maher, 62 Misc. Rep. 388, 116 N. Y. Supp. 180; affirmed, 141 App. Div. 919, 125 N. Y. Supp. 1126; Murdock v. Walker, 152 Pa. St. 595, 34 Am. St. Rep. 678, 25 Atl. 492 (defendants followed plaintiff's workmen, gathered about the boarding-house of plaintiff, used opprobrious epithets, ridicule, annoyance-methods calculated to make plaintiff's workmen "sick and tired"); Wick China Co. v. Brown, 164 Pa. St. 449, 30 Atl. 261; O'Neil v. Behanna, 182 Pa. 236, 61 Am. St. Rep. 702, 38 L. R. A. 382, 37 Atl. 843; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559 ("The anathemas of a secret organization of men combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body are quite as dangerous and generally altogether more effective than acts of violence'').

47 Mackall v. Ratchford, 82 Fed. 41; American Steel & Wire Co. v. Wire Drawers' etc. Unions (1898), 90 Fed. 608 (impairing ingress

§ 2032. (§ 599.) Unlawful Means — Fines and Expulsion.—A not unusual means for an organization to resort to in order to influence the conduct of its members to the detriment of a person's business through interference with his "probable expectancies" is a system of fines and expulsion. Such means obviously are not kin-Idred to simple persuasion. On the other hand, whether they are to be classed with unlawful coercion, and hence branded as unjustifiable under all circumstances, is open to serious debate. On this question the courts are divided. A recent Massachusetts case,48 in holding a large fine unjustifiable, presented one view as follows: "In the case before us, the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. . . . This method of procedure is

and egress is a nuisance. Proper, therefore, to enjoin defendants from congregating in streets near the plaintiff's place of business in such numbers as to prevent men from going to work); Southern R'y Co. v. Machinists' Local Union (1901), 111 Fed. 49; Union Pacific R. Co. v. Ruef, 120 Fed. 102; Jordahl v. Hayda, 1 Cal. App. 696, 82 Pac. 1079; Franklin Union v. People (1906), 220 Ill. 355, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001, 77 N. E. 176; Ideal Mfg. Co. v. Ludwig (1907), 149 Mich. 133, 119 Am. St. Rep. 656, 112 N. W. 723; Iverson v. Dilno, 44 Mont. 270, 119 Pac. 719 (congregating on sidewalk so as to impede progress is a public nuisance but may be enjoined by the plaintiff on the ground of special damage); Ex parte Heffron, 179 Mo. App. 639, 162 S. W. 652 (congregating on the sidewalk is not necessarily a private nuisance, but obstructing the entrance to a store is); Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n, 59 N. J. Eq. 49, 46 Atl. 208 (a permanent guard in front of plaintiff's business in the public street is a nuisance); George Jonas Glass Co. v. Glass Blowers' Ass'n, 64 N. J. Eq. 644, 54 Atl. 567 (defendants enjoined from entering plaintiff's premises and blocking the entrance); Foster v. Retail Clerks' International Protective Ass'n, 39 Misc. Rep. 48, 78 N. Y. Supp. 860.

48 Martell v. White (1904), 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085.

arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public. and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal."49 "Nor," says the same court, "is the nature of the coercion changed by the fact that the persons fined were members of the association. . . . The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims." It should not be understood from this, however, "that a fine is of itself necessarily or even generally an illegal implement. In many cases it is so light as not to be coercive in its nature."50

To the contrary, it is contended that fines and penalties, including expulsion, are not improper means for an organization to use to secure obedience to its rules and orders. The argument in support of the practice is that since the creation of the organization is lawful (e. g., a labor union), and since as between itself and its members it has a right to pass rules and impose fines upon its members for the purpose of securing obedience to those rules, and since, further, it has a right within certain

<sup>49</sup> Willcutt & Sons Co. v. Driscoll (1908), 200 Mass. 110, 23 L. R. A. (N. S.) 1236, 85 N. E. 897 (see a note approving this case in 22 Harvard Law Review 234); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 123, 30 Atl. 881, semble; Booth & Bro. v. Burgess (1906), 72 N. J. Eq. 181, 196, 197, 65 Atl. 226; Boutwell v. Marr (1896), 71 Vt. 1, 76 Am. St. Rep. 746, 43 L. R. A. 803, 42 Atl. 607; and see Longshore Printing Co. v. Howell, 26 Or. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547.

<sup>50</sup> Martell v. White (1904), 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085.

limits and for certain purposes to strike, then it must follow that it should be permitted to use the right to fine and expel in order to make effective the right to strike. In other words, that the right to impose such penalties is incidental to the carrying out of the purposes of the organization; in fact, that penalties are the very bone and sinew of the organization; and so long as the purposes of the organization are justifiable, the penalties are justifiable.<sup>51</sup>

§ 2033.- (§ 600.) Lawful Means in the Competitive Struggle—Persuasion—Offer of Economic Advantage.— In marked contrast with fraud and violence, and intimidation in all its forms, resorted to in the effort to advance one's economic interests, are the simple arts of persuasion and the offering of pecuniary rewards. Such methods are the very foundation stones of all legitimate competition, and must be approved so long as competition is approved. A cannot complain that B has taken away his customers by simply extending an invitation to them to trade with him instead of with A. nor by making his place of business more attractive, nor by offering his wares at better prices; nor can A complain that B has taken away his employees (not under contract) by offering better wages or more satisfactory conditions of employment; nor if B is an employee on a strike, or a combination of employees on a strike for a justifiable cause, can A complain that B has interfered with the normal flow of labor to A by presenting arguments which convince other laboring men that the cause of labor will be best served by leaving A without help.

<sup>51</sup> Martin, "The Modern Law of Labor Unions," § 148 et seq.; Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 South. 590; Wabash R. R. Co. v. Hannahan, 121 Fed. 563, at pp. 568 and 571; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319, 21 L. R. A. 337, 55 N. W. 1119; Rhodes Bros. Co. v. Musicians' Protective Union, 37 R. I. 281, 92 Atl. 641.

As a means to a justifiable end, such methods are universally approved.<sup>52</sup>

§ 2034. (§ 601.) Motive in This Branch of the Law. Where resort is had simply to persuasion in interfering with the probable expectancies of another, the question has been raised as to whether even a prima facie tort has been committed, in the case, for example, where the defendant was seeking personal revenge and had no commercial or other proper interest to serve. If the conduct in such case is not prima facie tortious, the question of justification does not arise, and, as a consequence, what the defendant's reasons were for inflicting the loss on the plaintiff becomes immaterial. On the other hand, if the postulate, advanced by some authorities, is accepted, that every intentional interference with another's trade expectancies is at least prima facie wrongful, the controversy is at once carried, for its final determination, into the field of justification, and forthwith into the field of motives. The question may then be raised. Was the defendant laboring for his own economic advancement or wholly for the gratification of personal spite? If the former, his justification would be established; if the latter, it would fail.

On the problem here presented, there is a wide conflict of authority. It is asserted by some that so long as one confines himself to simple persuasion—and this includes the offering of pecuniary rewards, such as the reduction of prices—there is no liability, regardless of what the

52 Mogul Steamship Co. v. McGregor, [1889] L. R. 23 Q. B. 598; Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. 163, 62 L. R. A. 673, 44 C. C. A. 426; Vegelahn v. Guntner (1896), 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 722, 44 N. E. 1077 (opinion of Holmes, J.); W. & A. Fletcher Co. v. International Association of Machinists (N. J. Eq.), 55 Atl. 1077; Foster v. Retail Clerks' International Protective Ass'n, 39 Misc. Rep. 48, 78 N. Y. Supp. 860; Rogers v. Evarts, 17 N. Y. Supp. 264; Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72.

actor's motive may have been. In support of this view, it is argued that there is danger of going too far in interfering with the right of free speech and individual freedom of action in dealing with one's own property; that these rights should be as carefully safeguarded as the right to an unmolested business, and hence that one should not be called upon to answer for harm caused by such methods.53 In Passaic Print Works v. Ely & Walker Dry Goods Co.,54 it is said that, aside from a limited class of cases. "It is a general rule that the bad motive which inspires an act will not change its complexion, and render it unlawful, if otherwise the act was done in the exercise of an undoubted right." And in Guethler v. Altman,55 the court says "We know of no authority holding that an action will lie for persuading a party not to enter into a contract."

The contrary view is presented by the late James Barr Ames, Dean of the Harvard Law School, in the following language: "The willful causing of damage

53 See a learned article by Jeremiah Smith on "Crucial Issues in Labor Litigation," in 20 Harvard Law Review, 253.

54 (1900), 105 Fed. 163, 62 L. R. A. 673, 44 C. C. A. 426. In this case the defendant sold certain calicoes, manufactured by the plaintiff, to the retail trade at prices lower than those fixed by the plaintiff.

55 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355. See accord, Allen v. Flood, [1898] App. Cas. 1 (a case not supported on its reasoning by later English cases. See Leathem v. Craig, L. R. Ir. [1899] 2 Q. B. & Ex Div. 667, and Quinn v. Leathem, L. R. [1901] App. Cas. 495); United States v. Kane (1885), 23 Fed. 748; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union (1905), 165 Ind. 421, 6 Ann. Cas. 829, 2 L. R. A. (N. S.) 788, 75 N. E. 877 (but in this case there was a justification in fact, in that the defendants were seeking higher wages); Orr v. Home Mutual Ins. Co., 12 La. Ann. 255, 68 Am. Dec. 770; Parker, J., in National Protective Ass'n v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135, 63 N. E. 369; Foster v. Retail Clerks' International Protective Ass'n, 39 Misc. Rep. 48, 78 N. Y. Supp. 860.

to another by a positive act, whether by one man alone or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort, unless there was just cause for inflicting the damage; and whether there was or was not just cause will depend in many cases, but not in all, upon the motive of the actor." And with reference to motive, he says: "The motive of an act, being the ultimate purpose of the actor, is rightful if the purpose be the benefit of the actor himself—wrongful if the purpose be doing damage to another."

56 "How Far an Act may be a Tort Because of the Wrongful Motive of the Actor," 18 Harvard Law Review, 411, 412. See, in support of the same view, "The Respective Rights of Capital and Labor in Strikes," 5 Illinois Law Review 453, and an article in 16 Harvard Law Review, at page 243. Among the decisions the recent case of Tuttle v. Buck, 107 Minn. 145, 131 Am. St. Rep. 446, 16 Ann. Cas. 807, 22 L. R. A. (N. S.) 599, 119 N. W. 946, presents the problem very squarely and decides it in the affirmative. The plaintiff was in the barber business; the defendant was a banker. It was contended on behalf of the plaintiff that the defendant established a barber-shop in the same town with the plaintiff for the sole purpose of running the plaintiff out of business, and with the intention of himself retiring, upon the accomplishment of this purpose. overruling a demurrer to the complaint, the court said: "To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising a legal right or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms." The leading English case of Mogul Steamship Co. v. McGregor. [1889] L. R. 23 Q. B. Div. 598, is also decided on this premise. "Assume," says the court, "that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, Was it done with or without 'just cause or excuse?' . . . But such It is, thus, an open question in our law as to whether any justification need be shown to avoid liability in case the means of interfering with the probable expectancies of another have been confined to simple persuasion. If the accomplished result is to be treated as not imposing even a prima facie liability in tort, it follows that equity will not enjoin such activities, regardless of what the motive may have been. On the other hand, if such harm, intentionally caused, is held prima facie tortious, then equity will or will not grant an injunction depending (1) upon whether the interference with the plaintiff's rights can be justified, which in turn will depend upon the motive of the actor; and (2) upon the question of whether the legal remedy would be inadequate, as in other cases where the power of equity is invoked.

legal justification would not exist when the act was done with the intention of causing temporal harm without reference to one's own lawful gain. . . . '' And in the dissenting opinion in Passaic Print Works v. Ely & Walker Dry Goods Co. (1900), 105 Fed. 163, 62 L. R. A. 673, 44 C. C. A. 426, Sanborn, J., said: "The proposition is sustained by respectable authority; it is just and I believe it is sound,—that an action will lie for depriving a man of custom (that is, of possible contracts), when the result is effected by persuasion as well as when it is accomplished by fraud or force if the harm is inflicted without justifiable cause, such as competition in trade."

See, also, Temperton v. Russell, [1893] 62 L. J. Q. B. Div. 412, at 419; Tennessee Coal etc. Co. v. Kelly (1909), 163 Ala. 348, 50 South. 1008 (dictum); Doremus v. Hennessy, 62 Ill. App. 391, at 403; but compare Ulery v. Chicago Live Stock Exchange, 54 Ill. App. 233; Dunshee v. Standard Oil Co., 152 Iowa, 618, 36 L. R. A. (N. S.) 263, 132 N. W. 371 (for a discussion of this case, see 25 Harvard Law Review, 226); Boggs v. Duncan Schell Furniture Co., 163 Iowa, 106, L. R. A. 1915B, 1196, 143 N. W. 482; Walker v. Cronin, 107 Mass. 555, at 565; Hartnett v. Plumbers' Supply Ass'n, 169 Mass. 229, 38 L. R. A. 194, 47 N. E. 1002; Morasse v. Brochu, 151 Mass. 567, 21 Am. St. Rep. 474, 8 L. R. A. 524, 25 N. E. 74; Moran v. Dunphy, 177 Mass. 485, 83 Am. St. Rep. 289, 52 L. R. A. 115, 59 N. E. 125; Joyce v. Great Northern R. R. Co. (1907), 100 Minn. 225, 8 L. R. A. (N. S.) 756, 110 N. W. 975 (the defendant requested the depot company not to re-employ the plaintiff unless the plaintiff would

§ 2035. (§ 602.) Lawful Means—Primary Strike and Primary Boycott—The Right of the Employer Against His Own Employees.—In the contest between labor and capital the strike, either actual or threatened, and the boycott, are the most common means used by employees to bring their employers to terms.<sup>57</sup> First let it be

agree not to hold the defendant responsible for injuries. It was held that the defendant was liable unless he could justify. The case was decided, however, under a statute broad enough in its terms to include persuasion and a resort to the black list); Huskie v. Griffin (1909), 75 N. H. 345, 349, 139 Am. St. Rep. 718, 27 L. R. A. (N. S.) 966, 74 Atl. 595 (a well and fully reasoned case); Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111. In this connection, light will be secured by comparing the cases where a person by a natural use of his land injures his neighbor; for example, B digs a well on his own land and thereby cuts off the water so that A's well goes dry. There is substantial authority holding that B incurs no liability to A, regardless of his motive. He may have been actuated solely by spite. He may have had no intention of using the well. See to this effect, Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 62 L. R. A. 589, 94 N. W. 354. But there is other substantial authority holding that B can escape liability only by justifying his intentional infliction of loss on A, and that to justify he must show a reasonable beneficial use: Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 64 L. R. A. 255, 96 N. W. 1080. The latter is believed to represent the more modern view and the better view on principle. Also, see cases involving a wanton waste of natural gas wherein motive was held material: Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 50 L. R. A. 768, 57 N. E. 912; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. 576.

57 For various definitions of "strike," see Martin, "The Modern Law of Labor Unions," § 25. After criticising other definitions for including object and collateral conduct, Martin concludes: "In accordance with this view, a strike may be defined as a simultaneous cessation of work, by workmen acting in combination to compel their common employer to accede to demands made on him by such combination." See, also, Hannen, J., in Farrer v. Close, L. R. 4 Q. B. 612; National Protective Ass'n v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135, 63 N. E. 369, 370, 371; Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45, 52, 20 L. R. A. (N. S.) 315, 91 C. C. A. 631.

assumed that the employees of A have struck, or are threatening to strike, and have severed, or are threatening to sever, trade relations with A, and that A is seeking redress against such employees. Regardless of the motives of the employees and without reference to whether they were under contract, it is everywhere agreed that equity will not enjoin them from refusing to work for A or to deal with A, either at the instance of A or of anyone else. The reason for this, where a breach of contract is involved, is that equity never will enforce specifically a contract for personal services, and, except on rare occasions, a contract to purchase chattels.<sup>58</sup> And further, where there is no contract, there exists the additional obvious reason that the employees have not agreed to continue in A's employ. Moreover where no contract is involved and where the motive is proper, there is no possible cause for legal complaint. The time is long past when combinations of laborers formed for such worthy purposes as the securing of higher wages and better conditions of employment, by concerted action in quitting work, were illegal either criminally or civilly. Unionization and strikes are no longer per se illegal. 59

 <sup>&</sup>lt;sup>58</sup> See *post*, § 759; see, also, Arthur v. Oakes, 63 Fed. 310, 25
 L. R. A. 414, 11 C. C. A. 209, modifying decree in Farmers' Loan & Trust Co. v. Northern Pac. R. R. Co., 60 Fed. 803.

<sup>59</sup> Wabash R. R. Co. v. Hannahan (1903), 121 Fed. 563; Saulsberry v. Coopers' International Union (1912), 147 Ky. 170, 39 L. R. A. (N. S.) 1203, 143 S. W. 1018; My Maryland Lodge v. Adt, 100 Md. 238, 68 L. R. A. 752, 59 Atl. 721; Burnham v. Dowd, 217 Mass. 351, 51 L. R. A. (N. S.) 778, 104 N. E. 841; Lohse Patent Door Co. v. Fuelle (1908), 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (N. S.) 607, 114 S. W. 997; Martin v. McFall (1903), 65 N. J. Eq. 91, 55 Atl. 465; Connett v. United Hatters of North America, 76 N. J. Eq. 202, 74 Atl. 188; Jones v. Maher, 62 Misc. Rep. 388, 116 N. Y. Supp. 180; affirmed (1909), 141 App. Div. 919, 125 N. Y. Supp. 1126; Longshore Printing Co. v. Howell, 26 Or. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547; Cote v. Murphy, 159 Pa. St. 420, 39 Am. St. Rep. 686, 23 L. R. A. 135, 28 Atl. 190 (early common-law

It must not be inferred, however, that equity is entirely helpless in preventing a strike. If the purpose of the strike is unjustifiable, or if the employees are under contract, equity will in some jurisdictions enjoin the employees from combining<sup>60</sup> to quit work, officers and walking delegates from ordering or advising the strike, and the union officials from paying strike benefits, and the doing of other acts essential to the organization and maintenance of the strike.<sup>61</sup> On the other hand, some courts treat such injunctions as an effort to do indirectly what equity will not do directly, viz., compel men to work, and hence refuse the equitable remedy, notwith-

rule changed by statute). It should be noted in this connection that often when courts say that it is lawful to strike, they mean simply that the very act of quitting the service is not illegal, no matter what the motive, or, frequently, that men cannot be compelled to work by an injunction having that direct effect. They do not necessarily mean that the whole transaction is lawful, i. e., the precedent agreement to quit or the conditional withdrawal designed to force unjustifiable results from the employer. In Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226, it is said, for example, that "The right to refrain from contracting is an absolute right which every man may exercise justly or unjustly, for a good purpose, 'maliciously' in the popular sense, or benevolently." This is undoubtedly correct, if limited to an unconditional refusal to contract. limited, neither the other party to the expected contract nor anyone else has any legal basis for complaint. See, also, Commonwealth v. Hunt, 4 Met. (Mass.) 111, 38 Am. Dec. 346.

60 Reynolds v. Davis (1908), 198 Mass. 294, 17 L. R. A. (N. S.) 162, 84 N. E. 457.

61 Giblan v. Union, [1903] 2 K. B. 600 (proper to enjoin union officials from calling strike); Tunstall v. Stearns Coal Co., 192 Fed. 808, 41 L. R. A. (N. S.) 453, 113 C. C. A. 132 (payment of money enjoined); A. R. Barnes & Co. v. Berry, 156 Fed. 72 (officers enjoined from exercising their power to induce a strike). But see A. R. Barnes & Co. v. Berry, 157 Fed. 883 (bill dismissed); Folsom v. Lewis, 208 Mass. 336, 35 L. R. A. (N. S.) 787, 94 N. E. 316 (injunction against officers); George Jonas Glass Co. v. Glass Blowers' Ass'n, 64 N. J. Eq. 640, 54 Atl. 565 (payment of money enjoined).

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standing the strikers may subject themselves to tort or criminal liability.<sup>62</sup>

§ 2036. (§ 603.) The Primary Strike and the Primary Boycott, and Kindred Forms of Economic Pressure as Methods of Influencing One Person to the Injury of Another.—As pointed out in the preceding section, it is generally conceded that, as against their employer, laborers (not under contract) incur no civil liability by striking or threatening to strike, or by severing or threatening to sever trade relations with him. It does not follow, however, that, if they seek to extend the effeet of such conduct beyond the employer, by inducing him to sever relations with a third person, they will incur no liability to the latter. And in any case where A interferes with the establishment or continuance of relations of pecuniary profit between B and C, by bringing any form of economic pressure to bear on B, it must not be assumed that C is without a remedy. 63 cases of this character, liability is frequently imposed in favor of C and, within limits, the arm of equity extended for his protection. Likewise the situations here presented are to be distinguished from those where the probable expectancies of the third person (C) are in-

<sup>62</sup> A. R. Barnes & Co. v. Berry, 157 Fed. 883; Wabash R. Co. v. Hannahan (1903), 121 Fed. 563 (officers will not be enjoined from ordering a strike. "To enjoin them . . . from ordering or otherwise causing a strike is, in substance and effect, an injunction against resort to a strike by employees who may be members of the orders . . ."; Kemp v. Division No. 241, 255 Ill. 213, Ann. Cas. 1913D, 347, 99 N. E. 389.

<sup>63</sup> For example, the members of the A union strike or threaten to strike in order to induce their employer, B, (1) to discharge C, a fellow workman, or (2) to induce their employer, B, to withdraw his patronage from C, a manufacturer; or (3), to turn the case around, A, an employer, threatens to discharge B, an employee, in order to induce him to sever relations with C; or again, (4) A, who is engaged in trade with B, threatens to discontinue his trade relations with B in order to induce B to cease his patronage of C.

terfered with by simple persuasion. There is an obvious difference between influencing B to C's injury by a simple request and accomplishing such result by a threat of economic loss against B. The latter method is plainly coercive in its character—often extremely coercive. Hence that, in all cases where this weapon has been employed, the injured third party should be entitled to legal or equitable relief, unless a justification can be shown, seems eminently reasonable. This concession, indeed, is made by some of those courts and writers who maintain most strongly that simple persuasion should never be treated as forming a foundation for even a prima facie tort.64 The authorities, however, do not uniformly make even this much of a concession. Some courts reason that since the employees (not under contract) have an absolute right as against their employer either singly or in concert to quit work, and since the employer has a right to quit dealing, either as employer, seller or purchaser, with a third person (to whom he is not bound by contract) at any time and for any reason, it must of necessity follow that no possible wrong is done to anyone, if the employees exercise their right conditionally in order to influence the employer to sever relations with such third person. Since no prima facie wrong even has been committed, or threatened, no justification need be offered, and hence, their reason or motive for spreading injury or disaster cannot be inquired into. And by a parity of reasoning, in none of the cases supposed would A be liable to C.65 It is believed, how-

<sup>64 &</sup>quot;Crucial Issues in Labor Litigation," 20 Harv. L. Rev. 253.

<sup>65</sup> The famous case of Allen v. Flood, [1899] L. R. App. Cas. 1, is usually cited to this effect. It should be noted, however, that a majority of the judges concerned with this case through all of its stages were of the contrary view, and based their conclusion on the ground that an intentional interference with another's calling is prima facie tortious and must be justified, but found a justification present. It should be pointed out further that the later case of

ever, that the great weight of authority treats such methods of invading the probable expectancies of others as at least *prima facie* tortious, and therefore holds the

Leathem v. Craig, L. R. Ir. [1899] 2 Q. B. & Ex. Div. 667, adopts squarely the prima facie tort theory. In further support of the text, see Meier v. Speer (1910), 96 Ark. 618, 32 L. R. A. (N. S.) 792, 132 S. W. 988 (union employees of A refused to work for A if he should take a contract from P, who employed some non-union men and also to work for B if he should buy bricks from P, as a result of which B refused to deal with P. Held, P should have been nonsuited); Union Labor Hospital v. Vance Redwood Lumber Co., 158 Cal. 551, 33 L. R. A. (N. S.) 1034, 112 Pac. 886 (no injunction should issue against several defendant lumber companies for conspiring together and agreeing to discharge anyone who would not submit to have one dollar a month retained out of his wages to be turned over to any one of four hospitals, among which the plaintiff's name was not included. It was argued that since the defendants had an absolute right to discharge employees for any reason, "a fortiori they may threaten to discharge them without thereby doing an illegal act." There was, however, a separate opinion by Beatty, J., upholding the decision on the ground that the defendants had a justification, but contending that motive was material); Orr v. Home Mutual Ins. Co. (1857), 12 La. Ann. 255, 68 Am. Dec. 770 (held, that the defendants were not liable for depriving plaintiff of employment by jointly refusing to insure any boat on which the plaintiff might be employed as master without reference to what their motive was. It was argued that any one of the defendants could refuse insurance for any reason, and the fact that several of them combined to do the same thing could not make the act unlawful. But compare Graham v. St. Charles Street R. R. Co., 47 La. Ann. 214, 49 Am. St. Rep. 366, 27 L. R. A. 416, 16 South. 806); Heywood v. Tillson (1883), 75 Me. 225, 46 Am. Rep. 373 (causing plaintiff's tenant at will to give up the tenancy by threatening to discharge him. Held, defendant not liable. Motive immaterial); Payne v. Western & Atlantic R. R. Co. (1884), 13 Lea (Tenn.), 507, 49 Am. Rep. 666 (since it was not unlawful to discharge A, it was not unlawful to threaten to discharge him. But note dissenting opinion); Foster v. Retail Clerks' International Protective Ass'n (1902), 39 Misc. Rep. 48, 78 N. Y. Supp. 860 (reviews earlier New York decisions). But see, contra, W. P. Davis Machine Co. v. Robinson, 41 Misc. Rep. 329, 84 N. Y. Supp. 837. See, also, a review of the New York decisions by E. W. Huffcutt, under the title, "Interferinducer of the harm liable in tort or subject to equitable restraint, in the absence of justification.<sup>66</sup>

ence With Contracts and Business in New York," 18 Harvard Law Review, 423, in which, at page 439, the following conclusion is reached: "In the face of these decisions and dicta, it is difficult to escape the conclusion that while the matter is by no means settled, the trend of opinion, and especially in the appeal courts, is decidedly toward making the question of motive or purpose material." But he adds that probably under the New York law the burden is not put upon the defendant of justifying by showing a good motive, but upon the plaintiff to show a bad motive in order to make out his case, citing Collins v. American News Co., 34 Misc. Rep. 260, at 263, 69 N. Y. Supp. 638, and National Protective Ass'n v. Cumming, 53 App. Div. 227, 65 N. Y. Supp. 946, 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135, 63 N. E. 369.

66 Scottish Co-operative Society v. Glasgow Ass'n, [1898] 35 Scot. L. R. 64; Leathern v. Craig, L. R. Ir. [1899] 2 Q. B. & Ex. Div. 667; Quinn v. Leathem, L. R. [1901] App. Cas. 495; Giblan v. Union, [1903] 2 K. B. 600 (if the motive of the defendants is simply to wreak vengeance on the plaintiff, they are liable); March v. Bricklayers & Plasterers' Union, 79° Conn. 7, 118 Am. St. Rep. 127, 6 Ann. Cas. 848, 4 L. R. A. (N. S.) 1198, 63 Atl. 291; Employing Printers' Club v. Doctor Blosser Co. (1905), 122 Ga. 509, 106 Am. St. Rep. 137, 2 Ann. Cas. 694, 69 L. R. A. 90, 50 S. E. 353 (the point is particularly emphasized in this case that the defendants were not confining themselves to mere persuasion); London Guarantee etc. Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526 (an excellent case); Graham v. St. Charles Street R. R. Co., 47 La. Ann. 214, 49 Am. St. Rep. 366, 27 L. R. A. 416, 16 South. 806; Berry v. Donovan (1905), 188 Mass. 353, 108 Am. St. Rep. 499, 3 Ann. Cas. 738, 5 L. R. A. (N. S.) 899, 74 N. E. 603; De Minico v. Craig, 207 Mass. 593, 42 L. R. A. (N. S.) 1048, 94 N. E. 317; Wesley v. Native Lumber Co., 97 Miss. 814, Ann. Cas. 1912D, 796, 53 South. 346; Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co., 97 Miss. 148, 29 L. R. A. (N. S.) 869, 52 South. 454; Brennan v. United Hatters of North America, 73 N. J. L. 729, 118 Am. St. Rep. 727, 9 Ann. Cas. 698, 9 L. R. A. (N. S.) 254, 65 Atl. 165 (discusses question at great length. Criticises Allen v. Flood, supra); Blanchard v. Newark Joint District Council, 77 N. J. L. 389, 71 Atl. 1131; Macauley v. Tierney (1895), 19 R. I. 255, 61 Am. St. Rep. 770, 37 L. R. A. 455, 33 Atl. 1; Payne v. Western & Atlantic R. R. Co., 13 Lea (Tenn.), 507, 49 Am. Rep. 666 (dissenting opinion only). See, also, the cases under § 604, infra (justification).

§ 2037. (§ 604.) The Primary Strike, Primary Boycott, and Kindred Forms of Economic Pressure. Continued-When Justified.-As indicated in the previous section, loss inflicted by means of the primary strike and the primary boycott, and other similar methods, may, in any event, be justified. Economic pressure in the form of a strike or a withdrawal of any kind of voluntary profitable relation, actual or threatened, provided it is calculated to contribute directly to a justifiable end, is nowhere condemned.67 Liability will therefore be found to turn in a great many of these trade and labor cases upon the presence or absence of a legal justification. Thus, the union employees of a certain employer may, without legal hindrance, threaten to strike in order to induce the discharge of a non-union employee (not under contract) if the purpose is to secure for the union employees the work that the nonunion employee has been doing; but their action is not. justified, and they may be subjected to penalty or restraint if they are attempting to secure this discharge for purely arbitrary reasons. In the one case the motive is proper, namely, the direct furtherance by the union employees of their own competitive interests, and in the other case their motive is improper, because they are attempting to inflict loss on another with no corresponding benefit to themselves. In the one case, therefore, the prima facie wrong may be justified and in the other not.68

<sup>67</sup> A distinction should here be noted between bringing such pressure to bear on one who has it in his power to contribute directly to a justifiable end and one who can contribute but remotely and contingently to such end. For example, many cases recognize a distinction between the primary boycott and the secondary boycott, and between the primary strike and the sympathetic strike. See Pickett v. Walsh (1906), 192 Mass. 572, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, 6 L. R. A. (N. S.) 1067, 78 N. E. 753. Also, see § 607, infra.

<sup>68</sup> For a full discussion of the subject of motive, see § 601, supra.

So far as one can generalize, the defendant's motive is justifiable if his immediate purpose is to further his own economic interests; for example, if he is engaged in business, to secure more customers; or as an employer, to secure employees or to bring about a reduction of wages; and if he is an employee, to secure an increase of wages, shorter hours of employment, more work, or better working conditions. Conversely, the motive is not justifiable if the sole purpose of the defendant is to vent his malevolence on the injured party. For more particular light on the question of justification and for a more detailed view of the various situations in which the question arises, reference must be had to the cases.

69 See Romer, L. J., in Giblan v. National Union, [1903] 2 K. B. 606.

70 Defendants justified in causing loss to the plaintiffs: Scottish Cooperative Society v. Glasgow Ass'n, [1898] 35 Scot. L. R. 64 (competition between traders); National Fireproofing Co. v. Mason Builders' Ass'n (1909), 169 Fed. 259, 26 L. R. A. (N. S.) 148, 94 C. C. A. 535; Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367 (the right to select one's companions in labor is a justification); Lewis v. Huie-Hodge Lumber Co. (1908), 121 La. 658, 46 South. 685 (the defendant was in the mill business, but also had a store. The employees of the defendant were threatened with discharge unless they should quit trading with the plaintiff and bestow all their trade on the defendant. The defendant's acts were justified on grounds of trade competition); Pickett v. Walsh, 192 Mass. 572, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, 6 L. R. A. (N. S.) 1067, 78 N. E. 753 (union employees justified on grounds of trade competition in threatening to strike in order to obtain the discharge of a non-union employee and thereby to secure his work); Minasian v. Osborne, 210 Mass. 250, Ann. Cas. 1912C, 1299, 37 L. R. A. (N. S.) 179, 96 N. E. 1036 (the strike was to secure a change in work which affected wages); Gladish v. Kansas City Live Stock Exchange (1905), 113 Mo. App. 726, 89 S. W. 77 (injunction denied against the defendants, who were charged with the duty of enforcing a rule of the exchange which forbade members from dealing with any member who had been expelled. The plaintiff had been expelled because of dishonest dealing. The basis of the decision was that the purpose was commendable); Jones v. Cody (1902), 132 Mich. 13, 62 L. R. A. 160, 92

§ 2038. (§ 605.) Justification, Continued—The Closed Shop.—Not infrequently the purpose in threatening an employer with a strike and with the loss of patronage of union men is to force him to unionize his employment. The demand made upon him is that he shall require all of his non-union employees either to join the union or

N. W. 495 (the trade of the plaintiff, who owned a small store near a school-house, was impaired because the defendant, the principal of the school, ordered the children to go directly home from school. It was held that the defendant's act was justified, there being no malice); Mayer v. Journeymen Stone-cutters' Ass'n (1890), 47 N. J. Eq. 519, 20 Atl. 492; Dunlap's Cable News Co. v. Stone (1891), 60 Hun, 583, 15 N. Y. Supp. 2 (trade competition between the plaintiff and the Associated Press. Injunction denied); Tallman v. Gaillard (1899), 27 Misc. Rep. 114, 57 N. Y. Supp. 419 (competition between union and non-union men for work); Davis v. United Portable Hoisting Engineers (1898), 28 App. Div. 396, 51 N. Y. Supp. 180 (competition between union and non-union employees; injunction denied); National Protective Ass'n v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135, 63 N. E. 369 (union men justified in securing discharge of non-union man who is incompetent and unsafe to work with; injunction denied. But some parts of the opinion would indicate that no justification was necessary. also, Foster v. Retail Clerks' International Protective Ass'n (1902), 39 Misc. Rep. 48, 78 N. Y. Supp. 860, where the court reviewed the earlier authorities and concluded that motive was immaterial. But see contra on this point: W. P. Davis Machine Co. v. Robinson (1903), 41 Misc. Rep. 329, 84 N. Y. Supp. 837. See, also, 18 Harvard Law Review, at page 439, supporting the conclusion reached in the latter case); Cote v. Murphy, 159 Pa. St. 420, 39 Am. St. Rep. 686. 23 L. R. A. 135, 28 Atl. 190 (purpose was to secure employees at lower wage); Macauley v. Tierney (1895), 19 R. I. 255, 61 Am. St. Rep. 770, 37 L. R. A. 455, 33 Atl. 1 (justification found in the competition which existed between members of the Master Plumbers' Association and an outsider. Proper for the defendants to refuse to deal with a wholesaler who sold to non-members, the object being to deprive the competing seller of his supply); Payne v. Western & Atlantic R. R. Co., 13 Lea (Tenn.), 507, 49 Am. Rep. 666.

In the following cases a justification was lacking: Giblan v. Union, [1903] 2 K. B. 600 (attempting to enforce payment of a debt); United States v. Weber, 114 Fed. 950; United States v. Haggerty,

to quit his employment, and that he discharge them forthwith in case they refuse to join the union. The justifiableness of interfering for such purpose with the employment of a non-union laborer has been the subject of much judicial controversy. Defendants argue in support of it that the unionization of the employment is

116 Fed. 510 (object to monopolize labor in order to enhance price unreasonably); Wyeman v. Deady (1906), 79 Conn. 414, 118 Am. St. Rep. 152, 8 Ann. Cas. 375, 65 Atl. 129; Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 106 Am. St. Rep. 137, 2 Ann. Cas. 694, 69 L. R. A. 90, 50 S. E. 353 (attempting to punish plaintiff for having left an illegal combination); Brown v. Jacob's Pharmacy Co. (1902), 115 Ga. 429, 90 Am. St. Rep. 126, 57 L. R. A. 547, 41 S. E. 553 (unlawful conspiracy to restrain trade); London Guarantee etc. Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526 (object to compel plaintiff to compromise a claim held by him against the defendant. To accomplish this the defendant threatened to discontinue an accident policy held by plaintiff's employer. An excellent case); Jackson v. Stanfield (1893), 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14 (wholesaler induced not to sell to plaintiff by threats from defendants, who were members of a retailers' association, to withdraw their trade from the wholesaler. An injunction was granted on the ground that the object of the defendants was monopoly. There was some further coercion also, in that the wholesaler was notified that he would be fined); Graham v. St. Charles Street R. R. Co., 47 La. Ann. 214, 49 Am. St. Rep. 366, 27 L. R. A. 416, 16 South. 806 (defendant threatened to discharge employees who patronized plaintiff's store. Defendant was actuated wholly by ill-will); Webb v. Drake, 52 La. Ann. 290, 26 South. 791 (plaintiff was in hotel business. Defendants, who were merchants, formed a dislike for plaintiff while he was assessor. To vent their spite, they refused to deal with any drummer who patronized plaintiff's hotel. It was held that the plaintiff was entitled to damages); Lucke v. Clothing Cutters & Trimmers' Assembly, 77 Md. 396, 39 Am. St. Rep. 421, 19 L. R. A. 408, 26 Atl. 505, semble; De Minico v. Craig, 207 Mass. 593, 42 L. R. A. (N. S.) 1048, 94 N. E. 317 (the defendants secured the plaintiff's discharge because of personal dislike. It was held that the defendants were answerable in damages, but it was stated by way of dictum that if the plaintiff had been an unfit associate, the defendants' acts would have been justified); Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287 (object was to vitally important to the whole purpose for which the union exists, that the stronger the union the more successfully it can wage its contests for higher wages, shorter hours and better conditions of employment, and hence, that it should be permitted to strengthen itself by thus drawing all the employees into the fold of the union. The "unity of the organization is necessary to make the contest of labor effectual," says Holmes, J., in a dissenting opinion in Plant v. Woods, and, further, "societies of laborers lawfully may employ in their preparation the means which they might use in the final contest." In working for a closed shop, the union is working for a result only one step removed from higher wages and other material advantages, and the

compel the payment of a penalty); Wesley v. Native Lumber Co., 97 Miss. 814, Ann. Cas. 1912D, 796, 53 South. 346 (the defendant was in the mill business and the plaintiff in the store business. The defendant threatened to discharge employees to induce them not to patronize the plaintiff. It was held that the defendants were liable. "The act and the accompanying motive together constitute the unlawful act") Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co., 97 Miss. 148, 29 L. R. A. (N. S.) 869, 52 South. 454; Brennan v. United Hatters of North America, 73 N. J. L. 729, 118 Am. St. Rep. 727, 9 Ann. Cas. 698, 9 L. R. A. (N. S.) 254, 65 Atl. 165 (desire to punish a fellow employee for not having paid a fine illegally imposed is not a justification. Lengthy criticism of Allen v. Flood, supra, and discussion of the English law); Blanchard v. Newark Joint District Council (1909), 77 N. J. L. 389, 71 Atl. 1131 (facts similar to Brennan v. United Hatters, supra); Mills v. United States Printing Co., 91 N. Y. Supp. 185, 99 App. Div. 605; Connell v. Stalker (1897), 20 Misc. Rep. 423, 45 N. Y. Supp. 1048 (union secured plaintiff's discharge in the attempt to enforce a penalty); Connell v. Stalker (1897), 21 Misc. Rep. 609, 48 N. Y. Supp. 77: Coons v. Chrystie, 24 Misc. Rep. 296, 53 N. Y. Supp. 668 (defena ants caused plaintiff's workmen to quit because the plaintiff would not join an employers' association. It was held that the defendants were liable, since their motive was not to raise wages). See, also, § 605, infra.

71 176 Mass. 492, 79 Am. St. Rep. 330, 51 L. R. A. 339, 57 N. E. 1011.

former object is thus hallowed by the latter. 72 On the other hand, it is argued that the closed shop is too remotely connected with the actual material advancement of the union employees and contributes directly only to the manipulation of the labor market; that "the conduct directly affecting an employer to his detriment by interference with his business is not justifiable unless it is of a kind and purpose that has a direct relation to benefits that laborers are trying to obtain." And since the closed shop is not per se of material advantage to the defendants, but at most only clears the way for the accomplishment of justifiable ends, it follows that the rights of others to pursue their calling without molestation are interfered with without a justifiable reason.74 There is a damage to the plaintiff, whether he is the emplover whose employees have been induced to leave, or a

72 Kemp v. Division No. 241 (1912), 255 Ill. 213, Ann. Cas. 1913D, 347, 99 N. E. 389 (the court, however, was divided. Compare O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 3 Ann. Cas. 966, 75 N. E. 108, and Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424, 13 Ann. Cas. 54, 14 L. R. A. (N. S.) 1018, 83 N. E. 940); Wunch v. Shankland (1901), 59 App. Div. 482, 69 N. Y. Supp. 349 (but compare Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 37 L. R. A. 802, 46 N. E. 297, and other New York cases cited under note 75, infra); National Protective Ass'n v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135, 63 N. E. 369 (but in this case, unionization of the shop was not the sole motive); Mills v. United States Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185; Commonwealth v. Hunt, 4 Met. (Mass.) 111, 38 Am. Dec. 346 (but see later Massachusetts cases cited under the next note, contra); Roddy v. United Mine Workers, 41 Okl. 621, L. R. A. 1915D, 789, 139 Pac. 126; Cohn & Roth Electric Co. v. Bricklayers' etc. Union (Conn., 1917), 101 Atl. 659; Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (rule not to work upon non-union made material, not illegal).

<sup>73</sup> Folsom v. Lewis (1911), 208 Mass. 336, 35 L. R. A. (N. S.) 787, 94 N. E. 316.

<sup>74</sup> Folsom v. Lewis (1911), 208 Mass. 336, 35 L. R. A. (N. S.) 787, 94 N. E. 316.

non-union employee whose discharge has been brought about, without a sufficient correlative gain to the defendants. The weight of authority is quite plainly against the closed shop.<sup>75</sup>

75 A. R. Barnes & Co. v. Berry, 156 Fed. 72 (against public policy); Irving v. Joint District Council (1910), 180 Fed. 896; Tunstall v. Stearns Coal Co., 192 Fed. 808, 41 L. R. A. (N. S.) 453, 113 C. C. A. 132; Wyeman v. Deady, 79 Conn. 414, 118 Am. St. Rep. 152, 8 Ann. Cas. 375, 65 Atl. 129; Connors v. Connolly, 86 Conn. 641, 45 L. R. A. (N. S.) 564, 86 Atl. 600; O'Brien v. People (1905), 216 Ill. 354, 108 Am. St. Rep. 219, 3 Ann. Cas. 966, 75 N. E. 108; Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424, 13 Ann. Cas. 54, 14 L. R. A. (N. S.) 1018, 83 N. E. 940 (see Martin, "The Modern Law of Trade Unions," at page 45, for a comment on this case); Kemp v. Division No. 241 (1912), 255 Ill. 213, Ann. Cas. 1913D, 347, 99 N. E. 389 (three dissenting judges support this view, pointing out that a distinction must be drawn between "competition and remote or possible benefits"); Plant v. Woods, 176 Mass. 492, 79 Am. St. Rep. 330, 51 L. R. A. 339, 57 N. E. 1011 (divided court); Reynolds v. Davis (1908), 198 Mass. 294, 17 L. R. A. (N. S.) 162, 84 N. E. 457 (opinion by Knowlton, J.); Folsom v. Lewis (1911), 208 Mass. 336. 35 L. R. A. (N. S.) 787, 94 N. E. 316; Minasian v. Osborne (1911), 210 Mass. 250, Ann. Cas. 1912C, 1299, 37 L. R. A. (N. S.) 179, 96 N. E. 1036 (holding on the facts, however, that the fight was not for the closed shop); Berry v. Donovan (1905), 188 Mass. 353, 108 Am. St. Rep. 499, 3 Ann. Cas. 738, 5 L. R. A. (N. S.) 899, 74 N. E. 603 (attempts to monopolize labor should be discouraged); Fairbanks v. McDonald, 219 Mass. 291, 106 N. E. 1000; W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801; Brennan v. United Hatters of North America, 73 N. J. L. 729, 118 Am. St. Rep. 727, 9 Ann. Cas. 698, 9 L. R. A. (N. S.) 254, 65 Atl. 165; Perkins v. Pendleton, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; Swaine v. Blackmore, 75 Mo. App. 74; Carter v. Oster, 134 Mo. App. 146, 112 S. W. 995; Curran v. Galen, 152 N. Y. 33, 57 Am. St. Rep. 496, 37 L. R. A. 802, 46 N. E. 297 (a leading case); Davenport v. Walker (1901), 57 App. Div. 221, 68 N. Y. Supp. 161; W. P. Davis Machine Co. v. Robinson (1903), 41 Misc. Rep. 329, 84 N. Y. Supp. 837; Jacobs v. Cohen (1904), 99 App. Div. 481, 90 N. Y. Supp. 854; McCord v. Thompson-Starrett Co. (1908), 129 App. Div. 130, 113 N. Y. Supp. 385; Schlang v. Ladies' Waist Makers' Union (1910). 67 Misc. Rep. 221, 124 N. Y. Supp. 289; Albro J. Newton Co. v. Erickson (1911), 70 Misc. Rep. 291, 126 N. Y. Supp. 949; Erdman V - 289

§ 2039. (§ 606.) The Secondary Boycott and the Sympathetic Strike. 76—The distinction between primary boycott and a secondary boycott, and a primary strike and sympathetic or secondary strike, may be best indicated, perhaps, by illustration. For example, members of the A union demand higher wages of their employer, B. To enforce such demand, they not only strike or threaten to strike but also withdraw or threaten to withdraw their patronage, as purchasers, from B. Thus far the only threat of loss is directed immediately against the individual who has it in his power to give to the instigators of the movement satisfaction of their demands. In so far as B is threatened with a loss of labor, the weapon is the primary strike, and in so far as he is threatened with a loss of patronage, the weapon is the primary boycott. As stated in earlier paragraphs, no liability exists in such cases if the end sought is justifiable. But the efforts of the union often do not stop at this point. If B does not yield to this pressure, they then go to C, who has trade relations with B, and induce or attempt to induce C to withdraw or threaten to withdraw his patronage from B. In order to influence C's conduct in this regard, they threaten to sever their trade relations with C or to call a strike in C's

v. Mitchell, 207 Pa. St. 79, 99 Am. St. Rep. 783, 63 L. R. A. 534, 56 Atl. 327; State v. Dyer, 67 Vt. 690, 32 Atl. 814.

76 While the phraseology here adopted, i. e., primary and secondary boycott, has not been generally used, nevertheless it is finding entrance into legal literature, including court decisions (Martin, "The Modern Law of Labor Unions"; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324), and seems necessary to clear thinking and a convenient expression of well-marked distinctions in the law. The term "boycott," as ordinarily defined, is in reality a definition of secondary boycott as that term has been used and explained in the text. See, e. g., Toledo etc. R. Co. v. Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395 (Taft, J.); Gray v. Building Trades Council, 91 Minn. 171, at p. 179, 103 Am. St. Rep. 477, 1 Ann. Cas. 172, 63 L. R. A. 753, 97 N. W. 663. But compare Mills v. United States Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185.

business. A withdrawal of trade relations from C would be a secondary boycott, and a strike in C's business would be a sympathetic, or, to use the same phraseology, a secondary strike. Whichever method of influencing C's conduct is used, the principle involved is the same. The object is to coerce C, an economic neutral, against his will, to boycott B. The distinction is well illustrated by reference to the facts of a few leading cases mentioned in the note.<sup>77</sup>

§ 2040. (§ 607.) Same, Continued—The Status of the Law.—As defined in the previous section, the secondary boycott and the sympathetic or secondary strike are condemned by the great weight of authority in the United States, and in England, as unlawful weapons in the war of trade; that is, no matter what the motive of the defendant may be, no matter how worthy the ultimate object, such means cannot be justified. This condemnation is based upon the ground either that the pressure is unduly coercive, or that the economic cost of dragging in economic neutrals too greatly exceeds the possible economic gain.<sup>78</sup> It has been held, however,

77 Leathem v. Craig, L. R. Ir. [1899] 2 Q. B. & Ex. Div. 667; also see Quinn v. Leathem, L. R. [1901] App. Cas. 495 (threat of sympathetic strike); Barr v. Essex Trades Council (1894), 53 N. J. Eq. 101, 30 Atl. β81 (secondary boycott); Pickett v. Walsh (1906), 192 Mass. 572, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, 6 L. R. A. (N. S.) 1067, 78 N. E. 753 (sympathetic strike).

78 See McClure's Magazine, June, 1909, p. 204, by Hon. William Howard Taft; Temperton v. Russell, L. R. [1893] 1 Q. B. 715; Leathem v. Craig, L. R. Ir. [1899] 2 Q. B. & Ex. Div. 667; Quinn v. Leathem, L. R. [1901] App. Cas. 495; In re Debs (1894), 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900 (sympathetic strike); Toledo etc. R'y Co. v. Pennsylvania Co. (1893), 54 Fed. 730, 19 L. R. A. 387; Hopkins v. Oxley Stave Co. (1897), 83 Fed. 912, 28 C. C. A. 99 (in order to force plaintiff to give up use of machines, customers of plaintiff were notified to buy only hand-hooped barrels. Notice was also given that laboring men would not buy anything put in machine-made barrels. Injunction granted); Loewe v. California State Federation of Labor (1905), 139 Fed. 71 (see pp. 85,

that if the plaintiff attempts, during the pendency of a strike in his own factory, to have his work done by an-

86, for injunction order in full. The order, among other things, prevents the publishing of `plaintiff's customers as "unfair"); Shine v. Fox Bros. Mfg. Co., 156 Fed. 357, 86 C. C. A. 311 (injunction against carpenters who were threatening to strike on all jobs where materials from plaintiff's sash and door factories were used. The motive was to force plaintiff to unionize his factory); Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011 (injunction against publishing notices that plaintiff's beer was "unfair." Such notices necessarily intimidate customers of plaintiff); Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor (1907), 156 Fed. 809; Iron Molders Union v. Allis-Chalmers Co. (1908), 166 Fed. 45, 20 L. R. A. (N. S.) 315, 91 C. C. A. 631; American Federation of Labor v. Buck's Stove & Range Co., 33 App. Cas. (D. C.) 83, 32 L. R. A. (N. S.) 748 (pointing out clearly the distinction between the primary and the secondary boycott); Irving v. Joint District Council of New York (1910), 180 Fed. 896 (injunction against threatening to strike on jobs where plaintiff's materials used); State v. Glidden (1887), 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890 (in order to induce the publisher of a paper to discharge non-union men, the defendants threatened buyers and advertisers with loss if they continued to patronize the paper. Held, a criminal conspiracy); March v. Bricklayers & Plasterers' Union, 79 Conn. 7, 118 Am. St. Rep. 127, 6 Ann. Cas. 848, 4 L. R. A. (N. S.) 1198, 63 Atl. 291; Wilson v. Hey, 232 Ill. 389, 122 Am. St. Rep. 119, 13 Ann. Cas. 82, 16 L. R. A. (N. S.) 85, 83 N. E. 928 (injunction against notifying plaintiff's customers that plaintiff was on the "unfair" list on the ground that it implies a threat of loss to such customers if they trade with plaintiff. Court divided); Piano & Organ Workers International Union v. Piano & Organ Workers' Supply Co. (1906), 124 Ill. App. 353; My Maryland Lodge v. Adt (1905), 100 Md. 238, 68 L. R. A. 752, 59 Atl. 721 (boycott, secondary, defined). The plaintiff was a manufacturer of machinery, especially that used by brewers. The defendants demanded a ten per cent increase of wages, and because it was denied, sent out notices to the public not to buy beer made in breweries which used plaintiff's machinery. Many breweries were thus dissuaded from patronizing plaintiff); Pickett v. Walsh, 192 Mass. 572, 116 Am. St. Rep. 272, 7 Ann. Cas. 638, 6 L. R. A. (N. S.) 1067, 78 N. E. 753; Burnham v. Dowd, 217 Mass. 351, 51 L. R. A. (N. S.) 778, 104 N. E. 841 (proper to enjoin defendants from threatening strike against one who purchased materials from plaintiff and from putting such person on the blackother factory, his employees are justified in inciting a strik in such other factory. In so doing they are but following the plaintiff as to the matter in dispute.<sup>79</sup>

list); Beck v. Railway Teamsters' Protective Union (1898), 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13; Baldwin v. Escanaba Liquor Dealers' Ass'n (1911), 165 Mich. 98, 130 N. W. 214 (boycott of newspaper by liquor dealers); Gray v. Building Trades Council, 91 Minn. 171, 103 Am. St. Rep. 477, 1 Ann. Cas. 172, 63 L. R. A. 753, 97 N. W. 663 (excellent review of authorities, both English and American); Lohse Patent Door Co. v. Fuelle (1908), 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (N. S.) 607, 114 S. W. 997 (excellent opinion; thorough review of authorities; briefs of counsel); Matthews v. Shankland, 25 Misc. Rep. 604, 56 N. Y. Supp. 123 (unions were threatening advertisers in plaintiff's paper. Boycott defined, pages 128, 129); Beattie v. Callanan (1903), 82 App. Div. 7, 81 N. Y. Supp. 413; Schlang v. Ladies Waist Makers' Union (1910), 67 Misc. Rep. 221, 124 N. Y. Supp. 289 (defendants threatened to call strikes on other manufacturers who might help plaintiff out by doing the work that plaintiff had been doing. Good discussion); Albro J. Newton Co. v. Erickson, 70 Misc. Rep. 291, 126 N. Y. Supp. 949 (injunction against injuring the good-will of plaintiff's business by threatening in any manner with labor troubles those who might use plaintiff's materials. "To bring an 'obstinate' manufacturer to terms, an attack on his good-will would be fully as effective as to tear down his factory or to smash his machinery'); Barr v. Essex Trades Council (1894), 53 N. J. Eq. 101, 30 Atl. 881; Martin v. McFall (1903), 65 N. J. Eq. 91, 55 Atl. 465; Longshore Printing Co. v. Howell, 26 Or. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547 (the injunction was denied because the complaint was not sufficiently clear in showing irreparable injury, but the secondary boycott was fully recognized as unlawful); Purvis v. Local No. 500, United Brotherhood of Carpenters, 214 Pa. St. 348, 112 Am. St. Rep. 757, 6 Ann. Cas. 275, 12 L. R. A. (N. S.) 642, 63 Atl. 585 (defendants were enjoined from threatening customers of plaintiff with strike. The benefits to defendants arising from interference with plaintiff's customers are too remote); Crunip's Case (1888), 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620 (held, a criminal conspiracy for defendants to combine to threaten plaintiff's customers with loss); Patch Mfg. Co. v. Protection Lodge (1904), 77 Vt. 294, 107 Am. St. Rep. 765, 60 Atl. 74; Jensen v. Cooks & Waiters' Union, 39 Wash. 531, 4 L. R. A. (N. S.) 302, 81 Pac. 1069. 79 Iron Molders' Union No. 125 v. Allis-Chalmers Co. (1908),

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On the other hand, some authorities give unqualified support to such means, at least where the ultimate object is justifiable. These cases are decided on the heory either that no legal wrong has been even print facie committed where an individual or group of individuals have merely threatened to do what they had a legal right to do, or that, assuming the end to be proper, such means are not to be condemned simply because, they contribute indirectly rather than directly to such end; that the distinction between the primary boycott and the secondary boycott is not such as to require a different rule for the latter. The most pronounced supporter of this view, the California court, has said that it "recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer and to induce by fair means any and all other persons to do the same, and, in the exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal."80

166 Fed. 45, 20 L. R. A. (N. S.) 315, 91 C. C. A. 631. But see Schlang v. Ladies' Waist Makers' Union, 67 Misc. Rep. 221, 124 N. Y. Supp. 289.

80 Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 127 Am. St. Rep. 722, 18 L. R. A. (N. S.) 707, 96 Pac. 127 (quære); Parkinson Co. v. Building Trades Council (1908), 154 Cal. 581, 21 L. R. A. (N. S.) 550, 98 Pac. 1027 (threatening the customers of plaintiff, who was the owner and proprietor of a lumber-yard, with strikes in order to force a closed shop upon him, not unlawful and should not be enjoined. One dissenting opinion); Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324. See, also, Gill Engraving Co. v. Doerr (1914; Dist. Ct. South. Dist. of N. Y.), 214 Fed. 111; George J. Grant Const. Co. v. St. Paul Bldg. Trades Council (1917), 136 Minn. 167, 161 N. W. 520, 1055; Empire Theatre Co. v. Cloke (1917), 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107.

(§ 608.) What Constitutes a Threat of Boycott?—A threat of boycott may be either express or implied. The courts have frequently enjoined the sending of notices to the customers of one who is in business, containing simply a statement that he is "unfair" to organized labor. This is done on the theory that there is of necessity an implied threat that such customers will in turn suffer the loss of patronage if they continue to patronize the plaintiff. If the notices given or things done have the natural effect of exciting the reasonable apprehension of the persons to whom they are sent that they will be injured in their business unless they sever their relations with the plaintiff, it is immaterial that they are not accompanied by direct threats. The words "unfair list" may well be, as stated by a recent Illinois decision, a euphemism for a boycott, and, of course, it does not change the nature of an unlawful thing by substituting an inoffensive for an offensive name. Where the object is plain, the language is immaterial.81 On the other hand, some courts have held that the mere sending of a notice is at most a request and not a threat, and hence should not be enjoined.82 The general rule

<sup>81</sup> Wilson v. Hey, 232 Ill. 389, 396, 122 Am. St. Rep. 119, 13 Ann. Cas. 82, 16 L. R. A. (N. S.) 85, 83 N. E. 928. See, also, Loewe v. California State Federation of Labor (1905), 139 Fed. 71 (the order enjoined the publishing of plaintiff's customers as "unfair"); Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011 (publication of notices that plaintiff's beer "unfair," enjoined on the ground that such notices necessarily intimidate); Beck v. Railway Teamsters P. Union, 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13; Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98, 130 N. W. 214; Gray v. Building Trades Council, 91 Minn. 171, 103 Am. St. Rep. 477, 1 Ann. Cas. 172, 63 L. R. A. 753, 97 N. W. 663 (whether merely notifying a customer that plaintiff is "unfair" constitutes a threat depends upon the facts of each case).

 <sup>82</sup> Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264,
 127 Am. St. Rep. 722, 18 L. R. A. (N. S.) 707, 96 Pac. 127; Cohen
 v. United Garment Workers of America, 35 Misc. Rep. 748, 72 N. Y.

or principle is not different in these two lines of cases. The division turns rather upon the interpretation of the facts. The courts are generally agreed upon the principle that no injunction will issue where the effort to influence outsiders to join the boycott is limited to simple persuasion. It is the boycott of fear and intimidation rather than the boycott of persuasion that is enjoined.<sup>83</sup>

§ 2042. (§ 609.) One Law for Labor and Capital— Blacklisting.—The general results found in reference to substantive rights and injunctions against combinations of labor apply equally to combinations of capital. like situations there is one law for labor and capital. The considerations heretofore discussed will, therefore, control, no matter who the parties to the controversy may be. That is to say, the decisions will be found to turn upon questions of means and motive. As stated in the leading case of Jersey City Printing Co. v. Cassidy,84 "The rights of both classes are absolutely equal in respect of all these 'probable expectancies.' An operator of printing machines has the right to offer his labor freely to any of the printing shops in Jersey City. These shops may all combine to refuse to employ him The employeel on account of his race, or membership in a labor union, or for any other reason, or for no reason, precisely as twenty employees in one printing shop may combine and arbitrarily refuse to be further employed unless the business is conducted in accordance with their views. But in the case of the operative seeking

Supp. 518; Mills v. United States Printing Co. (1904), 99 App. Div. 605, 91 N. Y. Supp. 185; Iverson v. Dilno, 44 Mont. 270, 119 Pac. 719 (no injunction against carrying a banner, branding plaintiff as unfair).

<sup>83</sup> See cases cited supra, note 79.

<sup>84 63</sup> N. J. Eq. 759, 767, 53 Atl. 230. See, also, Willner v. Silverman (1909), 109 Md. 341, 24 L. R. A. (N. S.) 895, 71 Atl. 962.

employment, he has a right to have the action of the masters of the printing shops, in reference to employing him, left absolutely free. If, after obtaining, or seeking to obtain, employment in a shop, the master of that shop should be subjected to annoyances and molestations, instigated by the proprietors of other printing shops, who combine to compel, by such molestation and annoyance, this one master printer, against his will and wish, to exclude the operative from employment, this operative, in my judgment, would have a right to an action at law for damages, and would have a right to an injunction if his case presented the ordinary conditions upon which injunctions issue." And likewise where capital combines against capital. For example, where certain manufacturers and dealers in plumbers' supplies agreed with an association of master plumbers not to sell to any master plumber not in the association and that the association should boycott any dealer found selling to a nonmember, an injunction was granted by the Missouri court.85 There are many decisions to the same effect.86

<sup>85</sup> Walsh v. Association of Master Plumbers (1902), 97 Mo. App. 280, 71 S. W. 455.

<sup>86</sup> Jackson v. Stanfield, 137 Ind. 592, 608, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14 ("A conspiracy formed and intended directly or indirectly to prevent the carrying on of a lawful business, or to injure the business of anyone by wrongfully preventing those who would be customers from buying by threats or intimidation, is in restraint of trade and unlawful"). See, also, Aikens v. Wisconsin, 195 U. S. 194, 49 L. Ed. 154, 25 Sup. Ct. 3 (by statute in Wisconsin [1898, § 4466a] a malicious combination to injure another is declared unlawful. Certain newspapers combined to injure a rival newspaper by refusing space in their journals to anyone advertising in the rival journal; they were indicted under the statute of 1898. The United States supreme court upheld the statute, in the above case, on appeal); Employing Printers' Club v. Doctor Blosser Co. (1905). 122 Ga. 509, 106 Am. St. Rep. 137, 2 Ann. Cas. 694, 69 L. R. A. 90, 50 S. E. 353; Ertz v. Produce Exchange Co., 82 Minn. 173, 83 Am. St. Rep. 419, 51 L. R. A. 825, 84 N. W. 743; Brohn Mfg. Co. v. Hollis (1893), 54 Minn. 223, 40 Am. St. Rep. 319, 21 L. R. A. 337, 55 N. W.

§ 2043. (§ 610.) Combination and Conspiracy as Factors.—There is at common law nothing per se unlawful in the fact that a certain act has been done or threatened by numbers as distinguished from a single

1119 (acts of combination of retail lumbermen to eliminate competition by wholesalers, held lawful); John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n, 175 N. Y. 1, 96 Am. St. Rep. 578, 62 L. R. A. 632, 67 N. E. 136 (approving methods used by wholesalers of patent medicines in maintaining prices); Cote v. Murphy, 159 Pa. St. 420, 39 Am. St. Rep. 686, 23 L. R. A. 135, 28 Atl. 190; State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046 (combination of three newspaper owners to compel a fourth to reduce advertising rates); Hawarden v. Youghiogheny & Lehigh Coal Co. (1901), 111 Wis. 545, 55 L. R. A. 828, 87 N. W. 472.

Blacklisting.—The blacklisting of employees by employers is illustrative of the principle above asserted. Thus where a letter was written and circulated through an association of employers, which falsely recited that the plaintiff, a cutter in the employ of one of the members of the association, had been discharged because of his attempts to disorganize the employees, and which stated that the association should back up the member in the matter, and refuse the cutter employment and make an example of him, it was held that the cutter, sustaining damages in consequence of the letter, could sue therefor: Willner v. Silverman, 109 Md. 341, 24 L. R. A. (N. S.) 895, 71 Atl. 962. See, also, Hundley v. Louisville & Nashville R. R. Co., 105 Ky. 162, 88 Am. St. Rep. 298, 63 L. R. A. 289, 48 S. W. 429 (may be liability for blacklisting where untruthful statements made). An employer does have, however, a right to keep a book containing the names of discharged employees, showing the reasons for their discharge, and to invite inspection thereof by other employers even though it may cause the latter to refuse employment to such employees: Boyer v. Western Union Tel. Co., 124 Fed. 246 (injunction refused). And where a mill corporation sent out a blacklist of striking employees to other mill corporations, and there was a combination not to employ plaintiffs, except at the old price. in their old places, no injunction was allowed: Worthington v. Waring, 157 Mass. 421, 34 Am. St. Rep. 294, 20 L. R. A. 342, 32 N. E. See Cornellier v. Haverhill Shoe Mfrs. Ass'n, 221 Mass. 554, L. R. A. 1916C, 218, 109 N. E. 643 (employee left to his remedy at law against blacklisting on account of unlawful means of conducting strike).

individual, or, as is generally alleged in the cases, that the defendants conspired to do the acts in question. In a given case, however, a large number of individuals by acting in combination may be able to do certain things that differ in kind from what a single individual would have been able to do. But in such case the fact that a different legal result is reached is due not simply to the fact of combination but to the effect of combination. For example, the assembling of numbers in a street may amount to an obstruction and thus constitute a nuisance, or create an element of intimidation. similarly, where the plaintiff is basing his contention upon the threat of boycott against his customers, it may happen that the threat is coercive when a threat by a single individual would not be intimidating in its effect.87

87 Martin, "The Modern Law of Labor Unions," 29 et seq.; Quinn v. Leathem, [1901] App. Cas. 495; Mogul Steamship Co. v. McGregor, [1892] App. Cas. 25; Hopkins v. Oxley Stave Co., 83 Fed. 912, 921, 28 C. C. A. 99; State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; Lohse Patent Door Co. v. Fuelle (1908), 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (N. S.) 607, 114 S. W. 997. See, also, the cases cited under the next section infra. In American Federation of Labor v. Buck's Stove & Range Co. (1909), 33 App. Cas. (D. C.) 83, 32 L. R. A. (N. S.) 748, it was argued by the defendants that since each member of the union could bestow his trade as he pleased, therefore "the combination may lawfully discontinue or threaten to discontinue business intercourse with a given firm and all who handle its products." In answer to this argument the court said: "The loss of trade of a single individual ordinarily affects a given dealer very little. Being discriminatory, the purchasing public is left free to exercise its own judgment, will not act arbitrarily or maliciously, but will be controlled by natural considerations. a powerful combination to boycott immediately deflects the natural course of trade. . . . '' It is possible, as stated by Hammond, J., in Martell v. White, 185 Mass. 255, 260, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085, "that the difference between the power of individuals acting each according to his own preference and that of an organized and extensive combination may be so great in its effect upon public and private interests as to cease to be simply one

Conspiracy.—Nor are we to be misled by the fact that a conspiracy is generally alleged. As stated by the court in Bohn Manufacturing Company v. Hollis:88 "The gist of a private action for the wrongful acts of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants." To determine whether there is a conspiracy takes us immediately back to the questions already analyzed, classified and discussed. "It is elemental that the unlawfulness of a conspiracy may be found either in the end sought, or the means used. either is unlawful, within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in [the given case] both as to the object sought and the means used."89

of degree and to reach the dignity of a difference in kind"; and speaking again in Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, at 124, 23 L. R. A. (N. S.) 1236, 85 N. E. 897, the same judge said: "It is not universally true that what one man may do, any number of men by concerted action may do." In Vegelahn v. Guntner, 167 Mass, 92, Holmes, J., makes this significant statement "I agree, whatever may be the law in the case of a single defendant, . . . that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification." For a further discussion of the question of combination, see "Crucial Issues in Labor Litigation," 20 Harvard Law Review, at p. 348.

88 (1893), 54 Minn. 223, 40 Am. St. Rep. 319, 21 L. R. A. 337, 55 N. W. 1119.

89 Martell v. White (1904), 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085. In this case a tort action was brought against an association composed of manufacturers, quarriers and polishers of granite, by one who was not a member of the association, for coercing members not to deal with him. The action was sustained on the ground, partly if not wholly, that the means used were not lawful weapons in trade competition—viz., heavy fines. See, also, Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 13 Sup.

§ 2044. (§ 611.) Combinations in Restraint of Interstate Commerce.—Combinations either of capital or labor which use means to attain their purposes (otherwise legitimate), that obstruct the United States mails and interfere with interstate commerce, are guilty of conspiracy and may be enjoined. 90 Such injunctions

Ct. 542; United States v. Kane, 23 Fed. 748; Thomas v. Cincinnati etc. R'y Co., 62 Fed. 803; Casey v. Cincinnati Typographical Union, 45 Fed. 135, 12 L. R. A. 193; Elder v. Whitesides, 72 Fed. 724; Allis-Chalmers Co. v. Reliable Lodge, 111 Fed. 264; National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 259, 264, 26 L. R. A. (N. S.) 148, 94 C. C. A. 535; State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; Brown v. Jacobs' Pharmacy Co. (1902), 115 Ga. 429, 90 Am. St. Rep. 126, 57 L. R. A. 547, 41 S. E. 553; Employing Printers' Club v. Doctor Blosser Co. (1905), 122 Ga. 509, 106 Am. St. Rep. 137, 2 Ann. Cas. 694, 69 L. R. A. 90, 50 S. E. 353; Commonwealth v. Hunt, 4 Met. (Mass.) 111, 38 Am. Dec. 346; My Maryland Lodge v. Adt, 100 Md. 238, 68 L. R. A. 752, 59 Atl. 721; Berry Foundry Co. v. International Molders' Union, 177 Mo. App. 84, 164 S. W. 245 (strikers have no right to conspire to break up their employer's business); Ex parte Heffron, 179 Mo. App. 639, 162 S. W. 652; Clarkson v. Laiblan, 178 Mo. App. 708, 161 S. W. 660; Booth v. Burgess (1906), 72 N. J. Eq. 181, 65 Atl. 226; Reynolds v. Everett, 67 Hun, 294, 22 N. Y. Supp. 306; John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n, 175 N. Y. 1, 96 Am. St. Rep. 578, 62 L. R. A. 632, 67 N. E. 136; Erdman v. Mitchell, 207 Pa. St. 79, 99 Am. St. Rep. 783, 63 L. R. A. 534, 56 Atl. 327; Cote v. Murphy, 159 Pa. St. 420, 39 Am. St. Rep. 686, 23 L. R. A. 135, 28 Atl. 190; Longshore Printing Co. v. Howell, 26 Or. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547; State v. Dyer, 67 Vt. 690. 32 Atl. 814; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; Crump's Case, 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; State ex rel. Durner v. Huegin (1901), 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046; Hawarden v. Youghiogheny & Lehigh Coal Co. (1901), 111 Wis. 545, 55 L. R. A. 828, 87 N. W. 472.

90 In re Charge to Grand Jury (1894), 62 Fed. 828; United States v. Elliott, 64 Fed. 27, 30; Thomas v. Cincinnati, N. O. & T. P. R'y Co., 62 Fed. 803; United States v. Workingmen's Amalgamated Council, 54 Fed. 994, 26 L. R. A. 158; In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900; Toledo etc. R'y Co. v. Pennsylvania R'y Co., 54 Fed. 746, 19 L. R. A. 395.

are granted at the suit of the United States through its attorney-general,91 but will not be granted at the suit of a private individual.92 They are usually based upon the Interstate Commerce Act of 1890 (commonly called the Sherman Anti-trust Act), which expressly gives the courts power to prevent by injunction a conspiracy to interfere with interstate commerce.93 One federal judge declared that before the act of 1890, a federal court could not have enjoined such interference.94 But in the leading case of In re Debs,95 the supreme court placed the jurisdiction of equity on a broader ground, and held that where officials and members of a labor union, in order to enforce a boycott against the Pullman Car Company, conspired to obstruct trains carrying mail and interstate freight and passengers, and to interfere with service generally, an injunction would be granted on the larger ground of an interference with the exercise of the national powers of the federal government; that the United States had a property right in its mails which gave it a technical right to the aid of a

<sup>91</sup> United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290,
41 L. Ed. 1007, 17 Sup. Ct. 540; United States v. Coal Dealers'
Ass'n, 85 Fed. 252; Post v. Southern R'y Co., 103 Tenn. 184, 55
L. R. A. 481, 52 S. W. 301.

<sup>92</sup> Irving v. Neal (1913), 209 Fed. 471; Paine Lumber Co. v. Neal (1913-14), 212 Fed. 259, 214 Fed. 82, 130 C. C. A. 522; Southern Indiana Express Co. v. United States Express Co., 88 Fed. 659; Gulf C. & S. F. R. Co. v. Miami S. S. Co., 86 Fed. 407, 30 C. C. A. 142; Pidcock v. Harrington, 64 Fed. 821. A dictum contra, by Taft, J., in United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 46 L. R. A. 122, 29 C. C. A. 141, reversing 78 Fed. 712. These holdings are correct as to the Sherman Act, but see section 16 of the Clayton Act (No. 212, 63d Congress).

<sup>93</sup> Act of 1890, 26 Stats. 209; United States v. Elliott, 64 Fed. 27, 30; United States v. Agler, 62 Fed. 824; In re Charge to Grand Jury, 62 Fed. 828, 829, 831.

<sup>94</sup> United States v. Agler, 62 Fed. 824.

<sup>95 158</sup> U. S. 564, 581, 582, 586, 599, 39 L. Ed. 1092, 15 Sup. Ct. 900.

court of equity. Moreover, any obstruction of a national way of commerce was a nuisance, and an interference with a sovereign power, and could be enjoined by the equitable arm of the government. The court did not base its decision on the express act of 1890 which the circuit court had based its decision upon.

The combination, if it is against interstate traffic, will be enjoined without regard to whether the restraint is reasonable or unreasonable. A combination of railway employees to "strike" for better wages and to "unionize" the road, though in violation of their contracts, is not conspiracy of unlawful character or in restraint of interstate commerce simply because it indirectly has that effect, and therefore, will not be enjoined. 97

The question as to what combinations are in restraint of interstate commerce, like the larger question of what combinations are in restraint of trade, cannot be answered here. They are subjects for separate treatises.

§ 2045. (§ 612.) Attempts at Monopoly, and Combinations in Restraint of Trade.—Much is said in the trade and labor cases, more especially the trade cases, with reference to monopoly and combinations and conspiracies in restraint of trade. And many decisions turn in whole or in part upon the large and complicated considerations underlying these subjects. Certain attempts at monopoly and certain conspiracies in restraint of trade were condemned at the common law and are

<sup>96</sup> United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; United States v. Northern Securities Co., 120 Fed. 721; United States v. Joint Traffic Ass'n, 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96.

<sup>97</sup> Wabash R. R. Co. v. Hannahan, 121 Fed. 563.

specially prohibited by the Sherman Anti-trust Act, 98 and by state statutes similar thereto. Injunctions in restraint thereof have often been granted.

98 Act of July 2, 1890, 26 Stat. 209. The Clayton Act, section 16, seems to extend the right of equitable procedure to injured individuals. See Stockton v. Central R. R. Co. (1892), 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; Swift & Co. v. United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276, modifying a decree of injunction issued below; United States v. Swift & Co., 122 Fed. 529. See, also, Loewe v. Lawlor (1908), 208 U. S. 374, 13 Ann. Cas. 815, 52 L. Ed. 488, 28 Sup. Ct. 301 (a tort action based upon the Sherman Act. This is the famous Danbury Hatters' Case); Hitchman Coal & Coke Co. v. Mitchell, 202 Fed. 512 (legality of trades unions considered at length); United States v. Workingmen's Amalgamated Council (1893), 54 Fed. 994, 26 L. R. A. 158, combination to compel employment of none but union men, a combination in restraint of trade within the meaning of the Interstate Commerce Act); Kundsen v. Benn (1903), 123 Fed. 636; United States v. Standard Oil Co., 173 Fed. 177 (injunction in favor of government against combination); Macon Grocery Co. v. Atlantic Coast Line R. Co., 163 Fed. 738; National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 259, 26 L. R. A. (N. S.) 148, 94 C. C. A. 535; Brown v. Jacobs' Pharmacy Co., 115 Ga. 429, 90 Am. St. Rep. 126, 57 L. R. A. 547, 41 S. E. 553 (injunction granted; combination of retail druggists); Employing Printers' Club v. Doctor Blosser Co. (1905), 122 Ga. 509, 106 Am. St. Rep. 137, 2 Ann. Cas. 694, 69 L. R. A. 90, 50 S. E. 353 (injunction granted against combination of printers); Bohn Mfg. Co. v. Hollis (1893), 54 Minn. 223, 40 Am. St. Rep. 319, 21 L. R. A. 337, 55 N. W. 1119 (injunction denied against a combination of retail lumber dealers); Ertz v. Produce Exchange Co. (1901), 82 Minn. 173, 83 Am. St. Rep. 419, 51 L. R. A. 825, 84 N. W. 743 (action for damages against combination of produce dealers); John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n, 175 N. Y. 1, 96 Am. St. Rep. 578, 62 L. R. A. 632, 67 N. E. 136 (combination of wholesalers of patent medicine; divided court); Cote v. Murphy, 159 Pa. St. 420, 39 Am. St. Rep. 686, 23 L. R. A. 135, 28 Atl. 190; State v. Adams' Lumber Co., 81 Neb. 392, 116 N. W. 302 (under Nebraska Anti-trust Act); Hawarden v. Youghiogheny & Lehigh Coal Co. (1901), 111 Wis. 545. 55 L. R. A. 828, 87 N. W. 472 (combination between wholesale and retail dealers in coal; dealing with Wisconsin statute); State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046 (combined action by newspaper owners; held unlawful conspiracy). § 2046. (§ 613.) The Procedural Basis of Equitable Jurisdiction.—The absence of a plain, complete and adequate remedy at law lies at the base of all equitable intervention. This condition is found to exist in this class of cases without difficulty, in fact, is generally assumed to exist, and hence is passed over with very little discussion. Irreparable injury, multiplicity of suits, and continuing injury are mentioned, either separately or together, in most of the cases. The insolvency of

99 In Reynolds v. Everett, 144 N. Y. 189, 195, 39 N. E. 72, the rule is stated as follows: "Mere apprehension of some future acts of a wrongful nature, which might be injurious to the plaintiffs, was not a sufficient basis for insisting upon the preventive remedy of a final injunction. Such remedy becomes a necessity only when it is perfectly clear upon the facts that, unless granted, the complainant may be irreparably injured, and that he can have no adequate remedy at law for the mischief occasioned"; Atkins v. W. A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074. See, also, cases cited infra.

100 Cœur d'Alene etc. Min. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382; Blindell v. Hagan (1893), 54 Fed. 40; A. R. Barnes & Co. v. Berry, 156 Fed. 72 (no injunction against strike if services not unique); Sailors' Union v. Hammond Lumber Co., 156 Fed. 450, 85 C. C. A. 16; affirming Hammond Lumber Co. v. Sailors' Union, 149 Fed. 577 (solvency of the union immaterial, since remedy at law involves multiplicity of suits and delay, and hence is inadequate); Irving v. Joint District Council, 180 Fed. 896; Goldberg, Bowen & Co. v. Stablemen's Union (1906), 149 Cal. 429, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219, 8 L. R. A. (N. S.) 460, 86 Pac. 806 (legal remedy inadequate where plaintiff would have to sue many individuals and damages continuing and irreparable); Grand Rapids School Furniture Co. v. Haney School Furniture Co. (1892), 92 Mich. 558, 31 Am. St. Rep. 611, 16 L. R. A. 721, 52 N. W. 1009; Marx & Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 90 Am. St. Rep. 440, 56 L. R. A. 951, 67 S. W. 391; Barr v. Essex Trades Council, 53 N. J. - Eq. 101, 30 Atl. 881; Frank v. Herold (1902), 63 N. J. Eq. 443, 52 Atl. 152; Atkins v. W. A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074 (no showing that legal remedy inadequate); Longshore Printing Co. v. Howell, 26 Or. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547 (demurrer sustained because it was not made clear that the threatened injury would be irreparable); Heilman v. Union the defendants, while suggested with the other grounds mentioned, is never given as the sole reason for granting an injunction.<sup>101</sup>

§ 2047. (§ 614.) Where Act Enjoined is a Crime.—It is often offered as an objection to an injunction that the act threatened is a crime. While it is true that equity has no right to act for the sole purpose of preventing the commission of a crime, 102 nevertheless it is equally true that where there are other grounds for equitable interference, as, where an irreparable injury is threatened to property, the fact that the act is also a crime furnishes no reason for refusing an injunction. 103

Canal Co. (1860), 37 Pa. St. 100; Kirkpatrick v. McDonald, 11 Pa. St. 387; Davis v. Zimmerman, 91 Hun, 489, 36 N. Y. Supp. 303 (1. Defendants irresponsible to answer in damages; 2. Multitude of suits required in any event; 3. Damages from loss of contracts not ascertainable even approximately).

101 Marx & Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 149, 90 Am. St. Rep. 440, 56 L. R. A. 951, 67 S. W. 391 ("The authority to enjoin finds no better harbor in the empty pocket of the poor man than in the full pocket of the rich man."

102 Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106.

103 Arthur v. Oakes, 63 Fed. 310, 25 L. R. A. 414, 11 C. C. A. 209; Toledo A. A. & N. M. R'y Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387 (injunction where irreparable and continuing injury to property is threatened, even though an indictment would lie); United States v. Elliott, 62 Fed. 801; Consolidated Steel & Wire Co. v. Murray, 80 Fed. 811; Elder v. Whitesides, 72 Fed. 724; Allis-Chalmers Co. v. Reliable Lodge, 111 Fed. 264 (injunction granted against a criminal conspiracy by workmen); Union Pac. R. R. Co. v. Ruef, 120 Fed. 102; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Jones v. Van Winkle etc. Works, 131 Ga. 336, 127 Am. St. Rep. 235, 17 L. R. A. (N. S.) 848, 62 S. E. 236; Underhill v. Murphy (1904), 117 Ky. 640, 111 Am. St. Rep. 262, 4 Ann. Cas. 780, 78 S. W. 482; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106; Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n, 59 N. J. Eq. 49, 56, 46 Atl. 208 ("The court ignores the crime and protects the complainant's property or

(§ 615.) Freedom of Speech—Publication of Libel.—Where it is sought to enjoin the publication of boycott notices, the contention is sometimes made that the constitutional guaranties of freedom of speech and the well-recognized rule against enjoining a libel are a bar to the equitable remedy. In American Federation of Labor v. Buck's Stove & Range Co., 104 the court, in holding that the freedom of the press and of speech were not improperly abridged by enjoining the publication of matter in carrying out the purposes of an unlawful combination, said: "... There is a point where the right of free speech and a free press ends and unlawful interference with personal and property rights begins. When the citizen passes this point, he can no longer claim the protection of the constitution." And the Michigan court meets the contention, that equity will not enjoin the publication of a libel, in the following language: "It is urged that courts of equity will not restrain the publication of a libel, and that this boycotting circular is a libel, the publication and circulation of which cannot be enjoined. The same claim was made that courts of equity have no jurisdiction to restrain the commission of a crime. But the answer is, and always has been, that parties cannot interpose this defense when the acts are accompanied by threats, express or covert, or intimidation or coercion, and the accomplishment of the purpose

business from civil injury); Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514; Davis v. Zimmerman, 91 Hun, 489, 36 N. Y. Supp. 303; New York Central Iron Works Co. v. Brennan, 105 N. Y. Supp. 865. On the general principle, see Volume 1, Chapter XXI.

104 33 App. Cas. (D. C.) 83, 32 L. R. A. (N. S.) 748, Shepard, J., dissenting and contending that the defendant should be permitted to publish what it wishes, subject only to liability to answer in tort or for a crime if any is committed. See, also, Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, 31 Sup. Ct. 492, wherein it is held that the publication of such words as "unfair" and "We don't patronize," etc., is a "verbal act" and may be enjoined as such.

will result in irreparable injury to and the destruction of property rights. If all there was to this transaction was the publication of a libelous article, the position would be sound." The great weight of authority is in accord with the views taken in both of these quotations. On the other hand, it has been squarely held by a few courts that equity has no right to enjoin the distribution of cards and circulars pursuant even to an illegal boycott because of the constitutional guaranties of freedom of speech. 107

§ 2049. (§ 616.) Preliminary Injunction.—The usual rules as to preliminary injunctions apply as against combinations of labor or capital. The rule is stated by Sanborn, J., 108 and is quoted with approval in Harriman v. Northern Securities Co., 109 as follows: "A pre-

105 Beck v. Railway Teamsters' Protective Union, 118 Mich. 497,
 527, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13.

106 Martin, "The Modern Law of Labor Unions," § 106.

107 Marx & Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 90 Am. St. Rep. 440, 56 L. R. A. 951, 67 S. W. 391. See Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (N. S.) 607, 114 S. W. 997; Ex parte Heffron, 179 Mo. App. 639, 162 S. W. 652; Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 127 Am. St. Rep. 722, 18 L. R. A. (N. S.) 707, 96 Pac. 127.

<sup>108</sup> Denver & R. G. R. R. Co. v. United States, 124 Fed. 156, 161, 59 C. C. A. 579.

109 132 Fed. 464. See, also, Gulf Bag Co. v. Suthner (1903), 124 Fed. 467; Sun Printing & Publishing Ass'n v. Delaney, 48 App. Div. 623, 62 N. Y. Supp. 750; W. P. Davis Mach. Co. v. Robinson, 41 Misc. Rep. 329, 84 N. Y. Supp. 837 (a preliminary injunction will not be dissolved merely because the defendants deny all the material averments in the plaintiff's bill, when the defendants do not assert any right to do the acts complained of); Baltic Mining Co. v. Houghton Circuit Judge, 177 Mich. 632, 144 N. W. 209 (may be granted though the plaintiff's right is not clearly established nor is it plain that he will prevail on final hearing, if there is a real substantial question between the parties and danger of immediate injury if it is refused); Jonas Glass Co. v. Glass Blowers' Ass'n, 64 N. J. Eq. 644, 54 Atl. 567 (filing of affidavits by defendants deny-

liminary injunction, maintaining the status quo, may properly issue whenever the questions of law or fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

ing the acts alleged does not preclude court from granting preliminary injunction. The case cannot be tried on affidavits); Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; New York Central Iron Works Co. v. Brennan (1907), 105 N. Y. Supp. 865 (not necessary on application for a preliminary injunction to present entire evidence by which the plaintiff expects to sustain his action); Irving v. Joint District Council, 180 Fed. 896; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500 (scope of preliminary injunction defined); Puget Sound Traction, Light & Power Co. v. Whitley (1917), 243 Fed. 945. For a further discussion of the principles involved, see the general subject of preliminary injunctions, ante, § 264.

### CHAPTER XXIX.

### INJUNCTION: MISCELLANEOUS TORTS.

#### ANALYSIS.

§§ 629-631. Libels; slander of title.

§ 629. No injunction of a libel as such, except by statute.

§ 630. Same; libel may be enjoined on other equitable grounds.

§ 631. Same; the rule in England.

§ 632. The "right of privacy."

§ 633. Injunctions to enforce the obligations of common carriers and public service corporations.

§ 634. Injunctions against certain frauds on contractual rights
— "Ticket-scalpers"—Dealers in "trading stamps."

§ 635. Injunctions for the protection of electric currents.

§ 2050. (§ 629.) No Injunction of a Libel as Such, Except by Statute.—A libel occupies much the same relative position as a crime in considering the remedy of injunction.¹ Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may appear to be. This is the

1 In Beck v. Railway Teamsters' Union (1898), 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13, 24, the court states the law: "It is urged that courts of equity will not restrain the publication of a libel, and that this boycotting circular is a libel, the publication of which cannot be enjoined. The same claim was made that courts of equity have no jurisdiction to restrain the commission of a crime. But the answer is, and always has been, that parties cannot interpose this defense when the acts are accompanied by threats, express or covert, or intimidation and coercion, and the accomplishment of the purpose will result in irreparable injury to and the destruction of property rights . . . The purpose of [this libelous circular] was not alone to libel complainant's business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants. It called upon them to boycott them."

universal rule in the United States<sup>2</sup> and was formerly the rule in England.<sup>3</sup> The present rule in England contra rests on statute.

# § 2051. (§ 630.) Same; Libel may be Enjoined on Other Equitable Grounds.—But while the libel as such

<sup>2</sup> In Raymond v. Russell, 143 Mass. 295, 58 Am. Rep. 137, 9 N. E. 544 (false reports by a mercantile agency), the court held that equity cannot "restrain by injunction representations as to character and standing of the plaintiff, or as to his property, although such representations may be false, if there is no breach of trust or of contract involved"; Kidd v. Horry, 28 Fed. 774; Edison v. Edison, Jr., Chem. Co., 128 Fed. 957; Emack v. Kane, 34 Fed. 46; United States v. Kane, 23 Fed. 748; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Cœur d'Alene Min. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382; Mayer v. Journeyman Stonecutters' Ass'n, 47 N. J. Eq. 519, 20 Atl. 492; Francis v. Flynn, 118 U. S. 385, 30 L. Ed. 165, 16 Sup. Ct. 1148; Finnish Temperance Society etc. v. Raivaaja Pub. Co., 219 Mass. 28, Ann. Cas. 1916D, 1087, 1088, 106 N. E. 561; Howell v. Bee Publishing Co., 100 Neb. 39, Ann. Cas. 1917D, 655, L. R. A. 1917A, 160, 158 N. W. 358; Miller v. Journeyman Tailors' Ass'n, 11 Ohio Dec. 45; Dopp v. Doll, 13 Wkly. L. Bul. 355; Richter v. Journeyman Tailors' Union, 24 Wkly. L. Bul. 189; Baltimore Car-Wheel Co. v. Bemis, 29 Fed. 95; Singer Mfg. Co. v. Domestic S. M. Co, 49 Ga. 70, 15 Am. Rep. 674 (slander of business); Covell v. Chadwick, 153 Mass. 263, 25 Am. St. Rep. 625, 26 N. E. 237 (mere false statements as to character or quality of property, or title thereto, not enjoined); Brandreth v. Lance, 8 Paige, 24, 34 Am. Dec. 368; Marlin Firearms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163, reversing 68 App. Div. 88, 74 N. Y. Supp. 84 (no injunction against making false statements as to plaintiff's goods in order to coerce plaintiff into advertising); De Wick v. Dobson, 46 N. Y. Supp. 390, 18 App. Div. 399; Reyes v. Middleton, 36 Fla. 99, 51 Am. St. Rep. 17, 29 L. R. A. 66, 17 South. 937 (slander of title of real property not enjoined). All these cases must be distinguished from those of "unfair competition," where the fraud on the public is the ground of relief: see ante, §§ 577-582.

Slander.—Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219, 8 L. R. A. (N. S.) 460, 86 Pac. 806.

<sup>3</sup> Prudential Assur. Co. v. Knott, [1874] 10 Ch. App. 142.

will not be restrained, just as a crime will not be prevented by equity, yet when there is other legitimate ground for equity to issue the injunction the fact that the publication is also a libel will not prevent the injunction being issued,<sup>4</sup> even if there is a constitutional provision forbidding injunction against libels, as an interference with the right of free speech.<sup>5</sup> It is clear that the grounds must be more than the injury to property arising from the libelous character of the publication. Thus, the publication of a libelous circular will not be enjoined, when the injury to the property arises from the falsity of the charges. But where it tends to intimidate customers or workmen and injure plaintiff through their loss, the fact that the circular is libelous will not prevent an injunction against the circular.<sup>6</sup> Lord Cairns

- 4 Emack v. Kane, 34 Fed. 46; Cœur d'Alene Min. Co. v. Miners' Union, 51 Fed. 260, 267, 19 L. R. A. 382; Beck v. Railway Teamsters' Union, 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13, 24; Shoemaker v. South Bend Spark-Arrester Co., 135 Ind. 471, 22 L. R. A. 332, 35 N. E. 280; Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193. In Schwartz v. Edrington, 133 La. 235, Ann. Cas. 1915B, 1180, 47 L. R. A. (N. S.) 921, 62 South. 660, an injunction issued against the publication of what purported to be a petition expressing plaintiff's sentiments, but which plaintiff had expressly disowned.
- Beck v. Railway Teamsters' Union, 118 Mich. 497, 74 Am. St.
   Rep. 421, 42 L. R. A. 407, 77 N. W. 13, 24; Shoe Co. v. Saxey, 131
   Mo. 221, 52 Am. St. Rep. 622, 32 S. W. 1106.
- 6 In Emack v. Kane, 34 Fed. 46, the parties were manufacturers of patent slates, and the court enjoined one from sending circulars to the customers of the other, threatening them with litigation, and tending to intimidate them, and prevent their dealing with plaintiff. The circulars were not sent out in good faith, but maliciously. For further instances of the injunction of intimidating circulars, slandering the title to patent rights, see A. B. Farquhar Co. v. National Harrow Co., 102 Fed. 714, 49 L. R. A. 755, 42 C. C. A. 600; Shoemaker v. South Bend Spark-Arrester, 135 Ind. 471, 22 L. R. A. 332, 35 N. E. 280; Kelley v. Ypsilanti etc. Co., 44 Fed. 19, 10 L. R. A. 680 (dictum). To the effect that one sending out circulars in good faith will not be enjoined, see Adriance, Platt & Co. v. National

in refusing an injunction against a libelous insurance circular said: "It is clearly settled that a court of chancery has no jurisdiction to restrain the publication merely because it is a libel. There are publications which a court of chancery will restrain, and those publications as to which there is a foundation for the jurisdiction of the court to restrain them, will not be restrained the less because they happen also to be libelous."

§ 2052. (§ 631.) Same; The Rule in England.—Lord Cairns, in the case last cited, was stating the rule as the court of chancery worked it out. To-day in England, as a result of Parliamentary acts, equity will restrain the publication of a libel as such, contra to the rule recognized by Prudential Assur. Co. v. Knott. Chitty, J., in Collard v. Marshall, explains the change in the rule thus: "The court of chancery before the Judicature Acts had power to intervene by injunction to protect property, but not to protect character. It had no power to try a libel. Since the Judicature Act, the Chancery Division has on motion granted injunctions restraining the further publication of false statements calculated to injure

Harrow Co., 98 Fed. 118, 111 Fed. 637; Welsbach Light Co. v. American Incandescent Lamp Co., 99 Fed. 501; New York Filter Co. v. Schwarzwalder, 58 Fed. 577. For strong statements to the effect that an injunction will not issue, see Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; Kidd v. Horry, 28 Fed. 773; Baltimore Car-Wheel Co. v. Bemis, 29 Fed. 95. Compare Empire Theatre Co. v. Cloke, 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107. To the effect that equity will not interfere until the complainant has established his title at law, see Flint v. Hutchinson Smoke-Burner Co., 110 Mo. 492, 33 Am. St. Rep. 476; 16 L. R. A. 243, 19 S. W. 804.

<sup>7</sup> Prudential Assur. Co. v. Knott, [1874] 10 Ch. App. 142.

<sup>8</sup> Judicature Act of 1873, § 25, subd. 8. Sir George Jessel rests the present doctrine on the Judicature Act, taken in conjunction with the Common-law Procedure Act of 1854. See Quartz Hill Con. Min. Co. v. Beall, 20 Ch. D. 501.

<sup>9</sup> Prudential Assur. Co. v. Knott, supra.

a man's trade.''<sup>10</sup> The present rule was stated first in Dixon v. Holden,<sup>11</sup> and is to be found approved constantly since,<sup>12</sup> equity merely exercising its discretion as to issuing the injunction.

§ 2053. (§ 632.) The "Right of Privacy."—Within recent years an attempt has been made to obtain recognition for a so-called right of privacy. It has been maintained, for example, that an individual has a right not to have his portrait or representation published in any form, without his consent. As yet, this doctrine has not been generally recognized; although a few cases now sustain it, and it was repudiated by a bare majority only of the New York court of appeals. The cases must be

- 10 Collard v. Marshall, [1892] 1 Ch. 571.
- 11 Dixon v. Holden, L. R. 7 Eq. 488.
- 12 Thorley's Cattle Food Co. v. Massam, 14 Ch. D. 763; Thomas v. Williams, 14 Ch. D. 864; Bonnard v. Perryman, [1891] 2 Ch. 269; Loog v. Bean, 26 Ch. D. 306; Hill v. Davies, 21 Ch. D. 798; Hayward v. Hayward, 34 Ch. D. 198; Liverpool etc. Ass'n v. Smith, 37 Ch. D. 170. For additional cases, see 4 Pom. Eq. Jur., § 1358, note, 1.
- 13 The origin of the doctrine is said to be in an article in the Harvard Law Review, published in 1890: 4 Harv. Law Rev. 193.
- 14 In a leading and recent case in New York, the court, speaking by Mr. Chief Justice Parker, considered the authorities at length, and reached the conclusion that there is no such right. "The socalled right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. . . . If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well

carefully distinguished from those in which a property right is involved, as where a photographer in breach of trust publishes a likeness, or where a party publishes

the publication of a word picture, a comment upon one's looks, conduct, domestic relations, or habits': Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 89 Am. St. Rep. 828, 59 L. R. A. 478, 64 N. E. 442. This decision, however, was by a divided court, three of seven judges dissenting.

It has been held that the widow or heirs of a deceased person cannot enjoin the publication of the portrait or exhibition of a bust of the deceased: Séhuyler v. Curtis, 147 N. Y. 434, 49 Am. St. Rep. 671, 31 L. R. A. 286, 42 N. E. 22 (reversing 27 Abb. N. C. 387, 15 N. Y. Supp. 787, 64 Hun, 594, 19 N. Y. Supp. 264); Atkinson v. John E. Doherty Co., 121 Mich. 372, 80 Am. St. Rep. 507, 42 L. R. A. 219, 80 N. W. 285.

There is a dictum in Corliss v. E. W. Walker Co., 57 Fed. 434, 64 Fed. 280, to the effect that "a private individual has a right to be protected in the representation of his portrait in any form." But when he becomes a public character, the case is different. "A statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public." It was also held that publication of a biography of an individual will not be enjoined. For a criticism of this case and the distinction attempted, see Roberson v. Rochester Folding Box Co., supra.

For a recognition of the right by one of the lower courts in New York (now overruled), see Marks v. Jaffa, 6 Misc. Rep. 290, 26 N. Y. Supp. 908. In a very recent Georgia case, the right was clearly recognized by a unanimous court, in a suit at law for damages. The publication of the plaintiff's portrait was the wrong. The leading case of Roberson v. Rochester Folding Box Co., supra, was considered, and expressly repudiated, the court adopting the reasoning of the dissenting opinion: Pavesich v. New England Life Ins. Co., 122 Ga. 190, 106 Am. St. Rep. 104, 2 Ann. Cas. 561, 69 L. R. A. 101, 50 S. E. 68. The argument upholding the right is forcibly stated in the dissenting opinion of Gray, J., in the Roberson case. right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone: Cooley, Torts, p. 29. The principle is private letters. 15 In the latter cases the right to an injunction is established. If there is such a thing as a

fundamental and essential in organized society that everyone, in exercising a personal right and in the use of his property, shall respect the rights of others. . . . When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. . . . Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form in invitum their owner. . . . . But if it is to be permitted that the portraiture may be put to commercial or other uses for gain, by the publication of prints therefrom, then an act of invasion of the individual's privacy results. possibly more formidable and more painful in its consequences than an actual bodily assault might be. . . . I think that the plaintiff has the same property in the right to be protected against the use of her face for defendants' commercial purposes as she would have if they were publishing her literary compositions. The right would be conceded if she had sat for her photograph, but, if her face or her portraiture has a value, the value is hers exclusively until the use be granted away to the public. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason." See the following discussions of the principle: 4 Harv. Law Rev. 193; 36 Am. Law Rev. 614, 634, 636; 34 Am. L. Reg., N. S., 134; 41 Id. 669; 1 Col. L. R. 491; 2 Id. 437; 44 Alb. L. J. 428; 55 Cent. L. J. 123; 57 Id. 361; 12 Yale L. J. 35.

In California, the right is recognized by statute, and a violation is made a misdemeanor. No provision is made for injunction. "It shall be unlawful to publish in any newspaper, handbill, poster, book or serial publication, or supplement thereto, the portrait of any living person a resident of California other than that of a person holding a public office in this state, without the written consent of such person first had and obtained; provided, that it shall be lawful to publish the portrait of a person convicted of a crime": Pen. Code, § 258.

Picture in rogue's gallery.—It has been held that an innocent person may enjoin the police from putting his picture in a so-called rogue's gallery: Itzkovitch v. Whitaker, 115 La. 479, 112 Am. St. Rep. 272, 1 L. R. A. (N. S.) 1147, 39 South. 499. In general, as to right to put picture in rogue's gallery, see Schulman v. Whitaker, 117 La. 704, 8 Ann. Cas. 1174, 7 L. R. A. (N. S.) 274, 42 South. 227.

15 See ante, § 576.

right of privacy, an injunction is certainly a proper remedy for its protection.<sup>16</sup>

§ 2054. (§ 633.) Injunctions to Enforce the Obligations of Common Carriers and Public Service Corporations.—Common carriers and public service corporations in general owe duties to the public. Individuals are entitled to enforce these obligations, in so far as they are themselves concerned; and when the legal remedies are inadequate, equity will grant its relief. Common carriers, for example, are under an obligation to serve all persons without discrimination and for a reasonable compensation. Accordingly, shippers may enjoin the enforcement against them of unreasonable rates, in order to prevent a multiplicity of suits. <sup>17</sup> A mandatory injunction is sometimes awarded to compel a carrier to transport freight or to furnish proper transportation facilities. <sup>18</sup> Unjust and illegal discrimination may be a

<sup>16</sup> The cases cited *supra* were injunction cases, and the propriety of the remedy, if the right exists, is by them assumed.

<sup>17</sup> Tift v. Southern R'y Co., 123 Fed. 789; New York Cement Co. v. Consolidated R. Cement Co., 178 N. Y. 167, 70 N. E. 451, and cases cited (injunction against enforcement of illegal tolls, by a canal company, plaintiff being specially injured); Scofield v. Lake Shore etc. R. Co., 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907. See, however, Southern Pac. Co. v. Colorado Fuel & Iron Co., 101 Fed. 779, 42 C. C. A. 12 (denying power of court to determine maximum rate and to enjoin charges in excess thereof); McNulty v. Brooklyn Heights R. Co., 31 Misc. Rep. 674, 66 N. Y. Supp. 57 (refusing to enjoin the enforcement of excessive fare, because no special injury to the complainant). Compare In re Arkansas Railroad Rates, 168 Fed. 720.

<sup>18</sup> This section of the text is cited in Hogan v. Nashville Interurban R. Co., 131 Tenn. 244, Ann. Cas. 1916C, 1162, L. R. A. 1915E, 788, 174 S. W. 1118, in which case it was held proper to enjoin a railroad from persecuting plaintiff, a cripple, by refusing to carry him unless accompanied. In general, in support of the text, see Wells, Fargo & Co. v. Northern Pac. R. Co., 23 Fed. 469 (mandatory preliminary injunction to compel railroad to furnish facilities to an express company); Butchers & Drovers' Stockyards Co. v. Louis-

reason for equitable interferences.<sup>19</sup> Relief may also be had against a violation of duty by general public service corporations, such as gas, water, and telephone companies, when the rights of the individual complainant will be affected thereby.<sup>20</sup>

ville & N. R. Co., 67 Fed. 35, 14 C. C. A. 290, 31 U. S. App. 252 (requiring defendant to furnish facilities for loading and unloading livestock); Louisville & N. R. Co. v. Pittsburg & K. Coal Co., 111 Ky. 960, 98 Am. St. Rep. 447, 64 S. W. 969 (mandatory injunction may issue to compel company to furnish cars to a shipper, but not when the cars would have to stand in a public street in violation of a city ordinance). See, also, Bedford-Bowling Green Stone Co. v. Oman, 115 Ky. 369, 73 S. W. 1038. But that a preliminary mandatory injunction cannot issue, under the decisions in New Jersey, to compel the maintenance of a railroad station at a certain point. where that is not required by statute or charter, see Jacquelin v. Erie R. Co., 69 N. J. Eq. 432, 61 Atl. 18 (right of complainant being a legal one and not clear and undisputed, and the appropriate remedy being mandamus). An injunction was denied in Northern Pac. R'y Co. v. Van Dusen Harrington Co., 245 Fed. 454, 157 C. C. A. 616.

19 United States v. Michigan Cent. R. Co., 122 Fed. 544 (suit by government); Memphis News Pub. Co. v. Southern R. Co., 110 Tenn. 684, 75 S. W. 941. But an injunction will not issue at suit of an individual to prevent the enforcement of an exclusive grant to solicit baggage: Norfolk & W. R. Co. v. Old Dominion Baggage Co., 99 Va. 111, 3 Va. Sup. Ct. Rep. 55, 50 L. R. A. 722, 37 S. E. 784. Although an injunction to prevent discrimination against a hackdriver was granted in Cooper v. Devall, 81 Ark. 314, 8 L. R. A. (N. S.) 1027, 98 S. W. 976. See, also, cases cited in 8 L. R. A. (N. S.) 1027, note.

20 Richmond Nat. Gas Co. v. Clawson, 155 Ind. 659, 51 L. R. A. 744, 58 N. E. 1049; Wiemer v. Louisville Water Co., 130 Fed. 251; Gordon & Ferguson v. Doran, 100 Minn. 343, 8 L. R. A. (N. S.) 1049, 111 N. W. 272; Traverse City v. Citizens' Telephone Co., 195 Mich. 373, 161 N. W. 983 (suit by city); City of Louisville v. Louisville Home Tel. Co., 149 Ky. 234, Ann. Cas. 1914A, 1240, 148 S. W. 13 (suit by city); Consolidated Gas Co. v. Mayer, 146 Fed. 150 (enforcement of gas rates); contra, that the proper remedy is mandamus, see Johnson v. Atlantic City Gas & W. Co., 65 N. J. Eq. 129, 56 Atl. 550; Cox v. Malden & Melrose Gaslight Co., 199 Mass. 324, 127 Am. St. Rep. 503, 17 L. R. A. (N. S.) 1235, 85 N. E. 180. Where

§ 2055. (§ 634.) Injunctions Against Certain Frauds on Contractual Rights—"Ticket-scalpers"—Dealers in "Trading Stamps."—Within recent years, courts of equity have exercised jurisdiction to restrain ticket brokers from dealing in non-transferable railroad tickets.<sup>21</sup>

an ordinance limits the rates of charge by a telephone company, parties having separate contracts with the company may join in a suit to enjoin it from charging higher rates: Charles Simon's Sons Co. v. Maryland T. & T. Co., 99 Md. 141, 63 L. R. A. 727, 57 Atl. 193. And it has been held that a city, after fixing a maximum scale of water rates may have an injunction to enforce its order: City of Des Moines v. Des Moines Waterworks Co., 95 Iowa, 348, 64 N. W. 269. In Gulf Compress Co. v. Harris etc. Co., 158 Ala. 343, 24 L. R. A. (N. S.) 399, 48 South. 477, an injunction against charging excessive rates was denied on the ground that a suit at law to recover the excess was an adequate remedy. The court said: "It is urged that the complainants would be put to numerous suits at law, and hence the bill has equity upon the doctrine of the prevention of a multiplicity of suits. It cannot be denied but that the complainants might in one action at law sue to recover all of the overcharges paid for the entire cotton season. One suit or a multiplicity of suits, therefore, would be a matter of complainant's own election. There being no necessity for a multiplicity of suits, the reason for the interference of a court of equity on the principle mentioned fails."

-21 Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; Louisville & N. R. Co. v. Bitterman, 128 Fed. 176; Illinois Cent. R. Co. v. Caffrey, 128 Fed. 770; Bitterman v. Louisville & Nashville R. Co., 207 U. S. 205, 12 Ann. Cas. 693, 52 L. Ed. 171, 28 Sup. Ct. 91; Kirby v. Union Pac. R'y Co., 51 Colo. 509, Ann. Cas. 1913B, 461, 119 Pac. 1042; Schubach v. McDonald, 179 Mo. 163, 101 Am. St. Rep. 452, 78 S. W. 1020; Kinner v. Lake Shore & M. S. R. Co., 69 Ohio St. 339, 69 N. E. 614; Lytle v. Galveston, H. & S. A. R. Co., 100 Tex. 292, 10 L. R. A. (N. S.) 437, 99 S. W. 396 (see cases cited in note in 10 L. R. A. (N. S.) 437). See, also, Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689. "These suits are to restrain these defendants from the continued and repeated use of these contracts as instruments and means whereby to commit frauds upon complainants' business. They are not suits between the parties to these contracts, but against third parties, to restrain the fraudulent use of the contracts as means of committing such wrong": Nashville, C. & St. L. R. Co. v. McConnell, supra. "When they engage in

The grounds generally given for relief are the prevention of a fraud on the complainant and the avoidance of a multiplicity of suits at law. Dealing in such tickets constitutes a tort, based either upon the interference with the contractual rights between the railroad and the holder of the ticket, or upon the fraud perpetrated by the wrongful use of tickets by persons not entitled thereto, upon the complainant's business. Each ticket transferred gives rise to a separate cause of action; and when the number is great, many suits at law are necessary. Such remedies are clearly inadequate, and accordingly an injunction is proper. It has been pointed out in some of the cases that the use of such tickets constitutes a fraudulent interference with the business of the railroad, and that great loss therefrom may be suffered. It is questionable whether a violation of law by the complainant in the matter of rates is a ground for refusal of relief. The maxim, "He who comes into equity must come with clean hands," ordinarily applies only to conduct with respect to the subject-matter. The courts are divided as to whether such a violation is in respect to the subject-matter of the injunction suit.22

Much the same questions have arisen in a group of cases relating to illegitimate dealing in "trading stamps." These were tokens, issued by a company to certain merchants for distribution to their customers on

the business of buying tickets that are not transferable, and by so doing interfere with complainant's business and subject them to loss and expense, and assist others to perpetrate a fraud on the complainants, they are engaged in an unlawful calling, productive of injury to others, and acts of that nature can be rightfully enjoined'': Illinois Cent. R. Co. v. Caffrey, supra. As to multiplicity of suits, see Nashville, C. & St. L. R. Co. v. McConnell, supra, holding also that several brokers may be joined as defendants. To the effect that it is immaterial that such acts constitute crimes, see same case.

22 To the effect that such violation is a bar to relief, see Delaware L. & W. R. Co. v. Frank, 110 Fed. 689. *Contra*, Kinner v. Lake Shore & M. S. R. Co., 69 Ohio St. 339, 69 N. E. 614.

certain terms, non-transferable by them, and redeemable in merchandise by the issuing company when presented in a sufficient number by such a customer. The purchase and sale of such stamps, on an extensive scale, by unauthorized parties, in such a manner as to work a fraudulent and unfair interference with the issuing company's contracts and serious damage to its business, has been enjoined.<sup>23</sup>

§ 2056. (§ 635.) Injunctions for the Protection of Electric Currents.—The interference with wires in a public street by the stringing of other wires in such a manner as to cause electrical induction and the injuries resulting therefrom, has been considered by the courts in a series of recent cases. In the cases which have arisen, neither party has been entitled to an exclusive right; both have had authority to use the street. As a matter of law, it is held that "where a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvements, have been shown by experience to be the best."24 Hence it is held that a street railway company will not be enjoined from maintaining a trolley wire in the center of the street merely because the grounding of the wire causes a current in a telephone wire, by conduction.<sup>25</sup> Where, however, wires are strung so close to others as to cause induction,

<sup>23</sup> Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 128 Fed. 800, 135 Fed. 833; Same v. Temple, 137 Fed. 992.

<sup>24</sup> Cumberland Telephone & Tel. Co. v. United Electric R'y Co., 42 Fed. 273, 12 L. R. A. 544. See, also, American Tel. & Tel. Co. v. Morgan Co. Tel. Co., 138 Ala. 597, 100 Am. St. Rep. 53, 36 South. 178.

<sup>&</sup>lt;sup>25</sup> Cumberland Tel. & Tel. Co. v. United Electric R'y Co., 42 Fed. 273, 12 L. R. A. 544.

which might be prevented by placing the wires at a greater distance, a right is infringed, and an injunction is a proper remedy.<sup>26</sup> The ground of the jurisdiction has been said to be that defendant's conduct "is an unwarranted usurpation amounting to a trespass on complainant's rights, which is recurrent, continuous and tending to a multiplicity of suits."<sup>27</sup>

26 Birmingham Traction Co. v. Southern Bell Tel. & Tel. Co., 119 Ala. 144, 24 South. 731; Paris El. Light etc. Co. v. Telephone Co. (Tex. Civ. App.), 27 S. W. 902. See, also, Rutland El. L. Co. v. Marble City El. L. Co., 65 Vt. 377, 36 Am. St. Rep. 869, 20 L. R. A. 821, 26 Atl. 635. But of course no injunction will issue at suit of a telephone company whose franchise is conditioned that it shall not interfere with an existing railway: Hudson River Tel. Co. v. Watervliet Turnpike & R. Co., 135 N. Y. 393, 31 Am. St. Rep. 838, 17 L. R. A. 674, 32 N. E. 148.

27 Birmingham Traction Co. v. Southern Bell Tel. & Tel. Co., 119 Ala. 144, 24 South. 731.

# CHAPTER XXX. MANDATORY INJUNCTIONS.

ANALYSIS.

§ 636. Mandatory injunctions.

§ 2057. (§ 636.) Mandatory Injunctions. — "This term, in strictness, is confined to interlocutory or preliminary injunctions. Where, on the final hearing in a case of nuisance, or interference with easements, or continued trespass analogous to nuisance, the relief is granted compelling the defendant to remove his obstructions or erections, and to restore the plaintiff to his original condition, and thereby to end the wrong, the remedy is in fact an ordinary decree for an abatement, and is in no proper sense an injunction of any kind. But in these and similar cases the preliminary injunction, while purporting simply to restrain the wrong, and while negative in its terms, may be so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by removing the obstructions or erections, and by restoring the plaintiff to his former condition. Such an injunction is termed mandatory. and resembles in its effect the restorative interdict of the Roman law. It is used where the injury is immediate, and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, since an order directly compelling an abatement of the nuisance, or a removal of the obstruction, cannot be made upon interlocutory motion. The rule is

1 "Preliminary mandatory injunctions have undoubtedly been granted more freely by the English courts than by the American.

fully established, at least by the English decisions, and is not controverted by American authority, that in such cases, where the facts are clearly established and the injury is real, and the plaintiff acted promptly upon

Indeed, it has been said in some American decisions that a mandatory interlocutory injunction would never be granted. The doctrine is not only opposed to the overwhelming weight of authority, but is contrary to the principle which regulates the administration of preventive relief, and is manifestly absurd.

"In Robinson v. Lord Byron, 1 Brown Ch. 588, Lord Eldon granted a preliminary injunction restraining defendant 'from using and maintaining certain dams, gates, etc., so as to prevent water from flowing to plaintiff's mill as it had done.' This was done for the express purpose of compelling defendant to remove the dams, gates, etc., which he had constructed. In Lane v. Newdigate, 10 Ves. 192, Lord Eldon granted a preliminary injunction restraining defendant 'from impeding plaintiff from navigating [a certain canal] by continuing to keep the canal banks and works out of repair, by diverting the water, or by continuing the removal of the stop-gate.' Lord Eldon said this would have the effect of causing defendant to restore the stop-gate and repair the banks; and he avowedly granted the injunction for that express object. These two cases are among the earliest, if not the very earliest, instances of preliminary injunctions intentionally and expressly mandatory in their operation": 4 Pom. Eq. Jur., § 1359, and note.

In the following cases preliminary mandatory injunctions were denied: Blakemore v. Glamorganshire Canal Nav., 1 Mylne & K. 154, 183, 184 (criticising Lane v. Newdigate and Robinson v. Lord Byron, supra, Brougham, L. C., said: "I take leave to agree with Lord Lyndhurst in the opinion that if the court has this jurisdiction, it would be better to exercise it directly and at once; and I will further take leave to add, that the having recourse to a roundabout mode of obtaining the object, seems to cast a doubt upon the jurisdiction; . . . although we have no right to say there is not a precedent for taking a similar course here, yet surely we may pause; and, without denying the jurisdiction, decline to exercise it") Gardner v. Stroever, 81 Cal. 148, 6 L. R. A. 90, 22 Pac. 483: Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co., 116 Iowa, 681, 88 N. W. 1082; Ladd v. Flynn, 90 Mich. 181, 51 N. W. 203; Lord v. Carbon Iron Mfg. Co., 38 N. J. Eq. 452; Herbert v. Pennsylvania R. Co., 43 N. J. Eq. 23, 10 Atl. 872 ("a mandatory injunction should be issued interlocutorily with hesitation and cauhis acquiring knowledge of the defendant's proceeding, a preliminary mandatory injunction may be granted, although the act complained of was fully completed before the suit was commenced. It should be observed,

tion, and only in an extreme case, where the law plainly does not afford an adequate remedy"); Delaware, L. & W. R. Co. v. Central etc. Co., 43 N. J. Eq. 605, 12 Atl. 374, 13 Atl. 615; Bailey v. Schnitzius, 45 N. J. Eq. 178, 16 Atl. 680; Jacquelin v. Erie R. Co., 69 N. J. Eq. 432, 61 Atl. 18; Black Lick Mfg. Co. v. Saltsburg Gas Co., 139 Pa. St. 448, 21 Atl. 432. In Black v. Good Intent etc. Co., 31 La. Ann. 497, the rule is laid down as follows: "The writ in the mandatory form cannot be issued until a hearing on the merits, when it is a judicial writ and is used to enforce a decree; or when, a prohibitory writ having issued, restraining a party from obstructing the exercise of a right, the obstruction may be commanded to be removed because its continuance effects the very injury he was prohibited from effecting." In Rogers Locomotive etc. Works v. Erie R'v Co., 20 N. J. Eq. 379, it was said that if a preliminary mandatory injunction ever does issue, it is only in cases of obstruction to easements or rights of like nature.

To the effect that a preliminary mandatory injunction is proper in some cases, see Cole Silver Min. Co. v. Virginia etc. Water Co., 1 Sawy. 470, Fed. Cas. No. 2989; 1 Sawy. 685, Fed. Cas. No. 2990 (mandatory injunction granted to compel building of bulkhead to prevent diversion of water); Longwood Val. R. Co. v. Baker, 27 N. J. Eq. 166 (court will not interfere by mandatory injunction unless extreme or very serious damage will ensue from withholding that relief; and each case must depend on its own circumstances); Black Lick Mfg. Co. v. Saltsburg Gas Co., 139 Pa. St. 448, 21 Atl. 432 (relief denied, but right recognized); White v. Codd, 39 Wash. 14, 80 Pac. 836 (relief granted). In Pennsylvania, when there has been "a race against law," and a party has done certain acts in such a way as to indicate that he has sought to evade action by the court, a preliminary mandatory injunction may issue to put the parties in statu quo: Cooke v. Boynton, 135 Pa. St. 102, 19 Atl. 944. It may also issue to compel a natural gas company to restore a flow of gas: Whiteman v. Fayette Fuel Gas Co., 139 Pa. St. 492, 20 Atl. 1062. But such an injunction will not issue to take the place of ejectment: Fredericks v. Huber, 180 Pa. St. 572, 37 Atl. 90. In Low v. Innes, 4 De Gex, J. & S. 286, a mandatory injunction, in aid of specific performance of a covenant in a lease, to however, that no other equitable remedy is more liable to be defeated by acquiescence, or by delay on the plaintiff's part from which acquiescence may be inferred. The cases require of the plaintiff a promptness in objecting and in taking steps to enforce his objection, upon receiving notice of the defendant's structures or erections which are sought to be restrained, if the circumstances are such that the defendant would be unnecessarily prejudiced by the plaintiff's delay."<sup>2</sup>

compel the pulling down of a wall, was dissolved upon a reasonable offer being made by defendants.

Mandatory injunctions were granted as final relief in Corning v. Troy Iron & Nail Co., 40 N. Y. 191; Auburn etc. P. R. v. Douglass, 12 Barb. 553; Penniman v. New York Balance etc. Co., 13 How. Pr. 40; Whitaker v. McBride, 5 Neb. (Unof.) 411, 98 N. W. 877 (to enforce decree quieting plaintiff's title against one in possession).

Mandatory injunctions were denied upon the hearing in the following cases: Curriers Co. v. Corbett, 4 De Gex, J. & S. 764; Jacomb v. Knight, 3 De Gex, J. & S. 533; Isenberg v. East India House Co., 3 De Gex, J. & S. 263.

See, further, on the subject of mandatory injunctions, preliminary and final, ante, chapters XXIII-XXVI, XXVIII.

<sup>2</sup> Pom. Eq. Jur., § 1359. The author continues, in the note: "In some cases a delay by the plaintiff would clearly not be prejudicial to defendant. For example, in Greatrex v. Greatrex, 1 De Gex & S. 692, one partner had wrongfully removed the partnership books from the place of business, and a preliminary injunction was granted, restraining him 'from keeping them or permitting them to be kept at any other place than the place of business,' thus compelling him to restore the books. Here a delay of weeks or even months could work the defendant no harm. Where the injunction is sought to compel the removal of structures, walls, buildings, and the like, if the plaintiff knowingly permit the defendant to go on and incur any considerable further expenditure of money before he makes objection, he will generally lose his right to the somewhat special remedy of a mandatory injunction."

### CHAPTER XXXI.

## EQUITABLE RELIEF AGAINST ACTIONS, JUDG-MENTS AND EXECUTIONS AT LAW.

### ANALYSIS.

y obt. Origin of the jurisdiction	§	637.	Origin	$\mathbf{of}$	the	jurisdiction
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- §§ 638-644. When the jurisdiction is not exercised.
  - § 638. General doctrine.
  - § 639. Same—Inexcusable neglect.
  - § 640. Jurisdiction of federal courts to enjoin proceedings in state courts.
  - § 641. State courts cannot enjoin proceedings of federal courts.
  - § 642. Relief from equitable proceedings and decrees.
  - § 643. Probate decrees.
  - § 644. No injunction against criminal proceedings.
  - § 645. When the jurisdiction may be exercised—First class— Equitable rights.
  - § 646. Same-Second class.
- §§ 647-669. Same-Third class.
  - § 648. Rationale of the doctrine.
  - § 649. Fraud as a ground for relief.
  - § 650. Violation of stipulation or agreement.
  - § 651. Miscellaneous instances of unconscionable conduct.
  - § 652. Same—Continued.
  - § 653. Fraud subsequent to trial.
  - § 654. Fraudulent concealment.
- §§ 655-656. Instances of refusal of relief.
  - § 656. Perjury.
- §§ 657-662. Accident, mistake and surprise.
  - § 657. In general.
  - § 658. Accident.
- §§ 659-661. Mistake.
  - § 660. Same-Mistake of officers of court.
  - § 661. Same-Newly discovered evidence.
  - § 662. Surprise.
- §§ 663-666. Want of jurisdiction—Failure to serve summons or process.

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- § 664. Same—Continued.
- § 665. Same—Unauthorized appearance of attorney.
- § 666. Same-Miscellaneous.
- § 667. Meritorious defense must be shown.
- § 668. Jurisdiction to grant new trials at law.
- § 669. Effect of statutory remedies.
- § 670. Injunctions against proceedings in foreign jurisdictions.
- §§ 671-674. Injunctions against executions.
  - § 672. Same—Real property.
  - § 673. Same-Property of third persons.
  - § 674. Same-Not for mere irregularities.

§ 2058. (§ 637.) Origin of the Jurisdiction.<sup>1</sup>—"The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction.<sup>2</sup> It is no exaggeration to say that, during its formative periods, the equitable jurisdiction was built up through the instrumentality of the injunction restraining the prosecution of legal actions, where the defendants sought the aid of chancery, which alone could take cognizance of the equities that would defeat a recovery at law against them. This was not accomplished, however, without a long and severe opposition from the common-law judges, which continued until the reign of James I. The jurisdiction then firmly established by judicial authority has never since been questioned. The reasons urged by the common-law judges were frivolous. The injunction is not addressed to, nor does it operate upon, the courts of law; instead of denying or interfering with, it virtually admits and assumes,

<sup>1</sup> This chapter is cited, generally, in Orban v. Northwestern Fire & Marine Ins. Co., 169 Mich. 404, Ann. Cas. 1913E, 73, 135 N. W. 252.

<sup>&</sup>lt;sup>2</sup> The text is quoted in Steger & Sons Piano Mfg. Co. v. Mac-Master, 51 Tex. Civ. App. 527, 113 S. W. 337, and in Simpson v. McGuirk (Tex. Civ. App.), 194 S. W. 979.

their jurisdiction. It is addressed to the litigant parties, and prohibits them from resorting to the legal jurisdiction, because their controversies, depending upon equitable principles, or involving equitable features, can only be fully and finally determined by a tribunal having the equitable jurisdiction. Injunction is the remedy which, above all others, necessarily operates in personam.''3

§ 2059. (§ 638.) When the Jurisdiction is not Exercised—General Doctrine.—"Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, a court of equity will not stay proceedings at law.<sup>4</sup> Equity will not restrain a legal action or judgment where the controversy would be decided by the court of equity upon a ground equally available at law, unless the party invoking the aid of equity can show some special equitable feature or ground of relief; and in the case assumed, this special feature or ground must necessarily be something connected with the mode of trying and deciding the legal action, and not with the cause of action or the defense themselves.<sup>5</sup> It is not such a special equitable ground

<sup>3</sup> Pom. Eq. Jur., § 1360; quoted in Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 S. W. 1087; cited in Chapman v. American Surety Co., 261 Ill. 594, 104 N. E. 247.

<sup>&</sup>lt;sup>4</sup> Southampton Dock Co. v. Southampton etc. Board, L. R. 11 Eq. 254 (action at law stayed where completeness of relief at law is doubtful, and questions of fiduciary relationship, etc., are involved). The text is cited in Chapman v. American Surety Co., 261 Ill. 594, 104 N. E. 247.

<sup>5 &</sup>quot;Because it is assumed that the ground of decision is equally available at law and in equity, and therefore the special equitable feature must be something dehors the very issues and merits of the controversy: See Harrison v. Nettleship, 2 Mylne & K. 423; Williams v. Stewart, 56 Ga. 663." The text is quoted in Butler v. Topkis (Del. Ch.), 63 Atl. 646 (forcible entry and detainer proceedings may be restrained where there is an equitable defense); Crouse v. McVickar, 207 N. Y. 213, 45 L. R. A. (N. S.) 1159, 100 N. E. 697; and

of interference that the party has, by his own act or omission, failed to effectually avail himself of a valid defense at law, nor that the court of law has decided a question of law or of fact erroneously.<sup>6</sup> The

cited in Thompson v. Great Western Accident Ass'n, 136 Iowa, 557, 114 N. W. 31.

6 In Bateman v. Willhoe, 1 Schoales & L. 201, 204, 206, "Lord Redesdale stated this rule in language which has ever since been regarded as a correct exposition of the principle: 'It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation, and it is more important that an end should be put to litigation than that justice should be done in every case. . . . The inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity. There may be cases cognizable at law and also in equity, and of which cognizance cannot be effectually taken at law; and therefore equity does sometimes interfere, as in cases of complicated accounts, where the party has not made a defense, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law which equity will put out of the way or restrain him from using. But without circumstances of that kind. I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law,-a matter capable of being discussed there, and over which a court of law has full jurisdiction.' It should be carefully observed that the chancellor is not speaking of those cases which involve, in their very cause of action or defense, features or interests cognizable only by courts of equity; nor of the other class of cases which, in ordinary phraseology, belong to the concurrent jurisdiction both of law and equity; he refers to cases which in themselves present no equitable aspect, and properly come within the jurisdiction of the law, but which, for some reason or another, have been wrongly tried and decided by the court of law. There must have been some special equitable ground connected with this wrongful trial and decision, in order that equity may interfere and restrain the judgment": 4 Pom. Eq. Jur., § 1361, and note 3.

principle is well established, and is universal in its application, that when a cause belongs to the jurisdiction of the law courts, equity will never interfere to restrain the prosecution of the action, nor to stay proceedings on the judgment or execution, upon any mere legal grounds, although it may be demonstrated that the complainant in equity (generally the defendant at law) had a valid legal defense, which was not made available either through the error of the court in determining the law or the facts, or the omissions of himself or his counsel in presenting it, or in obtaining the evidence by which it could have been supported."

7 The text is cited in Swamp Land Reclamation Dist. No. 341 v. Blumenberg, 156 Cal. 539, 106 Pac. 392; Chapman v. American Surety Co., 261 Ill. 594, 104 N. E. 247 (but if the matter could not be received as a defense at law, equity may relieve notwithstanding an ineffectual attempt to defend at law). To the effect that a court of equity will not grant relief on account of mere errors of law, such as erroneous rulings as to the admission of evidence, erroneous decisions, etc., see Simpson v. Lord Howden, 3 Mylne & C. 97, 108; Daly v. Pennie, 86 Cal. 552, 21 Am. St. Rep. 61, 25 Pac. 67; Hood v. New York etc. R. Co., 23 Conn. 609; Burke v. Wheat, 22 Kan. 722; Shortridge v. Bartlett, 14 B. Mon. 248; Landry v. Bertrand, 48 La. Ann. 48, 19 South. 126; Brigot's Heirs v. Brigot, 49 La. Ann. 1428, 22 South. 641 (insufficiency of evidence not ground for relief); Yarborough v. Thompson, 3 Smedes & M. 291, 41 Am. Dec. 626; A, B Smith Co. v. Bank of Holmes Co. (Miss.), 18 South. 847; Price v. Johnson Co., 15 Mo. 433; Cooper v. Duncan, 58 Mo. App. 5; Fox v. McClay, 48 Neb. 820, 67 N. W. 888; Vaughn v. Johnson, 9 N. J. Eq. 173; Reeves v. Cooper, 12 N. J. Eq. 223, 498; Vilas v. Jones, 1 N. Y. 274; Thompson v. Meek, 3 Sneed. 271; Miller v. Shute, 55 Or. 603. 107 Pac. 467.

A mere irregularity in a judgment or decree is not ground for equitable relief; Skirving v. National Life Ins. Co., 19 U. S. App. 442, 59 Fed. 742, 8 C. C. A. 241; Davis v. Clements, 148 Ind. 605, 62 Am. St. Rep. 539, 47 N. E. 1056; Hart v. O'Rourke, 151 Ind. 205, 51 N. E. 330; Devinney v. Mann, 24 Kan. 682; Hunter v. Kansas City etc. Bank, 158 Mo. 262, 58 S. W. 1053 (party's name did not appear in caption); Knott v. Taylor, 99 N. C. 511, 6 Am. St. Rep. 547, 6 S. E. 788 (irregular because defendant had died); Henderson v.

§ 2060. (§ 639.) Same—Inexcusable Neglect.—Equity will not relieve one whose inexcusable neglect in the defense or prosecution of an action has resulted in a judgment against him. What amounts to such neglect

Moore, 125 N. C. 383, 34 S. E. 446; Reast v. Hughes (Tex. Civ. App.), 33 S. W. 1003.

In accordance with these views, it is generally held that a court of equity will not interfere upon grounds which were or are available at law, unless some good excuse is given for failure to take advantage of them: Ware v. Horwood, 14 Ves. 28, 31; Protheroe v. Forman, 2 Swanst. 227, 233; Kemp v. Tucker, L. R. 8 Ch. 369; Baron de Worms v. Mellier, L. R. 16 Eq. 554; Duckworth v. Duckworth's Adm'r, 35 Ala. 70; Creath v. Sims, 5 How. 192, 12 L. Ed. 111; Hendrickson v. Hinckley, 17 How. 443, 445, 15 L. Ed. 123; Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. Ed. 362; Phillips v. Negley, 117 U. S. 675, 29 L. Ed. 1013, 6 Sup. Ct. 901; Knox Co. v. Harshman, 133 U. S. 152, 33 L. Ed. 586, 10 Sup. Ct. 257; Deweese v. Reinhard, 165 U. S. 386, 41 L. Ed. 757, 17 Sup. Ct. 340; Truly v. Wanzer, 46 U. S. (5 How.) 141, 12 L. Ed. 88; Scottish U. & N. Ins. Co. v. Bowland, 196 U. S. 611, 49 L. Ed. 619, 25 Sup. Ct. 345; New Orleans v. Morris, 3 Woods, 103 Fed. Cas. No. 10,182; Tompkins v. Drennen, 13 U. S. App. 308, 56 Fed. 694, 6 C. C. A. 83; Quinton v. Equitable Investment Co., 196 Fed. 314, 116 C. C. A. 134; Cox v. O'Neal, 142 Ala. 314, 37 South. 674; Womack v. Powers, 50 Ala. 5; Shaw v. Lindsey, 60 Ala. 344; Holt v. Pickett, 111 Ala. 362, 20 South, 432; Foshee v. McCreary, 123 Ala. 493, 26 South. 309; Teft v. Booth, 104 Ga. 590, 30 S. E. 803; Hinrichsen v. Van Winkle, 27 Ill. 334 ("This rule is absolutely inflexible, and cannot be violated even when the judgment in question is manifestly wrong in law and in fact, or when the effect of allowing it to stand, will be to compel the payment of a debt which the defendant does not owe, or which he owes to a third party"); Warren v. Cook, 116 Ill. 199, 5 N. E. 538; White v. Young Men's Christian Ass'n, 233 Ill. 526, 84 N. E. 658 (non-performance of condition precedent); Dubuque etc. R. R. Co. v. Cedar Falls etc. R. Co., 76 Iowa, 702, 39 N. W. 691 (injunction against prosecution of action refused); Vennum v. Davis, 35 Ill. 568: Spraker v. Bartlett, 73 Ill. App. 522; Bard v. Jones, 96 Ill. App. 370; O'Connor v. Sheriff, 30 La. Ann. 441; Windwart v. Allen, 13 Md. 196; Lyday v. Douple, 17 Md. 188; Payson v. Lamson, 134 Mass. 593, 45 Am. Rep. 348; Saunders v. Huntington, 166 Mass. 96, 44 N. E. 127 (no injunction against action on ground that debtor has been discharged in bankruptcy, for that can be set up as a defense

depends largely upon the circumstances of each particular case. Where a party negligently fails to have an appearance properly made, and a default results, a court of equity will generally deny relief; and a like result

at law); St. Johns Nat. Bank v. Bingham Tp., 113 Mich. 203, 71

N. W. 588 (bill to enjoin action); Holmes v. Steele, 28 N. J. Eq. 173; Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9 (citing Pom. Eq. Jur., § 1361); Mayor etc. of New York v. Brady, 115 N. Y. 615, 22 N. E. 237 (quoting Pom. Eq. Jur., § 1361); Gatlin v. Kilpatrick, 4 N. C. 147, 6 Am. Dec. 557, 1 Car. Law. Repos. 534; McClure v. Miller, Bail. Eq. 107, 21 Am. Dec. 522; Hoge v. Fidelity Loan & Tr. Co., 103 Va. 1, 48 S. E. 494; Evans v. Taylor, 28 W. Va. 184. In many of these cases the complainant failed to avail himself of a defense through culpable negligence. If the failure to use a defense at law is the result of culpable negligence, relief will certainly be denied: See cases cited, § 639, post.

A novel situation is presented in Bomeisler v. Forster, 154 N. Y. 229, 39 L. R. A. 240, 48 N. E. 534, where a release available at law was made the basis of an injunction against a legal action, the fact that a trial would cause certain scandalous matter to become public being relied upon.

The rule of the text as applied to injunctions against judgments, assumes that the defense was not only legal in its nature, but available in the legal action. Thus, where a party embodied in his usurious note a power of attorney to confess judgment, he may enjoin a judgment taken without notice to him on the ground of the usury; since to hold otherwise would afford an easy method of evading the usury laws: Hightower v. Coalson, 151 Ala. 147, 125 Am. St. Rep. 20, 12 L. R. A. (N. S.) 659, 44 South. 53. And where, in an action by a grantee for breach of covenant of seisin, after judgment but before payment his title became good by adverse possession, the judgment defendant was allowed to bring a suit to enjoin the enforcement of the judgment: Mather v. Stokely, 236 Fed. 124, 149 C. C. A. 334.

Defenses which have been urged and adjudicated at law are not, under ordinary circumstances, ground for relief in equity: Morrison's Ex'r v. Hart, 5 Ky. (2 Bibb) 4, 4 Am. Dec. 663; Bachelder v. Bean, 76 Me. 370.

8 Higgins v. Bullock, 73 Ill. 205; Kern v. Strausberger, 71 Ill. 413; Wilson v. Coolidge, 42 Mich. 112, 3 N. W. 285; Graham v. Roberts, 1 Head, 56; Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178; Slack v. Wood, 9 Gratt. 40; Shields v. McClung, 6 W. Va. 79. See, also,

may be reached when the judgment results from a negligent failure to attend the trial. A neglect to set up a known legal defense will bar equitable relief growing out of it. 10 Ignorance of facts constituting a de-

Hass v. Leverton, 128 Iowa, 79, 5 Ann. Cas. 974, 102 N. W. 811. The mere employment of an attorney to defend the case is not a sufficient excuse: Payton v. McQuown, 97 Ky. 757, 53 Am. St. Rep. 437, 31 L. R. A. 33, 31 S. W. 874; Kern v. Strausberger, 71 Ill. 413. See, also, Sullivan v. Shell, 36 S. C. 578, 31 Am. St. Rep. 894, 15 S. E. 722 (proceeding to revive judgment; no appearance).

<sup>9</sup> Rogers v. Parker, 1 Hughes, 148, Fed. Cas. No. 12,018 (failure of attorney to attend trial).

10 "Whenever a competent remedy or defense shall have existed at law, the party who may have neglected to use it, will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation; and perhaps to the subversion of justice": Creath v. Sims, 5 How. 192, 12 L. Ed. 111; Sample v. Barnes, 55 U. S. 70, 14 L. Ed. 330. See, also, Tompkins v. Drennen, 56 Fed. 694, 6 C. C. A. 83; Hungerford v. Sergerson, 20 How. 156, 15 L. Ed. 869; Jamison v. May, 13 Ark. 600; Brum v. Ivins, 154 Cal. 17, 129 Am. St. Rep. 137, 96 Pac. 876 (defense that complainant was not the person intended to be sued); Smith v. Phinizy, 71 Ga. 641; Center Tp. v. Board of Comm., 110 Ind. 580, 10 N. E. 291; Paynter v. Evans, 7 B. Mon. 420; Gorsuch v. Thomas, 57 Md. 334; Kretschmar v. Ruprecht, 230 Ill. 492, 82 N. E. 836; Prather v. Prather's Adm'r, 11 Gill & J. 110; Williams v. Jones, 10 Smedes & M. 108; Robb v. Halsey, 11 Smedes & M. 140 (witnesses not subpænaed); Norwegian Plow Co. v. Bollman, 47 Neb. 186, 31 L. R. A. 747, 66 N. W. 292; Barker v. Elkins, 1 Johns. Ch. 465; Champion v. Miller, 2 Jones Eq. (55 N. C.) 194; Brenner v. Alexander, 16 Or. 349, 8 Am. St. Rep. 301, 19 Pac. 9; Brandon v. Green, 7 Humph. 130; White v. Cabal's Adm'r, 2 Swan, 550; Brownson v. Reynolds, 77 Tex. 254, 13 S. W. 986; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604; Day v. Cummings, 19 Vt. 496; Allen v. Hamilton, 9 Gratt. 255; Bierne v. Mann, 5 Leigh, 364; Richmond Enquirer Co. v. Robinson, 24 Gratt. 548. And see Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221 (party had knowledge of defense, but was inexcusably ignorant that case was still pending). Equity will not relieve merely because a party has, by mistake, put in a plea which does not cover his defense in a court of law, when, by the ordinary practice of that court, he could be permitted to amend: Graham v. Stagg, 2 Paige, 321.

fense does not excuse the omission of a party to make it, nor entitle him to the aid of equity, unless it can be shown that the party could not have acquired the information by the diligent and careful labor in preparing the cause for trial which he is bound to make.<sup>11</sup> Where a right of appeal has been lost by negligence, equity will not ordinarily interfere.<sup>12</sup> It is generally held in all of these matters that the neglect of an attorney is imputable to his client.<sup>13</sup> Of course, where it appears that the neglect has been caused by the promises or statements of the adverse party, or where, for any reason, it is excusable, relief may be freely granted.

## § 2061. (§ 640.) Jurisdiction of Federal Courts to Enjoin Proceedings in State Courts.—Congress has pro-

11 De Soto Coal Mining & Development Co. v. Hill, 188 Ala. 667, 65 South. 988; Smith v. Powell, 50 Ill. 21 (inexcusable ignorance of facts amounting to defense no ground for relief from default); Smith v. Allen, 63 Ill. 474; Fuller v. Little, 69 Ill. 229; Center Tp. v. Board of Comm., 110 Ind. 580, 10 N. E. 291; Dilly v. Barnard, 8 Gill & J. 170 (ignorance of facts which might have been obtained by bill of discovery); Gorsuch v. Thomas, 57 Md. 334; Kirby v. Pascault, 53 Md. 531; Carolus v. Koch, 72 Mo. 645; Metropolitan El. R'y Co. v. Johnston, 158 N. Y. 739, 53 N. E. 1128 (affirming 84 Hun, 83, 32 N. Y. Supp. 49); Floyd v. Jayne, 6 Johns. Ch. 479; Foster v. Wood, 6 Johns. Ch. 87; Munn v. Worrall, 16 Barb. 221; Mayor etc. of New York v. Brady, 115 N. Y. 616, 22 N. E. 237; Peace v. Nailing, 1 Dev. Eq. (16 N. C.) 289; Burton v. Wiley, 26 Vt. 430; Smith v. McLain, 11 W. Va. 654.

12 Ruppertsberger v. Clark, 53 Md. 402 (lost through delay of attorney); Renfroe v. Renfroe, 54 Mo. App. 429; Ballard v. Nashville & K. R. Co., 94 Tenn. (10 Pick.) 205, 28 S. W. 1088; Nye v. Sochor, 92 Wis. 40, 53 Am. St. Rep. 896, 65 N. W. 854. Likewise where an adequate remedy by motion for a new trial is lost through negligence, relief will not be granted: Hannon v. Maxwell, 31 N. J. Eq. 318.

13 Rogers v. Parker, 1 Hughes, 148, Fed. Cas. No. 12,018; Kern v. Strausberger, 71 Ill. 413; Fuller v. Little, 69 Ill. 229; Newman v. Schueck, 58 Ill. App. 328; Payton v. McQuown, 97 Ky. 757, 53 Am. St. Rep. 437, 31 L. R. A. 33, 31 S. W. 874; Patterson v. Matthews, 3 Bibb, 80.

vided that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." This provision has limited the powers of the federal courts, and in most cases prevents the exercise of the jurisdiction. Injunctions in aid of bankruptcy proceedings being expressly excepted by the statute, such relief is quite frequently given. 16

14 Act, March 2, 1793, c. 22, § 5, 1 Stats. 334; 1 U. S. Comp. Stats., 1901, § 720. See this statute construed in Security Trust Co. v. Union Trust Co., 134 Fed. 301; Fleischman Co. v. Murray, 161 Fed. 152; Danciger v. Stone, 187 Fed. 853; American Ship Building Co. v. Whitney, 190 Fed. 109; Nelson v. Camp, 191 Fed. 712, 112 C. C. A. 302.

15 United States v. Parkhurst-Davis Merc. Co., 176 U. S. 317, 44 L. Ed. 485, 20 Sup. Ct. 423 (no injunction against enforcement of claims against Indians in state court); Dial v. Reynolds, 96 U. S. 340, 44 L. Ed. 644; Diggs v. Walcott, 8 U. S. (4 Cranch. 179, 2 L. Ed. 587; Oliver v. Parlin & Orendorff Co., 105 Fed. 272, 45 C. C. A. 200; Aultman & Taylor Co. v. Brumfield, 102 Fed. 7; Mills v. Provident Life & Trust Co., 100 Fed. 344, 40 C. C. A. 394 (no injunction against levy and sale under execution); Cœur d'Alene R. & N. Co. v. Spalding, 93 Fed. 280, 35 C. C. A. 295; Chicago, R. I. & P. R'y Co. v. St. Joseph Union Depot Co., 92 Fed. 22; Simpson v. Ward, 80 Fed. 561; Baker v. Ault, 78 Fed. 394; Southern Bank & Trust Co. v. Folsom, 75 Fed. 929, 21 C. C. A. 568; Hemsley v. Myers, 45 Fed. 283. See, also, Bailey v. Willeford, 136 Fed. 382, 69 C. C. A. 226; Cincinnati N. O. & T. P. R'y Co. v. Morgan County, 143 Fed. 798, 75 C. C. A. 56; Guardian Trust Co. v. Kansas City South. R'y Co., 171 Fed. 43, 28 L. R. A. (N. S.) 620, 96 C. C. A. 285; Patton v. Marshall, 173 Fed. 350, 26 L. R. A. (N. S.) 127, 97 C. C. A. 610; Smith v. Jennings, 238 Fed. 48, 151 C. C. A. 124. That the prohibition of the federal statute does not deprive the federal court of its general equity power to enjoin the enforcement of a fraudulent or void judgment, see Simon v. Southern R'y Co., 236 U. S. 115, 59 L. Ed. 492, 35 Sup. Ct.

16 Whether a case is such as to entitle a party to an injunction, depends upon the provisions of the bankruptcy act. In the following cases, relief was granted: Chapman v. Brewer, 114 U. S. 158, 29 L. Ed. 83, 5 Sup. Ct. 799; Ex parte Christy, 44 U. S. (3 How.) 292,

The statute does not apply when the jurisdiction of a federal court has first attached. Accordingly, a federal court may grant an injunction against a proceeding in a state court when necessary to render effective its own decree.<sup>17</sup> It is also held that injunctions may issue in

11 L. Ed. 603; In re Kletchka, 92 Fed. 901; Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. 691; In re Donnelly, 188 Fed. 1001; In re Dana, 167 Fed. 529, 93 C. C. A. 238. In the following cases relief was denied under various circumstances: Leroux v. Hudson, 109 U. S. 468, 27 L. Ed. 1000, 3 Sup. Ct. 309; Pickens v. Dent, 106 Fed. 653, 45 C. C. A. 522; Heath v. Shaffer, 93 Fed. 647; In re Holloway, 93 Fed. 638; In re Ogles, 93 Fed. 426; In re Munro, 195 Fed. 817.

17 Harkrader v. Wadley, 172 U. S. 148, 43 L. Ed. 399, 19 Sup. Ct. 119; Riverdale Cotton Mills v. Alabama & G. Mfg. Co., 198 U. S. 188, 49 L. Ed. 1008, 25 Sup. Ct. 629; Central Trust Co. v. Western N. C. R. Co., 112 Fed. 471 (after decreeing foreclosure, court may enjoin sale under execution upon judgment of state court); James v. Central Trust Co., 98 Fed. 489, 39 C. C. A. 126; Riverdale Cotton Mills v. Alabama & G. Mfg. Co., 111 Fed. 431: State Trust Co. v. Kansas City, P. & G. R. Co., 110 Fed. 10; Starr v. Chicago, R. I. & P. R'y Co., 110 Fed. 3; Mercantile Trust & Dep. Co. v. Roanoke & S. R'y Co., 109 Fed. 3; Pitt v. Rodgers, 104 Fed. 387, 43 C. C. A. 600; Fidelity Insur., Trust & S. D. Co. v. Norfolk & W. R. Co., 88 Fed. 815; Terre Haute & I. R. Co. v. Peoria & P. U. R. Co., 82 Fed. See, also, Swift v. Black Panther Oil & Gas Co., 244 Fed. 20, 156 C. C. A. 448. The reasons for the rule are well stated in Deitzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497: "A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court. Deitzsch, the original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin which had been pending and was finally determined in the United States circuit court. court had jurisdiction of his person, and could enforce its judgment in the replevin suit against him, or those whom he represented, their agents and attorneys: The bill in this case was filed for that purpose, and that only. If the bill is not maintainable, the appellees would find themselves in precisely the same plight as if the judgment of the United States circuit court had been against them, instead of for them. The judgment in their favor would settle nothing. cases which have been regularly removed from state courts, to restrain further proceedings.<sup>18</sup>

§ 2062. (§ 641.) State Courts cannot Enjoin Proceedings of Federal Courts.—It is well established that a state court cannot enjoin a proceeding or judgment of a federal court. The jurisdictions are independent, and there is no right in a state court to interfere. "The exemption of the authority of the courts of the United States from interference by legislative or judicial action of the states is essential to their independence and efficiency." 19

Instead of terminating the strife between them and their adversaries, it would leave them under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice. As the bill in this case is filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law; and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect, unless by direct proceeding."

18 "When a cause is legally removed to the federal court, all jurisdiction in the state court is at an end. The very cause itself being transferred, no case any longer exists in the state court. The state court is then absolutely without authority over the parties and subject-matter of the litigation. Whatever the state court could have done before the removal it is competent after removal for the federal court to do. An injunction in such case by the federal court, restraining the parties before it from proceeding elsewhere, is no injunction, within the spirit and intent of the statute staying proceedings in a state court, because after removal there is no proceeding left in the state court, and no jurisdiction to be interfered with. If, after removal, a party could continue or renew his litigation in the state court, the whole purpose of the removal might be defeated": Wagner v. Drake, 31 Fed. 849. See Mutual Life Ins. Co. of N. Y. v. Langley, 145 Fed. 415; McAlister v. Chesapeake & O. R'v Co., 157 Fed. 740, 13 Ann. Cas. 1068, 85 C. C. A. 316; Western Union Tel. Co. v. Louisville & N. R. Co., 218 Fed. 628, 134 C. C. A.

19 This paragraph is quoted in Henderson v. Henrie, 61 W. Va. 183, 11 Ann. Cas. 741, 56 S. E. 369. See Central Nat. Bank v.

§ 2063. (§ 642.) Relief from Equitable Proceedings and Decrees.—As a general rule, one court of equity will not enjoin the process of another of co-ordinate juris-

Stevens, 169 U. S. 432, 42 L. Ed. 807, 18 Sup. Ct. 403, 837, reviewing the authorities. See, also, Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 177 U. S. 51, 44 L. Ed. 667, 20 Sup. Ct. 564 (reversing 173 Ill. 439, 51 N. E. 55, and holding that there is no right to enjoin when the federal court has first acquired jurisdiction); Smith v. Reed, 74 N. J. Eq. 776, 70 Atl. 961. A good statement of the reasons for the doctrine is found in Riggs v. Johnson Co., 6 Wall. 166, 18 L. Ed. 768: "State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or the proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye. Appellate relations exist in a class of cases between the state courts and this court, but there are no such relations between the state courts and the circuit courts. Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect, the process of proceedings of a circuit court; not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action circuit courts are wholly independent of the state tribunals." See, however, Shaw v. Frey, 69 N. J. Eq. 321, 59 Atl. 811, where a state court enjoined the prosecution of an action in a federal court pending discovery. Bergen, V. C., said: "The doctrine that a state court may never restrain a litigant in a federal court cannot, in my opinion, be supported by the adjudications of the supreme court of the United States. There are to be found in some of the reports expressions by the judges of that court which may, perhaps, bear that interpretation, but I have been unable to find any adjudication that establishes so broad a principle. . . . And while these cases, or some of them, contain the statement that state courts are devoid of all power to restrain either the process or proceedings of the national courts, it will be found upon examination that in every instance the question determined was the authority of the federal court to execute its judgments. . . . I can find no ex-· press adjudication holding that a state court having jurisdiction over the party is without power to restrain a litigant in a federal court, no federal question being involved, until he shall make such diction.<sup>20</sup> Relief is obtainable by application to the court which has jurisdiction of the original suit. Occasionally, however, one court of equity will interfere with the proceedings of another, as where it is necessary to prevent a multiplicity of suits.<sup>21</sup> Likewise, a court which has jurisdiction of an equitable action may enjoin the prosecution of another concerning the same subjectmatter, subsequently begun in another court.<sup>22</sup> An injunction may be granted against prosecuting a suit in or enforcing a decree of the same court;<sup>23</sup> and upon the

discovery of evidence as the rules of equity require." See, also, Keith v. Alger, 114 Tenn. 1, 85 S. W. 71, where a judgment of a federal court was enjoined for extrinsic fraud.

20 Vendall v. Harvey, Nelson, 19; Furnald v. Glenn, 26 U. S. App. 202, 64 Fed. 49, 12 C. C. A. 27; Central Trust Co. v. Evans, 43 U. S. App. 214, 73 Fed. 562, 19 C. C. A. 563; Gray v. South & N. A. R. Co., 151 Ala. 215, 11 L. R. A. (N. S.) 581, 43 South. 859; Corbin v. Casina Land Co., 26 App. Div. 408, 49 N. Y. Supp. 929. In Wisconsin, the principle is laid down strongly. "One court of equity will not enjoin the process of another. One suit in equity will not lie to enjoin process in issuing in another. The objection is fatal, whether the second suit be brought in the same or in another court, by a party or by a stranger to the first suit": Endter v. Lennon, 46 Wis. 299, 50 N. W. 194; Platto v. Deuster, 22 Wis. 482. To the effect that the relief will not be awarded in a separate action when it could be had in the one pending, see Waymire v. S. F. & S. M. R'y Co., 112 Cal. 646, 44 Pac. 1086 (citing Pom. Eq. Jur., §§ 1371, 1372); Wolfe v. Titus, 124 Cal. 264, 56 Pac. 1042; nor will a decree be enjoined on grounds which might have been set up in that action: Moran v. Woodyard, 8 B. Mon. 537. "An injunction ought not, as a rule, to be granted to restrain a person from making an application to the court to procure an injunction": Balogh v. Lyman, 6 App. Div. 271, 39 N. Y. Supp. 780. See, also, Wallack v. Soc. Ref. Juv. Del., 67 N. Y. 23.

- 21 Erie R'y Co. v. Ramsey, 45 N. Y. 641.
- 22 Booth v. Leycester, 3 Mylne & C. 459.
- 23 Jackson v. Leaf, 1 Jacob & W. 229; Mann v. Flower, 26 Minn. 479, 5 N. W. 365; Bond v. Greenwald, 7 Baxt. 466. To the effect that a bill may be maintained to correct a partition decree for mistake, see Sullivan v. Lumsden, 118 Cal. 664, 50 Pac. 777.

principle of *quia timet*, an injunction may issue to restrain the prosecution of a suit not commenced, such as a suit to foreclose a mortgage.<sup>24</sup>

§ 2064. (§ 643.) Probate Decrees.—It is said by some courts that equity has no jurisdiction to enjoin or set aside probate decrees obtained by fraud.<sup>25</sup> Except

24 Haeseig v. Brown, 34 Mich. 503 (ground for decision not stated). As illustrations of the power to enjoin enforcement of equitable decrees, see Brown v. Daniels (Tenn.), 51 S. W. 991 (injunction against enforcement of decree in partition).

25 Such a broad statement seems hardly warranted by the authorities. In State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118, the court, per Norton, J., said: "The court of chancery has no capacity, as the authorities have settled, to judge or decide whether a will is or is not a forgery; and hence there would be an incongruity in its assuming to set aside a probate decree establishing a will, on the ground that the decree was procured by fraud, when it can only arrive at the fact of such fraud by first deciding that the will was a forgery. There seems, therefore, to be a substantial reason, so long as a court of chancery is not allowed to judge of the validity of a will, except as shown by the probate, for the exception of probate decrees from the jurisdiction which courts of chancery exercise in setting aside other judgments obtained by fraud. But whether the exception be founded in good reason or otherwise, it has become too firmly established to be disregarded. At the present day, it would not be a greater assumption to deny the general rule that courts of equity may set aside judgments procured by fraud, than to deny the exception to that rule in the case of probate decrees." It is to be noted that the fraud in this case was intrinsic-forgery and perjury. Except for jurisdictions where perjury is a recognized ground for relief against judgments, the result is clearly correct. See, also, Tracy v. Muir, 151 Cal. 363, 121 Am. St. Rep. 117, 90 Pac. 832; Williams v. Risor, 84 Ark. 61, 104 S. W. 547; Bradley v. Bradley, 117 Md. 515, 83 Atl. 446.

For cases where relief has been granted, see Gill v. Pelkey, 54 Ohio St. 348, 43 N. E. 991 (correction of mistake); Wright v. Fleming, 76 N. Y. 517; Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232; Benson v. Anderson, 10 Utah, 135, 37 Pac. 256. See, also, cases collected in note 63, § 652.

For a discussion of equitable jurisdiction over probate matters in general, see Pom. Eq. Jur., § 1154, and cases cited in notes.

in jurisdictions where perjury is a ground for relief against judgments, cases in which equitable relief would be proper under the general principles are comparatively rare. A probate proceeding is generally ex parte. Cases do occur, however, in which a party is prevented, by some fraud or mistake, from having a hearing to which he is entitled; and under such circumstances, it would seem that equity should take jurisdiction.

§ 2065. (§ 644.) No Injunction Against Criminal Proceedings.—In general, a court of equity has no jurisdiction to enjoin criminal proceedings.<sup>26</sup> "To assume

26 This paragraph is cited in Campbell v. Jackman Bros., 140 Iowa, 475, 27 L. R. A. (N. S.) 288, 118 N. W. 755; Board of Medical Examiners of Utah v. Freenor, 47 Utah, 430, Ann. Cas. 1917E, 1156, 154 Pac. 941. Pom. Eq. Jur., section 1361, note, is cited to this effect in Fritz v. Sims, 122 Tenn. 137, 135 Am. St. Rep. 867, 19 Ann. Cas. 458, 119 S. W. 63; J. W. Kelly & Co. v. Conner, 122 Tenn. 339, 25 L. R. A. (N. S.) 201, 123 S. W. 622 (prohibition legislation). See Ex parte Sawyer, 124 U. S. 200, 31 L. Ed. 402, 8 Sup. Ct. 482; Harkrader v. Wadley, 172 U. S. 148, 43 L. Ed. 399, 19 Sup. Ct. 119; Fitts v. McGhee, 172 U. S. 516, 43 L. Ed. 535, 19 Sup. Ct. 269; Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. Ed. 778, 23 Sup. Ct. 498; Suess v. Noble, 31 Fed. 855; Hemsley v. Myers, 45 Fed. 283; Central Trust Co. v. Citizens' St. R. Co., 80 Fed. 218; Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258; Arbuckle v. Blackburn, 113 Fed. 613, 51 C. C. A. 122; Portis v. Fall, 34 Ark. 375; New Home etc. Machine Co. v. Fletcher, 44 Ark. 139; Lecourt v. Gaster, 49 La. Ann. 487, 21 South. 646; Crighton v. Dahmer, 70 Miss. 602, 21 L. R. A. 84, 13 South. 237; State v. Wood, 155 Mo. 425, 48 L. R. A. 596, 56 S. W. 474; Davis v. American Society, 75 N. Y. 362; Greiner-Kelly Drug Co. v. Truett, 97 Tex. 377, 79 S. W. 4. See, also, Sullivan v. San Francisco Gas & Elec. Co., 148 Cal. 368, 7 Ann. Cas. 574, 3 L. R. A. (N. S.) 401, 83 Pac. 156; Sennette v. Police Jury of St. Mary's Parish, 129 La. 728, 56 South. 653; Kleinke v. Oates, 187 Mich. 548, 153 N. W. 675 (game laws); Cobb v. French, 111 Minn. 429, 127 N. W. 415 (unlicensed milk testing): Andrieux v. City of Butte, 44 Mont. 557, Ann. Cas. 1913B, 712, 121 Pac. 291; State v. Southern R'y Co., 145 N. C. 495, 13 L. R. A. (N. S.) 966, 59 S. E. 570; Fritz v. Sims, 122 Tenn. 137, 135 Am. St. Rep. 867, 19 Ann. Cas. 458, 119 S. W. 63 (game laws); Denton v. Mcsuch a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade the domain of the courts of common law, or of the executive and administrative departments of the government."<sup>27</sup> Moreover, in the United States it is held that such a suit is in effect against a state, and is therefore prohibited by the federal constitution.<sup>28</sup> While the general rule is well established, it has been intimated that when prosecutions "are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available."<sup>29</sup>

Donald, 104 Tex. 206, 34 L. R. A. (N. S.) 453, 135 S. W. 1148 (in aid of habeas corpus); Littleton v. Burgess, 14 Wyo. 173, 2 L. R. A. (N. S.) 631, 82 Pac. 864 (invalidity of statute must first be established at law). For a good discussion of the subject, see Camden Interstate R'y Co. v. City of Catlettsburg, 129 Fed. 421, where it is said that the rule has two exceptions, viz.: (1) where the criminal proceedings are instituted by a party to a suit already pending, and to try the same thing that is in issue there; (2) where the proceedings have been provided to enforce a law which is unconstitutional because it invades the property rights of the complainant. For multiplicity of suits as a ground of equity jurisdiction in such cases, see 1 Pom. Eq. Jur., sections 243-275; Hall v. Dunn, 52 Or. 475, 25 L. R. A. (N. S.) 193, 97 Pac. 811.

Ex parte Sawyer, 124 U. S. 200, 31 L. Ed. 402, 8 Sup. Ct. 482.
Ex parte Sawyer, 124 U. S. 200, 31 L. Ed. 402, 8 Sup. Ct. 482;
Fitts v. McGhee, 172 U. S. 516, 43 L. Ed. 535, 19 Sup. Ct. 269.

29 Central Trust Co. v. Citizens' St. R. Co., 80 Fed. 218; Louisiana State Lottery Co. v. Fitzpatrick, 3 Woods, 222, Fed. Cas. No. 8541. See, also, Louisiana v. Lagarde, 60 Fed. 186; Truax v. Raich, 239 U. S. 33, Ann. Cas. 1917B, 283, L. R. A. 1916D, 545, 60 L. Ed. 131, 36 Sup. Ct. 7; Lindsley v. Natural Carbonic Gas Co. 162 Fed. 954; Christian Moerlein Brewing Co. v. Hill, 166 Fed. 140; Little v. Tanner, 208 Fed. 605; Evansville Brewing Ass'n v. Excise Commission, 225 Fed. 204; Clark v. Harford Agricultural & Breeders' Ass'n, 118 Md. 608, 85 Atl. 503; Michigan Salt Works v. Baird, 173 Mich. 655, 139 N. W. 1030; Milton Dairy Co. v. Great Northern R'y Co., 124 Minn. 239, 49 L. R. A. (N. S.) 951, 144 N. W. 764; Merchants' Exchange v. Knott, 212 Mo. 616, 111 S. W. 565;

There are also many cases in which the enforcement of void municipal ordinances, the execution of which directly affected property rights, have been enjoined, and criminal prosecutions before the municipal authorities restrained.<sup>30</sup>

§ 2066. (§ 645.) When the Jurisdiction may be Exercised-First Class-Equitable Rights .- "I pass from this negative view to consider the doctrine on its affirmative side. The cases in which, according to its original jurisdiction unaffected by statute, equity may interfere by injunction, and restrain an action at law either before or after judgment, may be reduced to three general classes: 1. Where the controversy, in addition to its legal aspect, involves some equitable estate, right, or interest which is exclusively cognizable by a court of equity, so that a complete determination of the issues cannot be made by a court of law, it is well settled that equity not only may, but must, interfere at the suit of the party in whom the equitable estate or right is vested, and restrain the action at law, and decide the whole controversy.31 This is so when the defendant at law has a purely equitable defense which the court of law

Ideal Tea Co. v. City of Salem, 77 Or. 182, Ann. Cas. 1917D, 684, 150 Pac. 852; Sherod v. Aitchison, 71 Or. 446, Ann. Cas. 1916C, 1151, 142 Pac. 351; Cain v. Daly, 74 S. C. 480, 55 S. E. 110; Brown v. State, 59 Wash. 195, 109 Pac. 802; Benz v. Kremer, 142 Wis. 1, 26 L. R. A. (N. S.) 842, 125 N. W. 99.

30 The text is cited in Baldwin v. City of Atlanta, 147 Ga. 28, 92 S. E. 630 (multiplicity of suits); Fellows v. City of Charleston, 62 W. Va. 665, 125 Am. St. Rep. 990, 13 Ann. Cas. 1185, 13 L. R. A. (N. S.) 737, 59 S. E. 623. For a discussion of the jurisdiction of equity to enjoin the enforcement of penal ordinances, see ante, volume I, chapter on Municipal Corporations.

31 The text is quoted in Watkins v. Tallassee Falls Mfg. Co. (Ala.), 38 South. 756; citing, also Pom. Eq. Jur., sections 1362-1364. Section 1362 is cited in Town of Washburn v. Lee, 128 Wis. 312, 107 N. W. 649; and sections 1362, 1363, in Blackstone Hall Co. v. Rhode Island Hospital Trust Co., 39 R. I. 69, 97 Atl. 484.

will not recognize or enforce, and especially when he is entitled to some affirmative equitable relief which will clothe him with a legal right or title, and thus defeat the legal action brought against him. Cases of this kind belong to the first branch of the exclusive jurisdiction of equity as described in the first volume.<sup>32</sup>

32 See Pom. Eq. Jur., § 219, and cases cited in note.

In the following cases injunctions were issued against prosecuting actions at law upon the ground that a complainant had an equitable defense not available at law: Williams v. Earl of Jersey, Craig & P. 91; Evans v. Bremridge, 8 De Gex, M. & G. 100; Crofts v. Middleton, 8 De Gex, M. & G. 192 (equitable defense to ejectment); Earl of Aylesford v. Morris, L. R. 8 Ch. 484; Lord Tredegar v. Windus, L. R. 19 Eq. 607; Griswold v. Hazard, 141 U. S. 260, 35 L. Ed. 678, 11 Sup. Ct. 972; Sullivan Timber Co. v. City of Mobile, 110 Fed. 186 (equitable estoppel); North British & Merc. Ins. Co. v. Lathrop, 25 U. S. App. 443, 70 Fed. 429, 17 C. C. A. 175; Frith v. Roe, 23 Ga. 139; Pindell v. Quinn, 7 Ill. App. 605 (restraining suits interfering with management of receiver); Ross v. Harper, 99 Mass. 175; Haeseig v. Brown, 34 Mich. 503; De Moss v. Economy F. & C. Co., 74 Mo. App. 117 (equitable estoppel); Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 S. W. 588 (equitable counterclaim which was unavailable in action in justice's court); Clement v. Young-McShea Amusement Co., 69 N. J. Eq. 347, 60 Atl. 419; Skinner v. White, 17 Johns, 357; Tice v. Annin, 2 Johns. Ch. 125; County of Armstrong v. Brinton, 47 Pa. St. 367; Moses v. Sanford, 2 Lea, 655 (equitable estoppel); Ordway v. Farrow, 79 Vt. 192, 118 Am. St. Rep. 951, 64 Atl. 1116 (in connection with redemption, injunction against trespass suits brought by mortgagee); Metcalf v. Hart, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407. See, also, Detroit etc. R. R. v. Brown, 37 Mich. 533.

In the following cases relief was granted against judgments on account of equitable defenses: Scott v. Shreeve, 12 Wheat. 605, 6 L. Ed. 744; Johnson v. Christian, 128 U. S. 374, 31 L. Ed. 820, 9 Sup. Ct. 87 (equitable defense to ejectment); Hawkins v. Wills, 4 U. S. App. 274, 49 Fed. 506, 1 C. C. A. 339 (equitable defense to ejectment); Humphries v. Adkins, 142 Ala. 517, 110 Am. St. Rep. 42, 38 South. 840; Miller v. Gaskins, Smedes & M. Ch. 524; State v. Graves, 92 Neb. 333, 138 N. W. 153; Hibbard v. Eastman, 47 N. H. 507, 93 Am. Dec. 467; Barbour v. Nat. Exchange Bank, 50 Ohio St. 90, 20 L. R. A. 192, 33 N. E. 542 (set-off); Appeal of Given,

This rule assumes that the equitable questions contained in the defense extend to the entire cause, so that

121 Pa. St. 260, 6 Am. St. Rep. 795, 15 Atl. 468 (judgment entered under warrant of attorney, the consideration for which was an agreement to suppress a criminal prosecution); Deaderick v. Mitchell, 6 Baxt. 35; Breeden v. Grigg, 8 Baxt. 163; Memphis & C. R. Co. v. Greer, 87 Tenn. (3 Pick.) 698, 4 L. R. A. 858, 11 S. W. 931; Ragsdale v. Hagy, 9 Gratt. 409; Franks v. Morris, 9 W. Va. 664; Jarrett v. Goodnow, 39 W. Va. 602, 32 L. R. A. 321, 20 S. E. 575 (injunction to let in set-off when judgment creditor insolvent); Greer v. Hale, 95 Va. 533, 64 Am. St. Rep. 814, 28 S. E. 873. In Gridley v. Garrison, 4 Paige, 647, an injunction was issued to restrain the enforcement of a judgment in order to enable the complainant to obtain a set-off. This jurisdiction was exercised, although similar jurisdiction had been acquired by law courts, the court applying the principle that jurisdiction acquired by law courts does not oust equity of its jurisdiction. In New York & H. R. Co. v. Haws, 56 N. Y. 175, an injunction was issued restraining the enforcement of a judgment because of a defense arising subsequent to its rendition. It has been held that enforcement of a judgment may be enjoined although an appeal to the supreme court is pending: Parker v. Maryland Cir. Ct. Judges, 25 U. S. (12 Wheat.) 561, 6 L. Ed. 729.

In the following case an injunction against an action at law was granted in aid of discovery: King v. Clark, 3 Paige, 76. The use of injunctions in such actions is illustrated in Boughton v. Phillips, 6 Paige, 433; Williams v. Harden, 1 Barb. Ch. 298.

Of course, if there is any equitable reason why equity should not aid a defense sought to be set up, relief will be denied: Murray v. Toland. 3 Johns. Ch. 569.

In the following cases relief was denied because the matter set up was as complete and as available a defense to the action at law, as it was a cause of action in equity: Atkinson v. Allen, 36 U. S. App. 255, 71 Fed. 58, 17 C. C. A. 570; Zinn v. Dawson, 47 W. Va. 45, 81 Am. St. Rep. 772, 34 S. E. 784.

A failure to interpose a defense good at law will not prevent the party from availing himself of an independent ground of relief in equity: Greenlee v. Gaines, 13 Ala. 198, 48 Am. Dec. 49.

The power of a court of equity to enjoin the prosecution of actions at law in order to prevent a multiplicity of suits is discussed at length in Pomeroy's Equity Jurisprudence, §§ 245 et seq.; see, especially, note to § 261. Only a few of the cases will be cited here. In the following cases injunctions were granted to prevent multi-

their decision determines the controversy.<sup>33</sup> When the cause contains both legal and equitable questions which are distinct, the court of equity, while taking jurisdiction, may not restrain the proceedings at law prior to the obtaining of judgment.''<sup>34</sup>

§ 2067. (§ 646.) Same — Second Class.—"The second general class includes those cases which belong to the second branch of the exclusive jurisdiction of equity as heretofore described; or, in the ordinary nomenclature of the books, cases over the facts of which both

plicity of suits: Virginia-Carolina Chem. Co. v. Home Ins. Co., 113 Fed. 1; Woods v. Monroe, 17 Mich. 238; Albert Lea v. Nielsen, 83 Minn. 101, 81 Am. St. Rep. 242, 82 N. W. 1104; Paterson etc. R. R. v. Jersey City, 9 N. J. Eq. 434; Third Ave. R. R. v. Mayor, 54 N. Y. 159; Coville v. Gilman, 13 W. Va. 314. On the other hand, relief was denied in Henderson v. Flanagan, 75 Ill. App. 283; Andel v. Starkel, 192 Ill. 206, 61 N. E. 356; Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236; Hartman v. Heady, 57 Ind. 545; Elridge v. Hill, 2 Johns. Ch. 281; West v. Mayor, 10 Paige, 539; Pennsylvania C. Co. v. Delaware etc. Co., 31 N. Y. 91; Woodruff v. Fisher, 17 Barb. 224.

33 The text is quoted in Bradley v. Bradley, 117 Md. 515, 83 Atl. 446.

34 Pom. Eq. Jur., § 1362. See Hill v. Billingsly, 53 Miss. 111; Mitchell v. Oakley, 7 Paige, 68 (preliminary injunction refused); Justice v. Scott, 4 Ired. Eq. (39 N. C.) 108. "In the cases referred to, it is supposed that there are both legal and equitable issues which may be tried and decided separately, and the decision of neither determines the whole controversy. Of course, if the equitable issues are really the very gist of the whole cause, and upon their decision the whole case really turns, and the ends of justice demand it, the court of equity may take control of the entire controversy by enjoining the further prosecution of the action at law. It is only where the decision of the equitable issues would necessarily defeat the whole right at law and destroy the entire legal cause of action, that the chancellor must take the entire controversy under his own control. It is then a matter of right, and not of discretion": 4 Pom. Eq. Jur., § 1362, note 2. See Camp v. Boyd, 229 U. S. 530, 57 L. Ed. 1317, 33 Sup. Ct. 785.

35 See Pom. Eq. Jur., §§ 220, 221, and cases cited in note 2, under § 221.

courts of law and of equity have a concurrent jurisdiction to grant their respective and distinctive remedies; for example, cases involving actual fraud, such as suits upon instruments, where the defense is fraud in procuring their execution. Where the jurisdiction is thus said to be concurrent, or in other words, where the interests and primary rights of the parties are legal, and the only question between the two courts relates to the adequacy of their respective remedies, as a general rule the tribunal which first exercises jurisdiction is entitled, or at least permitted, to retain an exclusive control of the issues.<sup>36</sup> It is therefore a well-settled doctrine that in cases of this kind, where the primary rights of both parties are legal, and courts of law will grant their remedies, and courts of equity may also grant their peculiar remedies, equity will not interfere to restrain the action or judgment at law, provided the legal remedy will be adequate; that is, provided the judgment at law will do full justice between the parties, and will afford a complete relief; the adequacy or inadequacy of the legal remedy is the sole and universal test.<sup>37</sup> On the other

36 See Pom. Eq. Jur., § 179; Mallett v. Dexter, 1 Curt. 178, Fed. Cas. No. 8988; Winn v. Albert, 2 Md. Ch. 42; Merrill v. Lake, 16 Ohio, 373, 47 Am. Dec. 377; Thompson v. Hill, 3 Yerg. 167; Crane v. Bunnell, 10 Paige, 333.

37 See Pom. Eq. Jur., §§ 220, 221; Mason v. Piggott, 11 Ill. 85; Ross v. Buchanan, 13 Ill. 55; Jackson v. Bell, 31 N. J. Eq. 554, 32 N. J. Eq. 411; Bumpass v. Reams, 1 Sneed, 595; Glastenbury v. McDonald's Adm'r, 44 Vt. 453; Du Pont v. Gardiner, 238 Fed. 755, 151 C. C. A. 605 (fraud may be set up as defense to an instrument not under seal); Wilson v. Miller, 143 Ala. 264, 111 Am. St. Rep. 42, 5 Ann. Cas. 724, 39 South. 178 (fraudulent alteration of deed). And see Hoare v. Bremridge, L. R. 8 Ch. 22, 14 Eq. 522. "Were a court of equity, in a case of concurrent jurisdiction, to try a cause, already tried at law, without the aid of any equitable circumstance to give jurisdiction, it would act as an appellate court, to affirm or reverse a judgment already rendered, on the same circumstances, by a competent tribunal. This is not the province of a court of chancery": Smith v. McIver, 9 Wheat. 532, 6 L. Ed. 152, Marshall, C. J.

hand, in cases of this general class, equity will enjoin the action at law, and will determine the whole cause, whenever the legal remedy is inadequate; and the legal remedy is deemed to be inadequate if the ends of justice would not be satisfied by a mere judgment for the defendant in the action at law, but would require that some distinctively equitable relief, such as a cancellation or a reformation of the instrument sued upon, be conferred upon him. If any affirmative equitable relief is necessary to a full settlement of the controversy, and to a complete protection of the defendant's rights, a court of equity will interfere, entertain a suit for such relief, and enjoin the action at law.<sup>38</sup> The scope of

See, also, Ochsenbein v. Papelier, L. R. 8 Ch. 695, where the rule was laid down by Selborne, L. C., as follows: "It is the rule of this court that in cases of concurrent jurisdiction this court ought not to interfere with any proceedings at law unless it has better means of doing justice between the parties than are possessed by a court of law. That may be the case either because a court of equity is able to give a more perfect remedy, or because the nature of the case admits of its being better tried by the procedure of this court than by that of a court of law."

38 Boyce's Ex'rs v. Grundy, 28 U. S. (3 Pet.) 210, 7 L. Ed. 655; Foltz v. St. Louis & S. F. R'y Co., 19 U. S. App. 576, 60 Fed. 316, 8 C. C. A. 635; Whitcomb v. Shultz, 223 Fed. 268, 138 C. C. A. 510 (defense of fraud in instrument under seal only available in equity in federal courts); Riggs v. Gillespie, 241 Fed. 311, 154 C. C. A. 191 (release under seal); Hightower v. Coalson, 151 Ala. 147, 125 Am. St. Rep. 20, 12 L. R. A. (N. S.) 659, 44 South. 53 (usurious note with power of attorney to confess judgment; though usury a legal defense, judgment obtained without notice may be enjoined); Kennedy v. Davis, 171 Ala. 609, Ann. Cas. 1913B, 225, 55 South. 104 (action by administrator for death of intestate; sole heir compromised the claim; injunction against administrator's action, since doubtful whether defense would be available at law); Bissell v. Beckwith, 33 Conn. 357; Griffin v. Fries, 23 Fla. 173, 11 Am. St. Rep. 351, 2 South, 266 (dictum); Scott v. Scott, 33 Ga. 102; Radcliffe v. Varner, 56 Ga. 222; Morris v. Barnwell, 60 Ga. 147; Mitchell v. Word, 60 Ga. 525; Horner v. Nitsch, 103 Md. 498, 63 Atl. 1052, (defendant at law unable to plead usury because of complicated nature this particular doctrine is plainly identical with that which governs the second branch of the exclusive jurisdiction of equity as described in the first volume. Whenever a court of equity exercises its jurisdiction over a case involving only legal interests and primary rights, for the purpose of awarding its exclusively equitable remedies, because the legal remedies would be inadequate, it will always, if necessary, enjoin an action at law which interrupts the full exercise of its jurisdiction."<sup>39</sup>

§ 2068. (§ 647.) Same — Third Class.—"In the two preceding classes of cases the ground for interference was some equitable element or feature involved in the very subject-matter of the controversy, or in the reme-

of transactions); Wyckoff v. Victor S. M. Co., 43 Mich. 309, 4 N. W. 405; Fidelity Mut. Life Ins. Co. v. Blain, 144 Mich. 218, 107 N. W. 877 (action on insurance policy restrained because of fraud); Henwood v. Jarvis, 27 N. J. Eq. 247; Hamilton v. Cummings, 1 Johns. Ch. 517; Dale v. Roosevelt, 5 Johns. Ch. 174; Athenaeum L. Ass'n Soc. v. Pooley, 3 De Gex & J. 294, 299; Traill v. Baring, 4 De Gex, J. & S. 318. The case of Bomeisler v. Forster, 154 N. Y. 229, 39 L. R. A. 240, 48 N. E. 534, presents a novel situation. The complainant was granted an injunction based upon a release which was a valid defense at law. The inadequacy of the legal remedy consisted in the fact that a trial at law would cause the publication of certain scandalous matter. "The difference to the plaintiff between a trial of the action at law, in which all the scandalous matters would be made public, and his reputation more or less affected, according as credence might be given to the statements and charges of the plaintiff therein, and a trial of the action in equity, where the issues would be confined to the question of whether there had been a release and settlement of all claims against him, which formed the basis of the complaint in the pending action, and an agreement not to sue further upon them, is quite perceptible and substantial."

39 Pom. Eq. Jur., § 1363; quoted in Buskirk v. Sanders, 70 W. Va. 363, 73 S. E. 937. In some states it is held that one court cannot control the execution of the orders and process of another court of equal jurisdiction: Scott v. Runner, 146 Ind. 12, 58 Am. St. Rep. 345, 44 N. E. 755; Platto v. Duester, 22 Wis. 484.

dies appropriate thereto, which constituted an equitable defense in full or in part to the legal action, and over which the court of equity had either a concurrent or an exclusive jurisdiction. In the present class there is no such equitable element or feature of the controversy; there is no equitable defense embraced in any possible issues, no equitable right or interest of the defendant which defeats or modifies the legal cause of action; all the issues are wholly legal. The ground for the equitable jurisdiction to interfere is, therefore, something dehors the issues, something arising out of or connected with the trial itself of the legal action in the court of It was a settled doctrine of the equitable jurisdiction—and is still the subsisting doctrine except where it has been modified or abrogated by statute, or has become obsolete through the enlarged powers of the law courts to grant new trials—that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced. From the very nature of the case, this interference takes place after the judgment, and not while the action at law is pending."40

<sup>40</sup> Pom. Eq. Jur., § 1364. This section of Pom. Eq. Jur. is cited in Pickford v. Talbott, 225 U. S. 651, 56 L. Ed. 1240, 32 Sup. Ct. 687; Hayes v. United States Phonograph Co., 65 N. J. Eq. 5, 55 Atl. 84; Kirkhuff v. Kerr, 57 N. J. Eq. 623, 42 Atl. 734; Merkel v. Merkel, 87 N. J. Eq. 154, 99 Atl. 924 (as to what is newly discovered evidence); Turknett v. Western College of N. M. Conference, 19 N. M. 572, 145 Pac. 138; Froebrich v. Lane, 45 Or. 13, 106 Am. St. Rep. 634, 76 Pac. 351; Bowsman v. Anderson, 62 Or. 431, 123 Pac. 1092, 125 Pac. 270; Gulf, T. & W. R'y Co. v. Lunn (Tex. Civ. App.) 141 S. W. 538; Brandt v. Little, 47 Wash. 194, 14 L. R. A. (N. S.) 213, 91 Pac. 765 (to

§ 2069. (§ 648.) Rationale of the Doctrine. — The ground for the exercise of this jurisdiction is that there has been no fair adversary trial at law. Consequently a distinction is made between fraud, accident, mistake and the like relating to the subject-matter of the action and similar elements relating to the conduct of the suit. Fraud relating to the subject-matter is not of itself sufficient ground for relief. Where it relates to the conduct of the suit, as where it prevents a party from asserting his rights, there is no fair adversary proceeding, and equity will interfere. The courts commonly speak of the former class as intrinsic and of the latter as extrinsic, fraud, etc. Thus, it is generally said that

vacate judgment for lack of jurisdiction, must show that there was a defense). See general statements in Wingate v. Haywood, 40 N. H. 437; Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. Ed. 362

41 The text is quoted in De Soto Coal Mining & Development Co. v. Hill, 194 Ala. 537, 69 South. 948. See Stead v. Curtis, 191 Fed. 529, 112 C. C. A. 463; Whitcomb v. Shultz, 223 Fed. 268, 138 C. C. A. 510; De Soto Coal Mining & Development Co. v. Hill, 188 Ala. 667, 65 South. 988; Zellerbach v. Allenberg, 67 Cal. 296, 7 Pac. 908; Friebe v. Elder, 181 Ind. 597, 105 N. E. 151; Hendron v. Kinner, 110 Iowa, 544, 81 N. W. 783; Loughren v. Bonniwell, 125 Iowa, 518, 106 Am. St. Rep. 319, 101 N. W. 287; Covington v. Chamblin, 156 Mo. 574, 57 S. W. 728; Moody v. Peyton, 135 Mo. 482, 58 Am. St. Rep. 604, 36 S. W. 621; Einstein v. Strother (Mo. App.), 182 S. W. 122; Vandeventer Trust Co. v. Western Stoneware Co., 197 Mo. App. 132, 193 S. W. 995; Shufeldt v. Gandy, 34 Neb. 32, 51 N. W. 302; Boulton v. Scott's Adm'r, 3 N. J. Eq. 231; Gardiner v. Van Alstyne, 163 N. Y. 573, 57 N. E. 1110; Ingalls v. Merchants' Nat. Bank, 51 App. Div. 305, 64 N. Y. Supp. 911; Mayor etc. of New York v. Brady, 115 N. Y. 615, 22 N. E. 237; Crouse v. McVickar, 207 N. Y. 213, 45 L. R. A. (N. S.) 1159, 100 N. E. 697; Michael v. American Nat. Bank, 84 Ohio St. 370, 38 L. R. A. (N. S.) 220, 95 N. E. 905; Uecker v Thiedt, 133 Wis. 148, 113 N. W. 447; Laun v. Kipp, 155 Wis. 347, 145 N. W. 183. "The ground for the equitable jurisdiction to interfere is, therefore, something dehors the issues, something arising out of or connected with the trial itself of the legal action in the court of law": Pom. Eq. Jur., § 1364.

it is extrinsic fraud, mistake and the like which are grounds for relief.

§ 2070. (§ 649.) Fraud as a Ground for Relief .--"Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, [or by] a false offer of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new trial and a fair hearing."42 It will be seen that the fraud here is not necessarily actual, legal fraud.

§ 2071. (§ 650.) Violation of Stipulation or Agreement.—Relief is very freely granted where a judgment is taken in violation of a stipulation or agreement as to the conduct of the suit. It is apparent that there is no fraud in the technical sense; such conduct does not fall within the definition of "actual" fraud—misrepresentation of existing facts. There is merely a breach of a contract; but the effects of such a breach are so manifestly against conscience that the courts will relieve, and base their jurisdiction on the ground of fraud. These stipulations may take various forms. Where an attor-

<sup>42</sup> United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93. To the effect that the kinds of fraud here described do not generally fall within the definition of "actual" fraud, see 2 Pom. Eq. Jur., § 875.

ney represents that a case will not be called at a certain term of court, equity will enjoin or set aside a judgment entered at that term in the absence of the complainant.<sup>43</sup> Likewise, where there is an agreement that a case is not to be tried without notice, relief will be granted against a judgment entered without notice.<sup>44</sup> A party may rely upon a statement that an action will be dismissed, and if his opponent, in violation of such an agreement, takes judgment, equitable relief is proper.<sup>45</sup>

43 The text is quoted in Fidelity & Deposit Co. v. Crenshaw, 120 Tenn. 606, 110 S. W. 1017. See De Louis v. Meek, 2 G. Greene, 55, 50 Am. Dec. 491; Bigham v. Kistler, 114 Ga. 453, 40 S. E. 303; Southern R'y Co. v. Planters' Fertilizer Co., 134 Ga. 527, 68 S. E. 95; Merriman v. Walton, 105 Cal. 403, 45 Am. St. Rep. 50, 30 L. R. A. 786, 38 Pac. 1108. See, also, Evans v. Wilhite, 176 Ala. 287, 58 South. 262 (adjournment by consent); Sanderson v. Voelcker, 51 Mo. App. 328 (agreement for continuance); Beck v. Jackson, 160 Mo. App. 427, 140 S. W. 919 (agreement for an adjournment); Mitchell v. Kirby, 18 Ky. Law Rep. 961, 38 S. W. 507. See, however, Norman v. Burns, 67 Ala. 248, where relief was refused. The judgment was taken notwithstanding a verbal assurance of plaintiff's attorney that it would not be taken at that term of court. The case rests upon a statute providing that "no private agreement or consent, between the parties or their attorneys, relating to the proceedings in any cause" shall be binding unless in writing. See, also, Hendley v. Chabert, 189 Ala. 258, 65 South. 993. A mere vague and uncertain suggestion on which it was negligent to rely is not ground for relief: German Fire Ins. Co. v. Perry, 45 Ill. App. 197.

44 How v. Mortell, 28 Ill. 479. The text is quoted and followed in Fidelity & Deposit Co. v. Crenshaw, 120 Tenn. 606, 110 S. W. 1017.

45 Huggins v. King, 3 Barb. 616; Cadwallader v. McClay, 37 Neb. 359, 40 Am. St. Rep. 496, 55 N. W. 1054; Greenwaldt v. May, 127 Ind. 511, 22 Am. St. Rep. 660, 27 N. E. 158. In Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573, S. obtained judgments against E. in two states on the same cause of action. E. settled one upon the promise that the other would be dismissed. It was held that E. could enjoin the enforcement of the second judgment. In Dallin v. McIvor, 12 Ind. App. 150, 39 N. E. 765, the defendant at law was shown an agreement to dismiss which was given to a co-defendant. This was held ground for setting aside a default. In Hamil-

Where a party induces another to allow judgment to be taken against him upon the representation that it is not to be enforced against him, or that if the amount shall turn out to be too large, it will be corrected, an injunction will issue to prevent the enforcement of the judgment in violation of the agreement.<sup>46</sup> Equity will also

ton v. Wood, 55 Minn. 482, 57 N. W. 208, the debtor paid the claim after the suit was brought and the creditor agreed to dismiss. Instead of doing this he took judgment surreptitiously. An injunction was awarded. In McLeran v. McNamara, 55 Cal. 508, a plaintiff took a judgment in violation of a written stipulation on file dismissing the suit, fifteen years later. An injunction was allowed although the plaintiff at law claimed that he did not know of the stipulation. In Pelham v. Moreland, 11 Ark. 442, an attorney stipulated that an answer need not be filed, and then took judgment. Relief was granted.

46 Thus, it is proper when a surety allows judgment under an agreement that it is to be used only as a means of collection from the principal, and the judgment creditor subsequently attempts to enforce against the surety: Cage v. Cassidy, 64 U. S. (23 How.) 109, 16 L. Ed. 430; Baker v. Redd, 44 Iowa, 179; Union Bank v. Geary, 5 Pet. 99, 8 L. Ed. 60; Kelley v. Kriess, 68 Cal. 211, 9 Pac. 122. In Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600, there was an agreement that a judgment was to be used only as security. The court said: "If, as alleged in this case, the judgment was agreed and understood by the parties to it to be, not an ascertainment of so much indebtedness, but only as a security for so much as thereafter might be ascertained to be due, then in such a case it would be a fraud on the part of the appellants to use it for a purpose different from that of the agreement, and a court of equity would enjoin them from doing so." In Perry v. Johnston, 95 Fed. 322, one defendant at law did not make a defense, relying upon an agreement that the same judgment should be entered against him as against others. It was held that an injunction was proper when a different judgment was allowed to stand. See, also, in support of the text, Hinckley v. Miles, 15 Hun, 170; Purviance v. Edwards, 17 Fla. 140; Shufeldt v. Gandy, 25 Neb. 602, 41 N. W. 553; Poindexter v. Waddy, 6 Munf. 418, 8 Am. Dec. 749. In Delaney v. Brown, 72 Vt. 344, 47 Atl. 1067, a party did not file a bill of review in time, relying upon a statement that a judgment would not be enforced against him. It was held that he was entitled to an injunction.

relieve against a judgment obtained in violation of a compromise agreement.<sup>47</sup> An inferior court has enjoined the enforcement of an order made by a higher court, surreptitiously and fraudulently obtained. Thus, where a judgment obtained by consent was reversed in the appellate court because the consent did not appear of record, the lower court granted relief, and its decision was sustained on appeal.<sup>48</sup> In general, whenever a party has been lulled into inaction by the promises, stipulations or representations of the prevailing party, relief will be granted because of the unconscionable conduct.<sup>49</sup> If, however, the promises, stipulations or

- 47 Murphy v. Smith, 86 Mo. 333; Brake v. Payne, 137 Ind. 479, 37 N. E. 140.
- 48 Bank of Kentucky v. Hancock's Adm'r, 36 Ky. (6 Dana) 284, 32 Am. Dec. 76.
- 49 Markham v. Angier, 57 Ga. 43 (inducing defendants to withdraw an equitable plea by a promise to do the equity set up in the plea); Brooks v. Whitson, 7 Smedes & M. 513 (attorney was prevented from making a plea on representation that no defense was to be made); Webster v. Skipwith, 26 Miss. 341 (statement as to purpose of suit); Booth v. Stamper, 6 Ga. 172 (stipulation as to manner of trial); Stroup v. Sullivan, 2 Ga. (2 Kelly) 275, 46 Am. Dec. 389; Pearce v. Olney, 20 Conn. 544; Fox v. Robbins (Tex. Civ. App.), 62 S. W. 815; Brooks v. Twitchell, 182 Mass. 443, 94 Am. St. Rep. 662, 65 N. E. 843 (agreement not to take advantage of delay in making appearance); Klabunde v. Byron-Reed Co., 69 Neb. 120, 95 N. W. 4, 98 N. W. 182; Moore v. Lipscombe, 82 Va. 546; Holland v. Trotter, 22 Gratt. 136; Dodge v. Williams, 107 Ga. 410, 33 S. E. 468. See, also, Flood v. Templeton, 152 Cal. 148, 13 L. R. A. (N. S.) 579, 92 Pac. 78 (mortgagee's promise, made with intention not to perform, to devise the property to mortgagor, who is thereby induced not to interpose a valid defense and set-off to foreclosure); Lithuanian Brotherhelp Soc. v. Tunila, 80 Conn. 642, 125 Am. St. Rep. 138, 70 Atl. 25. In Heim v. Butin, 109 Cal. 500, 50 Am. St. Rep. 54, 42 Pac. 138, an injunction was sought against a judgment because of a promise not to enter a personal judgment. Relief was refused on the ground that there was no consideration for the promise.

representations are such that the defendant at law was not justified in relying upon them, relief will be denied.<sup>50</sup>

(§ 651.) Miscellaneous Instances of Uncon-§ 2072. scionable Conduct.—The unconscionable conduct may assume many forms. If an attorney employed to defend a case proves false to his trust and, in conjunction with his opponent, allows judgment to go against his client, a clear case for equitable relief is made out.51 Likewise, if a director of a corporation defendant, or any other person occupying a fiduciary position, fraudulently allows judgment to be taken without attempting to have a defense made, equity will relieve. 52 Collusion is a well-established ground. In such cases the bill for relief is generally brought by a third party who is injured by the collusive conduct of the parties to the original action. The rule seems to be that whenever the existence of a judgment, or the uses of which it is capable, and which are imminent, injuriously affect the rights or remedies of a stranger to it, he may by original bill

50 Jarboe v. Kepler, 4 Ind. 177; English v. Aldrich, 132 Ind. 500, 32 Am. St. Rep. 270, 31 N. E. 456 (equity will not set aside judgment on ground of mistake when party relied upon statement of clerk in office of plaintiff's attorney instead of upon allegations in complaint).

51 Pacific R. R. Co. of Mo. v. Mo. Pac. R. Co., 111 U. S. 520, 28 L. Ed. 504, 4 Sup. Ct. 583; Sanford v. White, 132 Fed. 531; Estudillo v. Security Loan & Trust Co., 149 Cal. 556, 87 Pac. 19; Renner v. Kannally, 193 Ill. 212, 61 N. E. 1026; Sasser v. Olliff, 91 Ga. 84, 16 S. E. 312. Any fraud or misrepresentation by one's own attorney in the interest of the adversary is ground for relief: Smith v. Quarles (Tenn. Ch. App.), 46 S. W. 1035; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197. See, also, People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381.

52 Pacific R. R. Co. v. Mo. Pac. R. Co., 111 U. S. 520, 28 L. Ed. 504, 4 Sup. Ct. 583; Patterson v. Carter, 147 Ala. 522, 41 South. 133; Street v. Alden, 62 Minn. 160, 52 Am. St. Rep. 632, 64 N. W. 157 (minority member of board of supervisors); Lang Syne G. M. Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358.

attack it for fraud or collusion.53 Such, for instance, may be creditors' bills, and bills by legatees against executors and administrators. Such, also, is a bill brought by citizens to set aside a writ of mandate to compel a canvass of votes, obtained by collusion between the relator and the defendant.<sup>54</sup> Of course where collusion is between a trustee and a claimant, the cestui is entitled One who prevents his opponent from anto relief.<sup>55</sup> swering by fraudulently waiting until he goes out of the jurisdiction before bringing suit, or by wrongfully having him confined in an asylum, or by inducing him to leave the country, is guilty of such unconscionable conduct that equity will readily interfere. 56 Where the prevailing party tampers with the jury, an injunction may issue if the facts are discovered at so late a time that legal relief cannot be secured.<sup>57</sup> If the judge himself is a party to the fraud, the ground for interference is especially strong; and in such a case it need not be

<sup>53</sup> First Nat. Bank of Decatur v. Pullen, 129 Ala. 638, 29 South. 685; Richardson v. Loree, 94 Fed. 375, 36 C. C. A. 301; Bement v. Ohio V. B. & T. Co., 99 Ky. 109, 59 Am. St. Rep. 445, 35 S. W. 139; Burnett v. Milnes, 148 Ind. 230, 46 N. E. 464; Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095; First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 Atl. 461; Grand Rapids, S. F. Co. v. Haney, 92 Mich. 558, 31 Am. St. Rep. 611, 16 L. R. A. 721, 52 N. W. 1009.

<sup>54</sup> State v. Matley, 17 Neb. 564, 24 N. W. 200.

<sup>55</sup> Wright v. Miller, 8 N. Y. 9, 59 Am. Dec. 438; Warren v. Union Bank, 157 N. Y. 259, 68 Am. St. Rep. 777, 43 L. R. A. 256, 51 N. E. 1036 (guardian and ward).

<sup>56</sup> Nelson v. Rockwell, 14 Ill. 375; Lockwood v. Mitchell, 19 Ohio 448, 53 Am. Dec. 438; Colby v. Colby, 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460. In this last case a husband sent his wife abroad and then brought suit for divorce. He purposely failed to send her money, so she was unable to return home to contest the case.

<sup>57</sup> Platt v. Threadgill, 80 Fed. 192. In this case, the action was to recover the value of certain cigars. The plaintiff at law conducted three jurors to his place of business and gave each a box of cigars, during the trial.

shown that he intentionally did wrong.<sup>58</sup> It is ground for relief when a party attempts to take advantage of an error of the clerk in failing to properly enter an order of the court.<sup>59</sup>

§ 2073. (§ 652.) Same — Continued.—Where it has appeared that a probate court has awarded the whole estate of an intestate to a brother, omitting entirely the widow, who understood little of the English language, relief has been granted.60 These facts were held sufficient to show that the court either labored under a mistake or was fraudulently imposed upon. Again, where the defendant has not appeared and a personal judgment has been taken, although unauthorized by the petition, an injunction has issued. 61 Where money is fraudulently coerced by a judgment fraudulently obtained, it is sometimes held that it may be recovered in equity, without the formality of obtaining a new trial or setting aside the judgment.62 Where an order or decree in a probate matter is obtained by fraud, relief may sometimes be granted.63 Many cases upholding

<sup>58</sup> Thus, in Baldwin v. Davidson, 139 Mo. 118, 61 Am. St. Rep. 460, 40 S. W. 765, a probate judge, when told by the attorney for heirs, prior to filing of administrator's final settlement, that he desired to contest the same, informed him that if when the settlement was filed, it should be fair on its face he would approve it, and the heirs could then appeal. It was approved without giving any opportunity to be heard. The lower court held that the judge acted honestly and without fraud; but on appeal it was held that the conduct was so fraudulent as to make equitable relief imperative. See, also, Kochtitzky v. Herbst, 160 Mo. App. 443, 140 S. W. 925; Burkharth v. Stephens, 117 Mo. App. 425, 94 S. W. 720.

<sup>59</sup> Turner v. Colson, 21 Ky. Law Rep. 1390, 55 S. W. 551; Williams v. Pile, 104 Tenn. 273, 56 S. W. 833.

<sup>60</sup> Benson v. Anderson, 10 Utah, 135, 37 Pac. 256.

<sup>61</sup> Larson v. Williams, 100 Iowa, 110, 62 Am. St. Rep. 544, 63 N. W. 464, 69 N. W. 441.

<sup>62</sup> Ellis v. Kelley, 8 Bush, 621.

<sup>63</sup> Johnson v. Waters, 111 U. S. 667, 28 L. Ed. 556, 4 Sup. Ct. 619; Silva v. Santos, 138 Cal. 536, 94 Am. St. Rep. 45, 71 Pac. 703; Aldrich

the general doctrine in its various phases are appended in the note.<sup>64</sup>

v. Barton, 138 Cal. 220, 94 Am. St. Rep. 43, 71 Pac. 169; Froebrich v. Lane, 45 Or. 13, 106 Am. St. Rep. 634, 76 Pac. 351. See ante, § 643. 64 The case of Wagner v. Shank, 59 Md. 313, is a remarkable example of fraud. Over a thousand suits were brought by one party on fictitious claims against various defendants before two justices of the peace. The defendants employed counsel, who went to the residence of the magistrate. After some conversation, the magistrate agreed to dismiss the cases, and signed a paper to this effect. The counsel took this paper and gave it to one of his clients, and informed all of them that the suits had been dismissed. Shortly afterward, without notice to the counsel or to any one of the defendants, the magistrate proceeded to enter up the judgments on his docket, No execution was issued on any one of these judgments until long after the time for appeal had elapsed; and neither the defendants, nor their counsel, had any knowledge of such judgments until nearly a year after they had been rendered. An injunction was issued against their execution. In the following cases the general rule is stated and applied: Davis v. Tileston, 47 U. S. (6 How.) 114, 12 L. Ed. 366; Sayers v. Burkhardt, 85 Fed. 246, 29 C. C. A. 137; Merrill v. First Nat. Bank, 94 Cal. 59, 29 Pac. 242; Gates v. Steele, 58 Conn. 316, 18 Am. St. Rep. 268, 20 Atl. 474; Norwood v. Richardson (Del.), 57 Atl. 244; Snelling v. American Freehold Land Mort. Co., 107 Ga. 852, 73 Am. St. Rep. 60, 33 S. E. 634; Everett v. Tabor, 119 Ga. 128, 46 S. E. 72; Schroer v. Pettibone, 163 Ill. 42, 45 N. E. 207; Devoll v. Scales, 49 Me. 320; Payne v. Payne, 97 Md. 678, 55 Atl. 368; Scriven v. Hursh, 39 Mich. 98; State v. Engelmann, 86 Mo. 551; Tapana v. Shaffray, 97 Mo. App. 337, 71 S. W. 119; Perry v. Siter, 37 Mo. 273; Wirth v. Weigand, 85 Neb. 115, 35 L. R. A. (N. S.) 1103, 122 N. W. 714; Herbert v. Herbert, 49 N. J. Eq. 565, 25 Atl. 366; Truitt v. Darnell, 65 N. J. Eq. 221, 55 Atl. 692; United Security Life Ins. & Tr. Co. v. Ott (N. J. Ch.), 26 Atl. 923; Miller v. Harrison, 32 N. J. Eq. 76; Semple v. Cleveland & P. R. Co., 172 Pa. St. 369, 33 Atl. 564, 37 Wkly. Not. Cas. 365; Given's Appeal, 121 Pa. St. 260, 6 Am. St. Rep. 795, 15 Atl. 468; Wistar v. McManus, 54 Pa. St. 318, 93 Am. Dec. 700; Wheeler v. Alderman, 34 S. C. 533, 27 Am. St. Rep. 842, 13 S. E. 673; Lumpkin v. Williams, 1 Tex. Civ. App. 214, 21 S. W. 967; Williams v. Lumpkin, 86 Tex. 641, 26 S. W. 493; Huff v. Miller (Tenn. Ch. App.), 58 S. W. 876; Dandridge v. Harris, 1 Wash. (Va.) 326, 1 Am. Dec. 465; Griffith v. Griffith (Tenn. Ch. App.), 46 S. W. 340; Royal Indemnity Co. v. Sangor,

§ 2074. (§ 653.) Fraud Subsequent to Trial.—Relief may be granted to a party injured by the fraudulent conduct of his opponent after the trial. Thus, where too large an amount is fraudulently entered in a decree by counsel, or where one decree is fraudulently substituted for another, equity may interfere;65 but the mere fact that an attorney, requested by a judge to frame a decree, acts fraudulently, is no ground for relief unless it is affirmatively shown that the judge has been imposed upon.66 It will be presumed that the judge has done his duty. An injunction may issue to restrain a party from keeping a judgment alive after it has been satisfied.<sup>67</sup> Not only may the defendant at law obtain equitable relief, but the plaintiff as well may in a proper case invoke its aid. Thus, where a plaintiff releases one of two joint debtors upon the urgent request of the other, and upon a promise by such other to pay, an injunction will issue to restrain such a party from taking advantage of his right at law to cancel the judgment.68

§ 2075. (§ 654.) Fraudulent Concealment.—Fraudulent concealment is sometimes relied upon as a ground for equitable relief against judgments. In order that concealment shall be ground for any equitable relief, there must be a duty to disclose. Ordinarily when there are two parties on an equal footing before the court, there is no such duty.<sup>69</sup> The concealment which is

166 Wis. 148, 164 N. W. 821; Carrington v. Holabird, 17 Conn. 530, 19 Conn. 84. This subject is discussed in a monographic note, 54 Am. St. Rep. 236 ff.

<sup>65</sup> Peck Lateral Ditch Co. v. Pella Irr. Ditch Co., 19 Colo. 222, 34 Pac. 988; McTeer v. Brisoe (Tenn. Ch. App.), 61 S. W. 564.

<sup>66</sup> Weaver v. Vanderwanter, 84 Tex. 691, 19 S. W. 889.

<sup>67</sup> Robinson v. Davis, 11 N. J. Eq. 302, 69 Am. Dec. 591.

<sup>68</sup> Cregar v. Cramen, 31 N. J. Eq. 375.

<sup>69</sup> The text is quoted in De Soto Coal Mining & Development Co. v. Hill, 194 Ala. 537, 69 South. 948 (should not rely on misrepresentations of adversary as to merits of case).

ground for relief generally arises in an ex parte proceeding where the court is deceived by facts concealed by the applicant for relief. Where fraudulent concealment is relied upon for the purpose of impeaching and setting aside a judgment regularly obtained, it must be an intentional concealment of a material or controlling fact, for the purpose of misleading or taking an undue advantage of the opposite party. That the adversary has not communicated facts which tend to defeat his claim or to impeach his witnesses is not ground for relief. An adversary cannot be expected to furnish the means for his defeat.

§ 2076. (§ 655.) Instances of Refusal of Relief.—Relief in equity will be refused where it appears that the fraud, even if attempted, was not successful. The mere fact that there is prejudice in the community which may prevent a fair trial is not ground for relief, for there is an adequate remedy at law; 14 nor does the fact that complainant was not notified of a default judgment show any unconscionable conduct. The mere fil-

70 The text is cited in De Soto Coal Mining & Development Co. v. Hill, 194 Ala. 537, 69 South. 948. See Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; Curtis v. Schell, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951; Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282.

71 Ward v. Town of Southfield, 102 N. Y. 287, 6 N. E. 660; Tucker v. Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101; Tomkins v. Tomkins, 11 N. J. Eq. 512; Moore v. Gulley, 144 N. C. 81, 10 L. R. A. (N. S.) 242, 56 S. E. 681; Thomason v. Thompson, 129 Ga. 440, 26 L. R. A. (N. S.) 536, 59 S. E. 236.

72 The text is quoted in De Soto Coal Mining & Development Co. v. Hill, 194 Ala. 537, 69 South. 948. See Mosby v. Gisborn, 17 Utah, 257, 54 Pac. 121; Taylor v. Bradshaw, 22 Ky. (6 T. B. Mon.) 145, 17 Am. Dec. 132; Long v. Gilbert (Tenn. Ch. App.), 59 S. W. 414; Nye v. Sochor, 92 Wis. 40, 53 Am. St. Rep. 896, 65 N. W. 854.

- 73 Allen v. Allen, 97 Fed. 525, 38 C. C. A. 336.
- 74 Graham v. Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.
- 75 Trustees of Amherst College v. Allen, 165 Mass. 178, 42 N. E. 570.

ing of a brief, surreptitiously perhaps, cannot be taken advantage of, for the court is not supposed to decide the case upon the briefs.<sup>76</sup> Other cases where it was held that no fraud was shown are appended in the note.<sup>77</sup>

(§ 656.) Perjury.—The courts hold that perjury is intrinsic fraud and that therefore it is not ground for equitable relief against a judgment resulting from it. We have seen that the fraud which warrants equity in interfering with such a solemn thing as a judgment must be fraud in obtaining the judgment, and must be such as prevents the losing party from having an adversary trial of the issue. Perjury is a fraud in obtaining the judgment, but it does not prevent an adversary trial. The losing party is before the court and is well able to make his defense. His opponent does nothing to prevent it. This rule seems harsh, for often a party will lose valuable rights because of the perjury of his adversary. However, public policy seems to demand that there be an end to litigation. If perjury were accepted as a ground for relief, litigation might be endless; the same issues would have to be tried repeatedly. As stated in a leading case, "the wrong, in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is, that a final judgment cannot be annulled merely because it can be

<sup>76</sup> Cox v. Bank of Hartsville (Tenn. Ch. App.), 63 S. W. 237.

<sup>77</sup> Mason v. House, 20 Tex. Civ. App. 500, 49 S. W. 911; McDonald v. Pearson, 114 Ala. 630, 21 South. 534; Wright v. Smith, 13 App. Div. 536, 43 N. Y. Supp. 728; Cayee v. Powell, 20 Tex. 767, 73 Am. Dec. 211.

shown to have been based on perjured testimony; for if this could be done once, it could be done again and again ad infinitum." And to use the language of an eminent court, "the maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted." <sup>79</sup>

In accordance with the principles laid down above, it is held, by the weight of authority, that neither perjury nor forgery is sufficient ground for equitable interference.<sup>80</sup> There is quite respectable authority, how-

<sup>78</sup> Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 13 L. R. A. 336,
25 Pac. 970, 27 Pac. 537. The text is quoted in Mottu v. Davis, 153
N. C. 160, 69 S. E. 63.

<sup>79</sup> Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454.

<sup>80</sup> United States v. Throckmorton, 98 U.S. 61, 25 L. Ed. 93; Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929; Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537; United States v. Beebe, 180 U. S. 343, 45 L. Ed. 563, 21 Sup. Ct. 371; Steen v. March, 132 Cal. 616, 64 Pac. 994; Wilkins v. Sherwood. 55 Minn. 154, 56 N. W. 591; Woodruff v. Johnston, 61 N. Y. Sup. Ct. 348, 19 N. Y. Supp. 861; Camp v. Ward, 69 Vt. 286, 60 Am. St. Rep. 929, 37 Atl. 747; Heathcote v. Haskins, 74 Iowa, 566, 38 N. W. 417; Maryland Steel Co. v. Marney, 91 Md. 360, 46 Atl. 1077; Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454; Wabash R. Co. v. Mirrielees, 182 Mo. 128, 81 S. W. 437; Farmers & Shippers' L. T. Warehouse Co. v. Pridemore, 55 W. Va. 451, 47 S. E. 258; Estes v. Timmons, 12 Okl. 537, 73 Pac. 303; Noll v. Chattanooga Co. (Tenn. Ch. App.), 38 S. W. 287; Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082. See, also, Estes v. Timmons, 199 U. S. 391, 50 L. Ed. 241, 26 Sup. Ct. 85 (decision of land department alleged to have been obtained by perjured testimony); Kretschmar v. Ruprecht, 230 Ill. 492, 82 N. E. 836; Richards v. Moran, 137 Iowa, 220, 114 N. W. 1035; Mengel v. Mengel, 145 Iowa, 737, 120 N. W. 72, 122 N. W. 899; Electric Plaster Co. v. Blue Rapids City Tp., 81 Kan. 730, 25 L. R. A. (N. S.) 1237. 106 Pac. 1079; Nesson v. Gilson, 224 Mass. 212, 112 N. E. 870; Steele

ever, the other way, and many are disposed to regard this minority rule as more in accordance with justice. In Nebraska the cases cited lay down the rule that the intentional production by a litigant of false testimony to establish his cause of action or defense amounts to such a fraud as will, in a proper case, entitle the adverse party, if unsuccessful, to the vacation of the judgment rendered against him. In a late case, however, it is said that actions of this kind are not to be encouraged, for public policy demands that there shall be an end to

v. Culver, 157 Mich. 344, 23 L. R. A. (N. S.) 564, 122 N. W. 95 (no relief though judgment plaintiff has confessed the perjury); Howard v. Scott, 225 Mo. 685, 125 S. W. 1158; Springfield Traction Co. v. Dent, 159 Mo. App. 220, 140 S. W. 606; French v. Raymond, 82 Vt. 156, 137 Am. St. Rep. 994, 72 Atl. 324 (award not set aside for perjury).

81 Barr v. Post, 59 Neb. 361, 80 Am. St. Rep. 680, 80 N. W. 1041; Munro v. Callahan, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151; Secord v. Powers, 61 Neb. 615, 87 Am. St. Rep. 474, 85 N. W. 846; Peagram v. King, 9 N. C. 295, 11 Am. Dec. 793; Meyers v. Smith, 59 Neb. 30, 80 N. W. 273; Miller v. Miller's Estate, 69 Neb. 441, 95 N. W. 1010; Avocato v. Dell' Ara (Tex. Civ. App.), 84 S. W. 443. See, also, Koop v. Acken, 90 Neb. 77, 35 L. R. A. (N. S.) 782, 132 N. W. 721; Moore v. Gulley, 144 N. C. 81, 10 L. R. A. (N. S.) 242, 56 S. E. 681 (intimated that perjury may be ground for relief where it is shown by written evidence, by a conviction, or by a dying declaration); El Reno Mut. Fire Ins. Co. v. Sutton, 41 Okl. 297, 50 L. R. A. (N. S.) 1064, 137 Pac. 700; Boring v. Ott, 138 Wis. 260, 19 L. R. A. (N. S.) 1080, 119 N. W. 865 (where evidence establishes perjury beyond reasonable controversy, and other party used diligence). In Minnesota it is provided by statute "that in all cases where judgment heretofore has been, or hereafter may be, obtained in any court of record by means of perjury, subornation of perjury, or any fraudulent act, practice or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice or representation": Gen. Stats. 1878, c. 66, § 285. In Stewart v. Duncan, 40 Minn. 410, 42 N. W. 89, it was held that "this statute is in derogation of the wellestablished and salutary principle and policy of the common law, litigation.<sup>82</sup> In some jurisdictions it is laid down that evidence of perjury is not sufficient ground for relief unless it appears to a reasonable certainty that, but for such testimony, the judgment would have been different.<sup>83</sup> In one case a distinction is attempted between actions at law and suits in equity, the contention being that perjury in an equity case is ground for relief.<sup>84</sup> In Washington and Oregon the general rule is guarded with limitations which appear to mitigate its harshness without contravening its policy.<sup>85</sup> It would seem correct to hold that while perjury itself may not be ground for relief, it may be considered along with other circumstances to show a fraudulent intent.<sup>86</sup>

which forbids the retrial of issues once determined by a final judgment, and that the statute should not, therefore, be so construed as to extend its operation beyond its most obvious import." In Watkins v. Landon, 67 Minn. 136, 69 N. W. 711, the rule is stated as follows: "When an issue is squarely made in a case, so that each party knows what the other will attempt to prove, and neither has a right, or is under any necessity, to depend on the other proving the fact as he himself claims it, the mere allegation by the defeated party that there was, as to such issue, false or perjured testimony by the successful party or his witnesses will not bring his case within the meaning of the statute." See, also, Hass v. Billings, 42 Minn. 63, 43 N. W. 797; Moudry v. Witzka, 89 Minn. 300, 94 N. W 885.

- 82 Barr v. Post, 59 Neb. 361, 80 Am. St. Rep. 680, 80 N. W. 1041. 83 Wood v. Davis, 108 Fed. 130; Holton v. Davis, 108 Fed. 138, 47
- C. C. A. 246. See, also, Koop v. Acken, 90 Neb. 77, 35 L. R. A. (N. S.) 782, 132 N. W. 721.
  - 84 Graver v. Faurot, 76 Fed. 257, 22 C. C. A. 156.
- 85 In McDougall v. Walling, 21 Wash. 478, 75 Am. St. Rep. 669, 58 Pac. 669, it is held that perjury does not constitute such a fraud as will authorize a vacation of a judgment, except under circumstances that deceive the opposite party as to the nature of the testimony, and relieve him of the implication of want of diligence in discovering its falsity. In Friese v. Hummel, 26 Or. 145, 46 Am. St. Rep. 610, 37 Pac. 458, it is held that a decree will not be set aside for perjury and fraud, unless the perjury and fraud are collateral to the questions examined and determined in the action.
  - 86 Colby v. Colby, 59 Minn. 420, 50 Am. St. Rep. 420, 61 N. W.

It would appear that a distinction might properly be drawn between cases in which two parties are before the court and ex parte proceedings. In the latter there is no adversary trial, so on principle there is no reason why relief should not be granted.87 Such was the holding in at least one state, California, but later decisions in that state have now greatly narrowed the exception as to ex parte proceedings. It is held that where there is a fraudulent concealment in connection with the perjury, equitable relief will be granted.88 It is difficult to imagine any ground upon which such a distinction can be upheld. Whether there is active perjury or passive concealment, there is still a fraud upon the court. To the average mind it will seem that an active falsehood is stronger ground for relief than passive concealment.

§ 2078. (§ 657.) Accident, Mistake and Surprise—In General.—Relief is frequently granted where, on account of accident, mistake or suprise, a party has, without his fault, been deprived of or caused not to present

460. See, also, Graves v. Graves, 132 Iowa, 199, 10 Ann. Cas. 1104, 10 L. R. A. (N. S.) 216, 109 N. W. 707.

87 Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; Dunlap v. Steere, 92 Cal. 344, 27 Am. St. Rep. 143, 16 L. R. A. 361, 28 Pac. 563. In this latter case the court said, referring to the general rule as laid down in United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93: "But the rule there announced is only applicable where the former judgment was the result of a trial between the parties, or where the one against whom the judgment was rendered had actual notice of the pendency of the action, and neglected to submit his proofs."

88 In the following cases of ex parte proceedings relief was denied: Fealey v. Fealey, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736. In the following cases relief was granted: Curtis v. Schell, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951; Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282.

some cause of action or matter of defense. The complaining party must not be at fault.89

§ 2079. (§ 658.) Accident.—The accident which is ground for relief in equity against a judgment must consist in circumstances beyond the control of the complaining party, which prevent him from obtaining proper relief. As in the case of fraud, the accident must relate to extrinsic matters, rather than to intrinsic. A most common illustration is where a party, without laches on his part, loses the benefit of a bill of exceptions by the death or illness of a judge, so that it cannot be signed and sealed. In such a case equity will interfere and grant proper relief.90 Likewise it has been held that where a statement of a case upon appeal has been lost without fault of the attorneys for the appellant, and, by reason of lapse of time, the judge is unable to settle the bill of exceptions, equity will relieve.91 Again, where a judge of a trial court is disabled by sudden sickness from disposing of a motion for a new trial during the term at which the judgment was rendered, the party filing the motion may, upon showing the facts in his

<sup>89</sup> Pom. Eq. Jur., §§ 836, 871, 1364.

<sup>90</sup> State v. Weiskittle, 61 Md. 49; Kansas & A. V. R'y Co. v. Fitzhugh, 61 Ark. 341, 54 Am. St. Rep. 211, 33 S. W. 960; Little Rock & F. S. R'y Co. v. Wells, 61 Ark. 354, 54 Am. St. Rep. 216, 33 S. W. 208; Wright v. Judge, 41 Mich. 726, 49 N. W. 925; Grafton & G. R. Co. v. Davisson, 45 W. Va. 12, 72 Am. St. Rep. 799, 29 S. E. 1028. But see Church v. Gallic, 75 Ark. 507, 88 S. W. 307 (mere allegation of loss of bill of exceptions by unavoidable accident is not sufficient).

<sup>91</sup> Commissioners of Greenville v. Old Dominion Steamship Co., 98 N. C. 163, 3 S. E. 505. The text is cited in Whitely v. St. Louis, E. R. & W. R'y Co., 29 Okl. 63, 116 Pac. 165 (loss of record, and removal of judge from state); Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491 (loss of essential exhibits pending an appeal, and until after time for relief by motion had expired). See, also, Washburn Land Co. v. White River Lumber Co., 165 Wis. 112, 161 N. W. 547 (loss of tax receipt, resulting in judgment against defendant).

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complaint, and that he was guilty of no negligence, and had a meritorious defense or cause of action, obtain relief in equity.92 Relief has also been allowed where an attorney who was entrusted with the duty of making a defense, was prevented from reaching court by ice in a river which he had to cross to reach the court-house.93 Sickness of a party may be a valid excuse for not appearing.94 Such cases, however, must depend upon the peculiar facts of each particular case. If a party has an attorney who can adequately present his defense, and if the presence of the party in court is not essential, sickness is not sufficient ground for relief. If, on the other hand, the party is needed as a witness, or if he is so sick when served that he cannot even take the first step of hiring an attorney, equity will relieve. The accident may consist in the failure of a state officer to perform a statutory duty, or to follow established rules.

<sup>92</sup> Leigh v. Armor, 35 Ark. 123.

<sup>93</sup> Ford v. Ford, 1 Miss. (Walk.) 505, 12 Am. Dec. 587. In Anthony v. Karbach, 64 Neb. 509, 97 Am. St. Rep. 662, 90 N. W. 243, dishonesty of attorney in failing to put in an answer was held to amount to such "casualty" as to entitle one to relief. Sudden illness of attorney, in absence of the party: Howell v. Ware & Harper, 133 Ga. 674, 66 S. E. 884. Absence of one of defendant's attorneys, who had cumulative evidence in his possession, is not ground for relief: Waldo v. Preston, 135 Pa. St. 181, 19 Atl. 1078.

<sup>94</sup> McKean v. Read, 16 Ky. 395, 12 Am. Dec. 318; Owen v. Gerson, 119 Ala. 217, 24 South. 413; Rice v. R. R. Bank, 7 Humph. 39. In Aultman, Miller & Co. v. Higbee, 32 Tex. Civ. App. 521, 74 S. W. 955, relief was refused, although both defendant and his attorney were prevented from attending court by reason of an epidemic of smallpox. It was held that another attorney should have been secured. See, also, Hopper v. Davies, 70 Ill. App. 682. See the following miscellaneous cases: Beveridge v. Hewitt, 8 Ill. App. 467 (an attorney failed to defend a case because the court failed to follow its rule requiring a new calendar of cases to be made up each month. and relief was granted); Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216 (relief denied).

thus depriving a party of an opportunity to make a defense.95

§ 2080. (§ 659.) Mistake.—It is a familiar doctrine that a mistake of law will not be relieved against save in certain exceptional cases. This principle is generally applied to relief against judgments. Bearing in mind that we are now considering only mistakes as to the proceedings, it is clear that a party should not be allowed to set up his lack of knowledge of law as a reason for not presenting his case. If he were allowed this right, it would be a very simple matter for an unsuccessful litigant to obtain a new trial on the ground that he did not present certain evidence because he thought it would not be admissible. The advice of counsel that there is no defense, or a similar expression from the judge on

95 "The failure of an officer of a state, whom foreign corporations are compelled by the statutes of the state to appoint their agent to receive service of process, as a condition of doing business in the state, to comply with a statute which requires him to send a summons to the defendant, to which it is directed, immediately upon its receipt, is not such fault or negligence of the defendant corporation as will estop it from securing equitable relief from an unconscionable judgment, which it was prevented from defending itself against by the neglect of the officer. It is an unavoidable accident, which the corporation could neither have foreseen nor anticipated": National Surety Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657. See Weed v. Hunt, 76 Vt. 212, 56 Atl. 980 (clerk of court agreed to notify attorney of any orders filed; he failed to do so and default was taken; relief granted; no statutory duty).

96 Dickerson v. Board of Commissioners of Ripley County, 6 Ind. 128, 63 Am. Dec. 373; Meem v. Rucker, 10 Gratt. 506; McKean v. Read, 16 Ky. 395, 12 Am. Dec. 318. See, also, Harrigan v. Peoria County, 262 Ill. 36, 104 N. E. 172 (bill of review does not lie on ground that party to suit did not know that the decree was contrary to state and federal constitution); Einstein v. Strother (Mo. App.), 182 S. W. 122 (mistake of plaintiff as to right of defendant, an executor, to charge commissions). Compare Wellman v. Bethea, 228 Fed. 882, 143 C. C. A. 280 (mistake of both parties as to effect of consent decree). See 2 Pom. Eq. Jur., §§ 841-851.

the bench, will not be sufficient to warrant equity in relieving from a mistaken course taken in reliance on such advice. 97 Mistakes of fact in this connection may be divided into two classes—mistakes by a party or his attorney, and mistakes by some officer of the court. These classes cannot be sharply distinguished, for it often happens that the mistake of the court is due to a mistake of a party. In order that a mistake of a party may be ground for relief, there must be no neglect on his part. A mistake due to one's own failure to investigate is not such as will warrant relief.98 But where there is no negligence, and a party is prevented from presenting his case properly on account of a mistake of fact, equity will interfere and will relieve.99 Thus, where an attorney for a plaintiff makes an error in the calculation of interest and takes a judgment for too small an amount, relief may be granted, for the error is merely clerical. 100 Likewise, where the amount of at-

97 Risher v. Roush, 2 Mo. 95, 22 Am. Dec. 442. But see Douglass v. Todd, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623. In this case the court says: "Section 1576 of the Civil Code is as follows: 'Mistake may be either of fact or law.' So that it would seem clear that in using the word 'mistake,' in section 473 of the Code of Civil Procedure, without any qualification, it was intended not to restrict the court in granting relief in furtherance of justice to that kind of mistake which involves only facts.'' "Of course, it does not follow that all mistakes of law are to be relieved against. A sound discretion controlled by an enlightened judgment, keeping in view public interests and the due and orderly administration of the law, is to be exercised in granting that relief which justice between the parties to the cause seems to require." The relief here was by motion, under the section of the Code of Civil Procedure referred to.

98 Yancey v. Downer, 15 Ky. 8, 15 Am. Dec. 35; Green v. Dodge, 6 Ohio 80, 25 Am. Dec. 736; Long v. Eisenbeis, 18 Wash. 423, 51 Pac. 1061; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604; English v. Aldrich, 132 Ind. 500, 32 Am. St. Rep. 270, 31 N. E. 456; Smith v. McLain, 11 W. Va. 654.

<sup>99</sup> Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604.

<sup>100</sup> Wilson v. Boughton, 50 Mo. 17; Long v. Eisenbeis, 18 Wash. 423, 51 Pac. 1061.

torney's fees was agreed to in court under a mistake of fact as to the value of the estate, 101 or where a widow makes an election to take under a will under a similar mistake, equity will relieve. 102

§ 2081. (§ 660.) Same—Mistake of Officers of Court. When the court, or some officer thereof, makes a mistake of fact, not judicial in its nature, equity may relieve. Of course if the mistake is judicial, there is an adequate remedy by appeal. It often happens that owing to a mistake of fact there is an error in the judgment, or that it misdescribes land, or that a judgment is given not warranted by the pleadings. In such cases relief may be awarded. Thus, where a decree of distribution omits a legatee, or where a record of a deed is inaccurate so that judgment has gone against a party, the jurisdiction is clear. The mistake may be made

101 Lane v. Moss, 64 Hun, 632, 18 N. Y. Supp. 605. Where, by mistake of all parties as to the reading of a will, a legatee was induced to accept \$2,000 in satisfaction of a \$10,000 legacy, and this mistake was carried into the decree of distribution, relief was given: Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317 (an instructive opinion).

102 Hill v. Hill, 62 N. J. L. 442, 41 Atl. 943. As to election, see
 1 Pom. Eq. Jur., § 512.

103 The text is cited in Engler v. Knoblaugh, 131 Mo. App. 481, 110 S. W. 16 (error of clerk in entering judgment; may be proved by parol evidence); Curtiss v. Bell, 131 Mo. App. 245, 111 S. W. 131. See 2 Pom. Eq. Jur., § 871, and cases cited; Smith v. Butler, 11 Or. 46, 4 Pac. 517; Quivey v. Butler, 37 Cal. 465; Murphy v. Johnson, 107 Tenn. 552, 64 S. W. 894; Henry v. Seager, 80 Ill. App. 172 (mistake of court clerk in not entering dismissal); Prussian Nat. Ins. Co. v. Chichocky, 94 Ill. App. 168 (mistake of judge in dismissing case called out of order). See, also, Moore v. Shook, 276 Ill. 47, 114 N. E. 592 (an interesting case; divorce decree corrected in order to validate remarriage); Jefferson v. Gregory, 113 Va. 61, 73 S. E. 452 (error in description on judicial sale). In State Bank v. Young, 2 Ind. 171, 52 Am. Dec. 501, it is held that a court of chancery cannot correct a record on account of the clerk of court making a mistake in entering judgment.

104 Hall v. Hall, 98 Wis. 193, 73 N. W. 1000; Clark v. Sayers, 48 W. Va. 33, 35 S. E. 882.

by the jury in calculating the amount due.<sup>105</sup> Where a judgment is entered on an agreement to which one defendant's name was forged, although a co-defendant who forged it was the only culpable party, relief will be granted, for the judgment is entered under a mistake of fact.<sup>106</sup> In order to warrant relief, there must be clear and conclusive evidence of mistake.<sup>107</sup>

§ 2082. (§ 661.) Same—Newly Discovered Evidence. It frequently happens that a party, through no fault of his own, is ignorant of facts constituting a defense to the action. The rule in such cases is that equity will relieve if the party could not, by the exercise of reasonable diligence, have obtained the evidence. But if there has been an ample opportunity to discover the evidence, and it is not then forthcoming, relief will be denied. 109

§ 2083. (§ 662.) Surprise.—Surprise is also frequently stated to be ground for equitable relief. As in the case of all the other matters which constitute grounds for relief against judgments, there must be no negligence. The surprise which is ground for relief

105 Rust v. Ware, 6 Gratt. 50, 52 Am. Dec. 100; Cohen v. Dubose, 1 Harp. Eq. 102, 14 Am. Dec. 709. In Hamburg-Bremen Fire Ins. Co. v. Pelzer Mfg. Co., 76 Fed. 479, 22 C. C. A. 283, the foreman of the jury, by mistake, had omitted to read one of the items allowed by the jury, and relief was given.

106 Lindsley v. Sparks, 20 Tex. Civ. App. 56, 48 S. W. 204.

107 Katz v. Moore, 13 Md. 566.

108 Dey v. Martin, 78 Va. 1; Roach v. Duckworth, 61 How. Pr. 128; Chicago & E. I. R. Co. v. Hay, 119 Ill. 493, 10 N. E. 29; in Hubbard v. State, 72 Neb. 62, 9 Ann. Cas. 1034, 100 N. W. 153, it was held that this rule does not apply to criminal cases.

109 Peters v. League, 13 Md. 58, 71 Am. Dec. 622; Hall v. Griffin, 119 Ala. 214, 24 South. 27; Hayes v. United States Phonograph Co., 65 N. J. Eq. 5, 55 Atl. 84. See, also, Pickford v. Talbott, 225 U. S. 651, 56 L. Ed. 1240, 32 Sup. Ct. 687; Citizens' Ins. Co. v. Herpolsheimer Imp. Co., 78 Neb. 707, 111 N. W. 606.

must consist in something in the proceedings which the party did not expect and which he had no reasonable ground to expect. The doctrine will be best illustrated by examining the facts of a few cases. Thus, in a federal case, foreigners were sued and were represented by an attorney. At the trial the complaint was amended, and the attorney was unable to meet the amendments. It was held a proper case for equitable interference. 110 Again, in another case, a verdict was obtained against the plaintiff by the production of a receipt signed by his agent, of which he was not notified and probably had no knowledge, and which he had no reason to expect would be produced. It was shown by evidence obtained too late to be available at law that the receipt was in reality given for other money. This was held to be ground for relief.<sup>111</sup> An injunction has issued against the enforcement of a judgment of a justice of the peace who agreed to notify the complainant of the time set for trial, but failed to do so. 112 The mere failure of an attorney, who has been employed, to appear does not constitute surprise, especially when the party has not supplied him with the facts necessary for a defense. 113 Ordinarily, when unexpected testimony is introduced it is the duty of the surprised party to ask for a continuance; and it would seem, in the absence of such a motion, that equitable relief should be denied. 114

§ 2084. (§ 663.) Want of Jurisdiction—Failure to Serve Summons or Process.—In many cases courts of equity will interfere to prevent injustice when a court

<sup>110</sup> Bell v. Cunningham, 1 Sumn. 89, Fed. Cas. No. 1246.

<sup>111</sup> Barnes v. Milne, 1 Rich. Eq. Cas. 459, 24 Am. Dec. 422.

<sup>112</sup> Levy v. Metropolis Mfg. Co., 73 Conn. 559, 48 Atl. 429.

 <sup>113</sup> Kearney v. Smith, 11 Tenn. 127, 24 Am. Dec. 550; Callaway
 v. Alexander, 8 Leigh, 114, 31 Am. Dec. 640.

<sup>114</sup> Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216 (a case of accident). See, also, Moore v. Gulley, 144 N. C. 81, 10 L. R. A. (N. S.) 242, 56 S. E. 681.

of law has acted without jurisdiction. This interference is based on the inequitable results which follow, and frequently is wholly independent of any wrong on the part of the prevailing party. One of the commonest illustrations is found in cases where no jurisdiction has been obtained because there has been no service of summons or process. The rule seems to be that where the failure to serve a party results in his inability to answer, relief will be granted. On the point as to whether a meritorious defense must be shown, the courts are divided. The question is discussed more at length in a subsequent paragraph.

The defect in service may not be apparent on the record, or again, the record itself may show the want of jurisdiction. In the former case the question arises as to whether a return can be attacked. It was formerly held by common-law courts that their judgments purported absolute verity. If the jurisdiction of the court depended upon the false return of an officer to the service of process, the party injured could maintain an action against the officer, but he could not be relieved from the judgment. The modern equity cases have greatly ameliorated this harsh doctrine, and it can be safely stated that the general rule, by the weight of authority, is that a return may be attacked in an action to set aside the judgment. The justice of this rule

115 Sections 663 et seq. are cited in Wilmer v. Epstein, 116 Md. 140, 81 Atl. 379. See Mutual Reserve Fund Life Ass'n v. Phelps, 103 Fed. 515; Raisin Fertilizer Co. v. McKenna, 114 Ala. 274, 21 South. 816; People v. Temple, 103 Cal. 447, 37 Pac. 414; Robberson v. Crow, 3 Ind. Ter. 174, 53 S. W. 534; Keely v. East Side Imp. Co., 16 Colo. App. 365, 65 Pac. 456; Leonard v. Capital Ins. Co., 101 Iowa, 482, 70 N. W. 629; Smoot v. Judd, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 854; Bell v. Williams, 1 Head, 229; Kochman v. O'Neill, 202 III. 110, 66 N. E. 1047; Rice v. Tobias, 89 Ala. 214, 7 South. 765. 116 Smith v. Morrill, 12 Colo. App. 233, 55 Pac. 824; Huntington v. Crouter, 33 Or. 408, 72 Am. St. Rep. 726, 54 Pac. 208; Ryan v. Bovd. 33 Ark. 778; McNeill v. Edie, 24 Kan. 108; Walker v. Gil.

requires no argument. The remedy at law against an officer is at best of a very doubtful character, and in many cases damages, if recovered, are a wholly inadequate remedy; for example, where the action is for the recovery of land. Some courts, however, have laid down the rule that an officer's return cannot be attacked unless it is willfully false and has been procured by the plaintiff at law. 117 The effect of this is to make the basis of the equity action fraud by the plaintiff at law. The injured party must, if no fraud be shown, depend upon his remedy against the officer. It is everywhere held, however, that the officer's return is prima facie evidence of regularity. The court in a default judgment must find that there has been due service. This finding will be presumed to be correct. Therefore, in order to impeach it, clear and satisfactory evidence must be pro-

bert, Freem. Ch. (Miss.) 85; Jones v. Commercial Bank of Columbia, 6 Miss. 43, 35 Am. Dec. 419; Duncan v. Gerdine, 59 Miss. 550; Dowell v. Goodwin, 22 R. I. 287, 84 Am. St. Rep. 842, 51 L. R. A. 873, 47 Atl. 693; Ridgeway v. Bank of Tennessee, 11 Humph. 523; Raisin Fertilizer Co. v. McKenna, 114 Ala. 274, 21 South. 816; Ruff v. Elkin, 40 S. C. 69, 18 S. E. 220; Owens v. Ranstead, 22 Ill. 161; Crafts v. Dexter, 8 Ala. 767, 42 Am. Dec. 666. It has been held that the evidence alone of the party himself is not sufficient to overturn the sheriff's return: Allen v. Hickey, 53 Ill. App. 437. To the effect that the return is conclusive, see Smoot v. Judd, 184 Mo. 508, 83 S. W. 481; Reiger v. Mullins, 210 Mo. 563, 124 Am. St. Rep. 755, with note on this subject, 109 S. W. 26.

117 Taylor v. Lewis, 25 Ky. 400, 19 Am. Dec. 135; Thomas v. Ireland, 88 Ky. 581, 21 Am. St. Rep. 356, 11 S. W. 653; Preston v. Kindrick, 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588; McClung v.-McWhorter, 47 W. Va. 150, 81 Am. St. Rep. 785, 34 S. E. 740; Cully v. Shirk, 131 Ind. 76, 31 Am. St. Rep. 414, 30 N. E. 882, distinguishing Dobbins v. McNamara, 113 Ind. 54, 3 Am. St. Rep. 626, 14 N. E. 887. See Walker v. Robbins, 55 U. S. (14 How.) 584, 14 L. Ed. 552. In Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687, these facts existed and relief was granted. See, also, Anthony v. Masters, 28 Ind. App. 239, 62 N. E. 505.

duced.<sup>118</sup> Often a summons is served by a private individual. In such cases the grounds upon which the officer's return is protected in some jurisdictions do not exist, and accordingly it is believed that an attack on the judgment will generally be allowed.<sup>119</sup>

§ 2085. (§ 664.) Same—Continued.—Where the judgment is attacked because of failure to serve process the usual principle applies, that relief will not be granted where there is an adequate remedy at law.<sup>120</sup> In most cases, as will be seen upon an examination of those heretofore cited, it is held that there is no such adequate remedy. In some states, however, it is held that a remedy by motion is sufficient and will bar all claim to equitable relief.<sup>121</sup> Much will depend upon the form of the statutes in the various jurisdictions.

Where a return is defective on its face, the judgment is clearly void. Some courts divide the cases into two classes, void judgments and voidable judgments—the former being those in which the defect is apparent and the latter those in which it is not. The general rule seems to be that equity will interfere with a judgment

<sup>118</sup> Jamison v. Weaver, 84 Iowa, 611, 51 N. W. 65; Huntington v. Crouter, 33 Or. 408, 72 Am. St. Rep. 726, 54 Pac. 208; Jones v. Commercial Bank of Columbus, 6 Miss. (5 How.) 43, 35 Am. Dec. 419; Northwestern & Pac. Hypotheek Bank v. Ridpath, 29 Wash. 878, 70 Pac. 139.

<sup>119</sup> Lapham v. Campbell, 61 Cal. 296.

<sup>120</sup> Walker v. Robbins, 55 U. S. (14 How.) 584, 14 L. Ed. 552; Hockaday v. Jones, 8 Okl. 156, 56 Pac. 1054; St. Louis & S. F. R'y Co. v. Lowder, 138 Mo. 533, 60 Am. St. Rep. 565, 39 S. W. 799; Railway Co. v. Ryan, 31 W. Va. 364, 13 Am. St. Rep. 865, 6 S. E. 924; Graham v. Roberts, 1 Head. 56; Armsworthy v. Cheshire, 17 N. C. 234, 34 Am. Dec. 273; Crocker v. Allen, 34 S. C. 452, 27 Am. St. Rep. 831, 13 S. E. 650; Dearing v. Bank of Charleston, 5 Ga. 497, 48 Am. Dec. 300. See, also, New York Life Ins. Co. v. Mobley, 90 S. C. 552, 73 S. E. 1032 (complete remedy by motion); Cage & Crow v. Owens (Tex. Civ. App.), 103 S. W. 1191 (same).

<sup>121</sup> See cases in preceding note.

even where it is void on its face provided the legal remedy has been lost.<sup>122</sup> This rule is not universal, however, for some courts, on the analogy of the familiar rule concerning cloud on title, hold that such a judgment, being a nullity, can confer no rights, and that therefore there is always an adequate remedy at law.<sup>123</sup>

A mere defect in the service of summons is not sufficient to warrant the interference of equity if the summons gives notice to the defendant so that he can prepare his defense. Where, however, the defect is such that it deprives the defendant of notice, relief will be granted. Thus, equity has interfered where, a statute requiring a copy of the declaration to be left at the dwelling-house of the defendant if he be absent, the copy is left upon the premises over a hundred feet from the house. Likewise, relief is proper when a summons is left at the residence of a defendant who is confined in an insane asylum, and neither he nor anyone for him has notice of the suit. Where, in an action against

122 Nicholson v. Stephens, 47 Ind. 185; San Juan etc. Co. v. Finch, 6 Colo. 214. In this case the court said: "That a judgment rendered against a party not before the court is invalid, is a jurisdictional principle of elementary familiarity, and that a court of chancery may interpose to enjoin the execution of a judgment rendered against a party without service of process upon him, by reason whereof he does not appear or make defense to the action, is well settled by weight of authorities."

123 Russell v. Interstate Lumber Co., 112 Mo. 40, 20 S. W. 26; Henman v. Westheimer, 110 Mo. App. 191, 85 S. W. 101 (dictum). Compare Hoover v. Bartlett, 42 Or. 145, 70 Pac. 378.

124 Chas. C. Taft Co. v. Bounani, 110 Iowa, 739, 81 N. W. 469; Griffith v. Milwaukee Harvester Co., 92 Iowa, 634, 54 Am. St. Rep. 573, 61 N. W. 243. See, also, Van Buren v. Posteraro, 45 Colo. 588, 132 Am. St. Rep. 199, 102 Pac. 1067.

125 Kibbe v. Benson, 84 U. S. (17 Wall.) 624, 21 L. Ed. 741. So, where the defendant did not understand that a summons was being read to him: Hilt v. Heimberger, 235 Ill. 235, 85 N. E. 304.

126 Blakeslee v. Murphy, 44 Conn. 188. See, also, State ex rel. Happel v. District Court, 38 Mont. 166, 129 Am. St. Rep. 636, 35

a corporation, service of process was accepted by the president and the secretary while acting as agents for the plaintiff, equitable relief was granted.<sup>127</sup> A summons in an action against a corporation must be served upon the proper officer. Accordingly, a judgment rendered on default when service had been made upon a local agent of an insurance company, who had no authority for that purpose, was canceled.<sup>128</sup> Where service is obtained by publication, by means of a false affidavit, relief may sometimes be granted; but where the acts of the defendant have induced the belief that he is a non-resident, relief will be refused.<sup>129</sup>

§ 2086. (§ 665.) Same—Unauthorized Appearance of Attorney.—Closely akin to judgments obtained by default are judgments obtained on the unauthorized appearance of an attorney. An attorney of a court of record is an officer of the court, and when he appears in a case it is presumed that he acts with authority. earlier cases, following somewhat the same line of argument as that used by the courts which hold that an officer's return cannot be attacked, held that ordinarily the judgment could not be questioned because of the unauthorized appearance of an attorney, unless there was collusion. 130 The remedy was against the attorney only. If he were insolvent the remedy against him might be inadequate, and in such event equity would probably take jurisdiction. The modern view, however, is that equity will relieve against a judgment obtained without

L. R. A. (N. S.) 1098, 99 Pac. 291 (no service on insane defendant); Wilcke v. Duross, 144 Mich. 243, 115 Am. St. Rep. 394, 107 N. W. 907 (service on daughter of defendant instead of on defendant).

<sup>127</sup> Fox v. Robbins (Tex. Civ. App.), 62 S. W. 815.

<sup>128</sup> State Ins. Co. v. Waterhouse, 78 Iowa, 674, 43 N. W. 611.

<sup>129</sup> McQuiddy v. Ware, 87 U. S. (20 Wall.) 14, 22 L. Ed. 311.

<sup>130</sup> Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144. See cases cited in note to this case in 75 Am. Dec. There is also a collection of cases in the note in 54 Am. St. Rep. 247.

service of process and upon the unauthorized appearance of an attorney. 131 As in the case of the sheriff described in the two preceding sections, the remedy against an attorney is generally unsatisfactory. Hence it is now held to be immaterial whether the attorney is solvent or not.132 A party is entitled to his day in court, and if he is deprived of that, whether by collusion or by the wrongful act of the attorney alone, he should be relieved. 133 The constitutions of the various states provide that no person shall be deprived of property without due process of law. To take one's property without giving him an opportunity to be heard is a violation of this provision. Hence it would seem that the duty of a court of equity is clear. An attorney, however, is presumed to act with authority, and therefore the burden of showing the lack is upon the complainant attacking the judgment.

§ 2087. (§ 666.) Same — Miscellaneous. — Numerous other cases may arise in which the court may be without jurisdiction. The amount involved may be too large for the court to take jurisdiction of the suit, and again

131 Shelton v. Tiffin, 47 U. S. (6 How.) 163, 12 L. Ed. 387; Brown v. Walker, 84 Fed. 532; McEachern v. Brackett, 8 Wash. 652, 40 Am. St. Rep. 922, 36 Pac. 690; Cassidy v. Automatic Time-Stamp Co., 185 Ill. 431, 56 N. E. 1116; Nelson v. Rockwell, 14 Ill. 375; Du Bois v. Clark, 12 Colo. App. 220, 55 Pac. 750; Handley v. Jackson, 31 Or. 552, 65 Am. St. Rep. 839, 50 Pac. 915; Harshey v. Blackman, 20 Iowa, 161, 89 Am. Dec. 520; Corbitt v. Timmerman, 95 Mich. 581, 35 Am. St. Rep. 586, 55 N. W. 437; Goldie Const. Co. v. Rich Const. Co., 112 Mo. App. 147, 86 S. W. 587. See, also, Robb v. Vos, 155 U. S. 13, 39 L. Ed. 52, 15 Sup. Ct. 4; Owens v. Cage & Crow, 101 Tex. 286, 106 S. W. 880.

132 Handley v. Jackson, 31 Or. 552, 65 Am. St. Rep. 839, 50 Pac. 915.

133 See cases cited above. It is incumbent upon the party claiming that an appearance is unauthorized to prove it: Stubbs v. Leavitt, 30 Ala. 352.

it may be too small.<sup>134</sup> The judge may be disqualified from acting because of interest in the result. 135 judgment may be entered before the time to answer has expired. 136 The nature of the suit may be such that the court has no jurisdiction. 137 For instance, in many states a justice's court has no equity jurisdiction, and if it assumes such jurisdiction, its decree may be enjoined. Again, the court may have no jurisdiction of the person of the defendant because ke lives in another county.138 In these and similar cases,139 courts of equity have granted relief. The judgment must be void, however, and not erroneous only, for in such a case there is an adequate remedy at law. 140 Even where the judgment is absolutely void there may be and often is an adequate remedy by appeal or motion. In such cases, relief will be refused.141

§ 2088. (§ 667.) Meritorious Defense must be Shown. It is not the province of equity to correct mere technical

- 134 Tucker v. Williams (Tex. Civ. App.), 56 S. W. 585.
- 135 Harrison v. Lokey, 26 Tex. Civ. App. 404, 63 S. W. 1030; Smith v. Pearce, 6 Baxt. 72 (related to party).
  - 136 Rumfield v. Neal (Tex. Civ. App.), 46 S. W. 262.
  - 137 Smith v. Carroll, 28 Tex. Civ. App. 330, 66 S. W. 863.
  - 138 Jennings v. Shiner (Tex. Civ. App.), 43 S. W. 276.
- 139 Elder v. Richmond G. & S. M. Co., 19 U. S. App. 118, 58 Fed. 536, 7 C. C. A. 354; Hicks v. Brinson, 100 Ga. 595, 28 S. E. 380; Woffard v. Booker, 10 Tex. Civ. App. 171, 30 S. W. 67; Combs v. Sewell, 22 Ky. Law Rep. 1026, 59 S. W. 526; Isaac v. Swift, 10 Cal. 71, 70 Am. Dec. 698; Olson v. Nunnally, 47 Kan. 391, 27 Am. St. Rep. 296, 28 Pac. 149; Iowa Sav. & L. Ass'n v. Chase, 118 Iowa, 51, 91 N. W. 807; McConkie v. Landt, 126 Iowa, 317, 101 N. W. 1121.
- 140 McIndoe v. Hazelton, 19 Wis. 567, 88 Am. Dec. 701; Earl v. Matheney, 60 Ind. 202; John V Farwell Co. v. Hilbert, 91 Wis. 437, 30 L. R. A. 235, 65 N. W. 172.
- 141 Fuller v. Townsley-Myrick Dry Goods Co., 58 Ark. 314, 24 S. W. 635; Sheldon v. Motter (Kan.), 53 Pac. 89; Geers v. Scott (Tex. Civ. App.), 33 S. W. 587. See, also, Knight v. Cresswell, 82 Ark. 330, 118 Am. St. Rep. 74, 101 S. W. 754.

wrongs. A party seeking its aid must show some substantial injury. It frequently happens that a judgment is obtained by fraud, accident, or surprise, although the same result would be reached if an adversary trial had been had. In such a case the defendant at law is equitably bound to pay the amount of the judgment, and equity will not interfere to relieve him. The fraud, accident, or surprise is, in such a case, a mere technical wrong. Hence it is laid down that equity will not relieve from judgments in general unless a meritorious defense is shown, so that on a re-examination and retrial of the case the result would be different.<sup>142</sup> This rule

142 The text is quoted in Sweet v. Denver & R. G. R'y Co., 59 Colo. 131, 147 Pac. 669; Needle v. H. C. Biddle & Co., 32 R. I. 342, 79 Atl. 942. See 4 Pom. Eq. Jur., § 1364, note; White v. Crow, 110 U. S. 183, 28 L. Ed. 113, 4 Sup. Ct. 71; Massachusetts Ben. Life Ass'n v. Lohmiller, 46 U. S. App. 103, 74 Fed. 23, 20 C. C. A. 274; Saunders v. Albritton, 37 Ala. 716; Little Rock & H. S. W. R. Co. v. Newman, 73 Ark. 555, 84 S. W. 727; Storrs v. Pensacola & A. R. Co., 29 Fla. 617, 11 South. 226; Brown v. Brown, 99 Ga. 312, 25 S. E. 649; Holmes v. Stateler, 57 Ill. 209; Lemon v. Sweeny, 6 Ill. App. 507; Way v. Lamb, 15 Iowa, 79; True v. Mendenhall, 67 Kan. 497, 73 Pac. 67; Finn v. Adams, 138 Mich. 258, 4 Ann. Cas. 1186, 101 N. W. 533; Tootle v. Ellis, 63 Kan. 422, 88 Am. St. Rep. 246, 65 Pac. 675; Roots v. Cohen (Miss.), 12 South. 593; Sauer v. City of Kansas, 69 Mo. 46; Petalka v. Fitle, 33 Neb. 756, 51 N. W. 131; Tomkins v. Tomkins, 11 N. J. Eq. 512; Stout v. Slocum, 52 N. J. Eq. 88, 28 Atl. 7; Gifford v. Morrison, 37 Ohio St. 502, 41 Am. Rep. 537; Hockaday v. Jones, 8 Okl. 156, 56 Pac. 1054; George v. Nowlan, 38 Or. 537, 64 Pac. 1; Rumfield v. Neal (Tex. Civ. App.), 46 S. W. 262; Rotan v. Springer, 52 Ark. 80, 12 S. W. 156; Bradley v. Richardson, 23 Vt. 720, Fed. Cas. No. 1786; Pilger v. Torrence, 42 Neb. 903. 61 N. W. 99; Bloss v. Hull, 27 W. Va. 503; Foust v. Warren (Tex. Civ. App.), 72 S. W. 404; Chambers v. Gallup, 30 Tex. Civ. App. 424, 70 S. W. 1009; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115; Vaughan v. Hewitt, 17 S. C. 442. See, also, the recent cases: Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623; Sweet v. Denver & R. G. R. Co., 59 Colo. 131, 147 Pac. 669; Patterson v. Northern Trust Co., 231 Ill. 22, 121 Am. St. Rep. 299, 82 N. E. 840; Steyermark v. Landau. is universal as to judgments obtained merely by fraud, accident, or surprise.<sup>143</sup> In cases where the ground of attack on the judgment is want of jurisdiction, as where there is no service of summons, there is a conflict of authority; but the prevailing view is that even there a good defense on the merits must be shown.<sup>144</sup> The cases

121 Mo. App. 402, 99 S. W. 41. In Illinois it is provided by statute that only so much of any judgment at law shall be enjoined as the complainant shall show himself equitably not bound to pay. See Ross v. Cox, 69 Ill. App. 430.

143 The text is quoted in Sweet v. Denver & R. G. R'y Co., 59 Colo. 131, 147 Pac. 669; Needle v. H. C. Biddle & Co., 32 R. I. 342, 79 Atl. 942.

144 The text is quoted in Bernhard v. Idaho Bank & Trust Co., 21 Idaho, 598, Ann. Cas. 1913E, 120, 123 Pac. 481; Needle v. H. C. Biddle & Co., 32 R. I. 342, 79 Atl. 942; Raisin Fertilizer Co. v. McKenna, 114 Ala. 274, 21 South. 816; Jones v. Commercial Bank, 6 Miss. (5 How.) 43, 35 Am. Dec. 419; Walker v. Gilbert, Freem. Ch. (Miss.) 85; Handley v. Jackson, 31 Or. 552, 65 Am. St. Rep. 839, 50 Pac. 915; Fowler v. Lee, 10 Gill & J. 358, 32 Am. Dec. 172; Rice v. Tobias, 83 Ala. 348, 3 South. 670; Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888; Colson v. Leitch, 110 Ill. 504; Heir v. Kaufman, 134 Ill. 215, 25 N. E. 517; Combs v. Hamlin Wizard Oil Co., 58 Ill. App. 123; Garden City Wire & Spring Co. v. Kause, 67 Ill. App. 108; Off v. Title G. etc. Co., 87 Ill. App. 472 (must show good defense or that judgment is excessive); Burch v. West, 134 Ill. 258, 25 N. E. 658; Williams v. Hitzie, 83 Ind. 303; Hollinger v. Reeme, 138 Ind. 363, 46 Am. St. Rep. 402, 24 L. R. A. 46, 36 N. E. 1114; Robberson v. Crow, 3 Ind. Ter. 174, 53 S. W. 534; Kendall v. Smith, 67 Kan. 90, 72 Pac. 543; Newman v. Taylor, 69 Miss. 670, 13 South. 831; Wilson v. Shipman, 34 Neb. 573, 33 Am. St. Rep. 660, 52 N. W. 576; Janes v. Howell, 37 Neb. 320, 40 Am. St. Rep. 494, 55 N. W. 965; Fickes v. Vick, 50 Neb. 401, 69 N. W. 951; Bankers' Life Ins. Co. v. Robbins, 53 Neb. 44, 73 N. W. 269, 46 Cent. L. J. 109; Lawton v. Nichols, 12 Okl. 550, 73 Pac. 262; Schleiche v. Markward, 61 Tex. 99; Masterson v. Ashcom, 54 Tex. 324; Stokes v. Knarr, 11 Wis. 389; State v. Hill, 50 Ark. 458, 8 S. W. 401; Mass. Benefit Life Ass'n v. Lohmiller, 46 U. S. App. 103, 74 Fed. 23, 20 C. C. A. 274. See, also, the recent cases: Young v. Deneen, 220 Ill. 350, 77 N. E. 193; Reed v. New York Nat. Exch. Bank, 230 Ill. 50, 82 N. E. 341: Cadillac Automobile Co. v. Boyton, 240 Ill. 171, 88 N. E. 564;

contra rest upon the theory that everyone is entitled to a day in court. The arguments in their favor are certainly most persuasive. The constitution of the United States and the constitutions of the various states provide that no person shall be deprived of property with-

Meyer v. Wilson, 166 Ind. 651, 76 N. E. 748; Alden Mercantile Co. v. Randall, 99 Neb. 44, 154 N. W. 866. In Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639, it was held that where a party does not deny an indebtedness for which a judgment is rendered, it would be as equitable to turn him over to his action against the sheriff for a false return as to relieve him from the judgment and turn the other party for redress to an action against the sheriff.

145 Ridgeway v. Bank of Tennessee, 11 Humph. 523; Kelly v. East Side Imp. Co., 16 Colo, App. 365, 65 Pac. 456; Crippen v. X. Y. Irrigating Ditch Co., 32 Colo. 447, 76 Pac. 794; Bell v. Williams, 1 Head, 229; Blakeslee v. Murphy, 44 Conn. 188; Ryan v. Boyd, 33 Ark. 778; Schiele v. Thede, 126 Iowa, 398, 102 N. W. 133; Cooley v. Barker, 122 Iowa, 440, 101 Am. St. Rep. 276, 98 N. W. 289. In Harrison v. Lokey, 26 Tex. Civ. App. 404, 63 S. W. 1030, a judgment was void, because the justice of the peace who rendered it had been an attorney in the case. It was held that an injunction would issue regardless of merits. In Colorado the courts have endeavored to establish two novel rules. In Great West. Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771, a distinction was attempted between a sale or deed and the judgment itself. It was said that before a man's property is sold or deeded away he should have an opportunity to pay. Therefore, where the court has had no jurisdiction, an injunction may issue against a sale, without regard to merits. In Wilson v. Hawthorne, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548, it was held that a good defense should be alleged in all cases as an evidence of good faith. Where the judgment is void, however, the good defense need not be proved. This seems more in keeping with the fictions of the old common law. It has been held that a good defense need not be shown if the party offers to pay the judgment: Hanswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798. The rule whereby a party seeking affirmative relief against void judgments is required to disclose a meritorious defense does not apply if plaintiff is himself seeking affirmatively to enforce the judgment: Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co., 50 Neb. 283, 61 Am. St. Rep. 573. 69 N. W. 774.

out due process of law. When a party is not served with process he is not in a position to defend his rights if he have any. It is a dangerous doctrine that a void judgment can be sustained. It is a boon to the unscrupulous. A plaintiff may obtain a judgment at will, and unless his opponent can convince the court that his defense is meritorious, relief will be refused.

§ 2089. (§ 668.) Jurisdiction to Grant New Trials at Law.—"The jurisdiction of the English chancery to enjoin judgments at law, not by reason of any equitable right involved in the controversy itself, but on account of wrongful acts or omissions accompanying the trial at law, originated at a time when the law courts had little or no power to grant new trials for such causes. To prevent a failure of justice, a distinct head of equitable jurisdiction was admitted, that of virtually granting new trials—of entertaining suits for a new trial—when a judgment at law had been thus obtained by fraud. mistake, or accident; and the injunction against further proceedings on the judgment was a mere incident of the broader relief which set aside the judgment and granted a rehearing of the controversy in the court of chancery. The original occasion for this special jurisdiction has disappeared. In England, and in most if not all of the. American states, either through statutes or through iudicial action, the courts of law have acquired, and constantly exercise, full powers to grant new trials, whenever from the wrongful acts or omissions of the successful party, or from accident or mistake of the other party, or from error or misconduct by the judge or the jury. there has been a failure of justice. In other words. the powers of the law courts to set aside verdicts or judgments are so ample as to meet all the requirements of equity and justice, and the special equitable jurisdiction with respect to this matter has become obsolete in the very large majority of the states, if not in all of

them. The result is, in my opinion, that practically the only jurisdiction now exercised by courts of equity to enjoin judgments at law, where no equitable right or interest is involved in the controversy, on account of wrongful acts or omissions connected with the trial, is a part of and incidental to the broad jurisdiction which equity possesses to set aside and cancel judgments, deeds, contracts, and the like which have been obtained through fraud, undue influence, or mistake. A court of equity, in general, no longer assumes control over a legal judgment for the purpose of a new trial or any similar relief; it will, in a proper case of fraud or mistake, set aside such judgment; and wherever it will grant this final remedy, it will, as a preliminary and incidental relief, restrain by injunction all proceedings upon the judgment."146

§ 2090. (§ 669.) Effect of Statutory Remedies.—In many states the reformed procedure has greatly encroached upon the jurisdiction of equity, and a remedy by motion for judgments obtained by fraud or without jurisdiction has been provided. "As a result of these innovations upon the ancient procedure, it has seldom been found necessary in the code states for a suitor to enjoin the enforcement of a judgment at law by means of an independent action for equitable relief. At no time would a court of equity interfere if a complete remedy could be obtained at law, and this well-estab-

146 4 Pom. Eq. Jur., § 1365. A large part of this paragraph is quoted in Norwood v. Louisville & N. R. Co., 149 Ala. 151, 42 South. 683; De Soto Coal Mining & Development Co. v. Hill, 188 Ala. 667, 65 South. 988 (injunction on ground of newly discovered evidence refused); Brown v. Trent, 36 Okl. 239, 128 Pac. 895. The text is cited in Pickford v. Talbott, 225 U. S. 651, 56 L. Ed. 1240, 32 Sup. Ct. 687; Fort Orange Barbering Co. v. New Haven Hotel Co. (Conn.), 101 Atl. 505; Clark v. Board of Education of City of Bayonne, 76 N. J. Eq. 326, 139 Am. St. Rep. 763, 25 L. R. A. (N. S.) 827, 74 Atl. 319; Kirkhuff v. Kerr, 57 N. J. Eq. 623, 42 Atl. 734.

lished rule has been frequently applied to cases where the relief sought in equity by an independent action was available to the suitor by motion made under the statute." It is an elementary principle of equity that chancery courts do not lose jurisdiction already acquired merely because courts of law obtain like powers. It would seem that such a principle should apply in cases of this sort, but the courts have seemingly made an exception. The equity courts are not generally completely ousted of their jurisdiction by the legal remedy. Often the remedy by motion proves inadequate, owing either to lapse of time or some other circumstance which renders it impossible to take advantage of it. In such cases equity will relieve. When

147 Kitzman v. Minnesota Thresher Mfg. Co., 10 N. D. 26, 84 N. W. 585. Where the remedy by motion, appeal, certiorari, etc., is adequate, relief will be denied: Cocke v. Copenhaver, 126 Fed. 145; Village of Dolton v. Dolton, 201 Ill. 465, 66 N. E. 323; Stewart v. Snow, 5 Ind. Ter. 126, 82 S. W. 696; Searcy v. Clay County, 176 Mo. 493, 75 S. W. 657; Kyle v. Richardson, 31 Tex. Civ. 101, 71 S. W. 399; Hickok v. Caton, 53 W. Va. 46, 44 S. E. 178; Baer v. Higson, 26 Utah, 78, 72 Pac. 180.

148 Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Smithson v. Smithson, 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300; Caruthers v. Hartsfield, 3 Yerg. 366, 24 Am. Dec. 580; Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co., 71 Fed. 826. See, also, Graves v. Graves, 132 Iowa, 199, 10 Ann. Cas. 1104, 10 L. R. A. (N. S.) 216, 109 N. W. 707 (fraud not discovered for over a year); State ex rel. Happel v. District Court, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (N. S.) 1098, 99 Pac. 291 (time for motion has expired); Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491 (same); Washburn Land Co. v. White River Lumber Co., 165 Wis. 112, 161 N. W. 547. See, especially, the highly instructive opinion of Beatty, C. J., in Estudillo v. Security Loan & Trust Co. of Southern California, 149 Cal. 556, 87 Pac. 19 ("The burden of proof rests upon no one more heavily than upon a plaintiff seeking relief upon the ground of fraud, and he ought not to be unduly hampered as to the means of making proof. In support of a motion he is limited to ex parte affidavits of voluntary witnesses unless the court in its discretion permits a wider latitude. In a separate suit he may bring the remedy by motion or otherwise is provided, a party must either take advantage of it or show some good reason why he has not. 149 If the remedy at law is still open, it must be pursued. It would seem that a remedy by motion is never so adequate a remedy as a bill in chancery. It is informal and generally rests upon affidavits. This certainly, as a matter of fact, is not so satisfactory as an equity suit where the matter can be thoroughly investigated. Where a motion for a new

unwilling witnesses into court by subpœna, and he may take their depositions. The remedy is ample and more efficacious, and the case is one which demands the amplest and most efficacious remedy'').

149 Luco v. Brown, 73 Cal. 3, 2 Am. St. Rep. 772, 14 Pac. 366; Hollenbeak v. McCoy, 127 Cal. 21, 59 Pac. 201; Snider v. Rinehart, 20 Colo. 448, 39 Pac. 408; Hurlbut v. Thomas, 55 Conn. 181, 3 Am. St. Rep. 43, 10 Atl. 556; Ross v. Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Edwards v. Handley, 3 Ky. (Hard.) 602, 3 Am. Dec. 745; Yancey v. Downer, 15 Ky. (5 Litt.) 8, 15 Am. Dec. 35; Hulett v. Hamilton, 60 Minn. 21, 61 N. W. 672; Woodward v. Pike, 43 Neb. 777, 62 N. W. 230; Mayer v. Nelson, 54 Neb. 434, 74 N. W. 841; Wolcott v. Jackson, 52 N. J. Eq. 387, 28 Atl. 1045; Ludwig v. Lazarus, 41 N. Y. Supp. 773, 10 App. Div. 62; Chambers v. Penland, 78 N. C. 53; Kitzman v. Minnesota Thresher Mfg. Co., 10 N. D. 26, 84 N. W. 585; Smith v. Kammerer, 152 Pa. St. 98, 25 Atl. 165; Crocker v. Allen, 34 S. C. 452, 27 Am. St. Rep. 831, 13 S. E. 650; Hamblin v. Knight, 81 Tex. 351, 26 Am. St. Rep. 818, 16 S. W. 1082; Weaver v. Vanderwanter, 84 Tex. 691, 19 S. W. 889; Sherman Steam-Laundry Co. v. Carter, 24 Tex. Civ. App. 533, 60 S. W. 328; Brown v. Chapman, 90 Va. 174, 17 S. E. 855; Hendrickson v. Hinchley, 58 U. S. (17 How.) 443, 15 L. Ed. 123; Travelers' Pro. Ass'n v. Gilbert, 111 Fed. 269, 55 L. R. A. 538, 49 C. C. A. 309; Furnald v. Glenn, 56 Fed. 372. In Chezum v. Claypool, 22 Wash. 498, 79 Am. St. Rep. 955, 61 Pac. 157, the court held the statutory remedy to be so complete and adequate as to be exclusive. See, also, the recent cases: Eggers v. Krueger, 236 Fed. 852, 150 C. C. A. 114; Yocum v. Taylor, 179 Iowa, 695, 161 N. W. 636; Stein v. Cuff, 76 N. J. Eq. 277, 21 Ann. Cas. 1285, 74 Atl. 517; Denny-Renton Clay & Coal Co. v. Sartori, 87 Wash. 545, 151 Pac. 1088.

trial has been made at law and has been denied, equity will not, on the same facts, interfere. 150

§ 2091. (§ 670.) Injunctions Against Proceedings in Foreign Jurisdictions.—As a court of equity acts in personam, it "has the power to and will restrain its own citizens from prosecuting suits in the courts of other states and foreign jurisdictions, whenever the facts of the case make such restraint necessary to enable the court to do justice, and prevent one citizen from obtaining an inequitable advantage over other citizens." Accordingly, proceedings in another state may be enjoined when the claim is entirely invalid and it would work an injustice to compel the defendant at law to resort to the courts of the foreign jurisdiction. 152 It

150 Codde v. Mahiat, 109 Mich. 186, 66 N. W. 1093; Telford v. Brinckerhoff, 163 Ill. 439, 45 N. E. 156; Hendrickson v. Bradley, 85 Fed. 508, 29 C. C. A. 303; Folsom v. Ballard, 70 Fed. 12, 36 U. S. App. 75, 16 C. C. A. 593; Hoffmann v. Burris, 210 Ill. 587, 71 N. E. 584. See, also, Bernhard v. Idaho Bank & Trust Co., 21 Idaho, 598, Ann. Cas. 1913E, 120, 123 Pac. 481; Leaverton v. Albert, 116 Md. 252, 36 L. R. A. (N. S.) 990, 81 Atl. 601; American Fidelity Co. v. R. L. Ginsburg Sons Co., 192 Mich. 693, 159 N. W. 365. But see Estudillo v. Security Loan & Trust Co., 149 Cal. 556, 87 Pac. 19.

151 Hawkins v. Ireland, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73, per Start, C. J. This paragraph is cited in American Express Co. v. Fox, 135 Tenn. 489, Ann. Cas. 1918D, 1148, 187 S. W. 1117; Rader v. Stubblefield, 43 Wash. 334, 10 Ann. Cas. 20, and note, 86 Pac. 560. This subject is discussed in a note in 59 Am. St. Rep. 879 ff. In California, such an injunction can issue only to prevent a multiplicity of suits: Spreckels v. Hawaiian Com. & Sugar Co., 117 Cal. 377, 49 Pac. 353.

152 The leading case in support of this proposition is Lord Portarlington v. Soulby, 3 Mylne & K. 104 (defense, gambling debt). See, also, Miller v. Gittings, 85 Md. 601, 60 Am. St. Rep. 352, 37 Atl. 372 ("equity will enjoin suits in other states where there is fraud, oppression, vexation, injustice, or unconscientious advantage"). See, further, Freick v. Hinkly, 122 Minn. 24, 46 L. R. A. (N. S.) 695, 141 N. W. 1096; Nelson v. Lamm (Tex. Civ. App.), 147 S. W. 664; and cases cited in the following notes.

would seem that the true basis of the jurisdiction in such a case is that the foreign court cannot do as complete justice as the domestic court. Thus, in divorce suits, where the plaintiff has obtained a mere colorable residence in another state for the purposes of the action, the defendant may obtain an injunction in the state of residence, the hardship of making a long journey to present her defense appealing to the court.<sup>153</sup> Moreover. in many actions the law of the domicile is controlling. The necessity and difficulty of proving such law in a distant state sometimes inclines a court to settle the case itself. 154 Where, however, the foreign court can do as complete justice to the parties as the domestic court. no injunction will issue. 155 Courts will not allow citizens of their own state to evade domestic laws by resorting

v. Kempson, 58 N. J. Eq. 94, 43 Atl. 97, 61 N. J. Eq. 303, 48 Atl. 244. In this latter case, the court, per Pitney, V. C., said: "She is in this predicament—she must either (1) go to the trouble and expense of appearing generally in the Dakota court to resist her husband's claim, or (2) she must attempt to appear specially for the purpose of contesting the jurisdiction of the court by showing his real domicile to be in New Jersey. Either of these defenses involves great labor and expense on her part. . . . It will be no hardship for the defendant herein to have the question of his actual domicile in Dakota settled by judicial investigation here before he proceeds with his suit there, and it seems to me that the ends of justice will be best attained by such preliminary determination." See, also, Von Bernuth v. Von Bernuth, 76 N. J. Eq. 177, 139 Am. St. Rep. 752, and note on the general subject, 73 Atl. 1049.

<sup>154</sup> Miller v. Gittings, 85 Md. 601, 60 Am. St. Rep. 352, 37 Atl. 372.

155 Harris v. Pullman, 84 Ill. 20, 25 Am. Rep. 416; Edgell v. Clark, 45 N. Y. Supp. 979, 19 App. Div. 199. See, also, Federal Trust Co. v. Conklin, 87 N. J. Eq. 185, 99 Atl. 109 (there must be a showing that the plaintiff is using the process of the courts in an inequitable and unconscionable manner); Guggenheim v. Wahl, 203 N. Y. 390, Ann. Cas. 1913B, 201, 96 N. E. 726; Wade v. Crump (Tex. Civ. App.), 173 S. W. 538.

to foreign tribunals; as, by suing in a jurisdiction where the exemption laws are more liberal, or by attempting to reach foreign assets after recognizing a general assignment for the benefit of creditors. <sup>156</sup> And where a

156 In general, see Cole v. Cunningham, 133 U. S. 107, 33 L. Ed. 538, 10 Sup. Ct. 269; Sandage v. Studebaker Bros. Mfg. Co., 142 Ind. 148, 51 Am. St. Rep. 165, 34 L. R. A. 363, 41 N. E. 380; Miller v. Gittings, 85 Md. 601, 60 Am. St. Rep. 352, 37 Atl. 372; Wyeth Hardware Co. v. Lang, 54 Mo. App. 147. To the effect that when there has been a general assignment for creditors, one will not be allowed to obtain a preference by suing in another state, see Hawkins v. Ireland, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73; Kendall v. McClure, 182 Pa. St. 1, 61 Am. St. Rep. 688, 37 Atl. 823. effect that an injunction may issue when a domestic creditor sues in a foreign jurisdiction to evade exemption laws, see Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Moton v. Hull, 77 Tex. 80, 8 L. R. A. 722, 13 S. W. 849; Griggs v. Doctor, 89 Wis. 161, 46 Am. St. Rep. 824, 30 L. R. A. 360, 61 N. W. 761. See, also, Greer v. Cook, 88 Ark. 93, 16 Ann. Cas. 671, 113 S. W. 1009; Wierse v. Thomas, 145 N. C. 261, 122 Am. St. Rep. 446 and note, 15 L. R. A. (N. S.) 1008, 59 S. E. 58. But see Cole v. Young, 24 Kan. 435. And a creditor will not be restrained from suing in the state of his domicile, although property sought to be reached is exempt by the law of the debtor's domicile: Griffith v. Langsdale, 53 Ark. 71, 22 Am. St. Rep. 182, 13 S. W. 733. To the effect that a domestic creditor of one adjudged insolvent within the state may be enjoined from suing elsewhere, see Cunningham v. Butler, 142 Mass. 47, 56 Am. Rep. 657, 6 N. E. 72; Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 67 Am. St. Rep. 680, 41 Atl. 1046 (citing Pom. Eq. Jur., § 1318). It has been held that a mere difference in the law of evidence is not sufficient to warrant relief: Edgell v. Clark, 45 N. Y. Supp. 979, 19 App. Div. 199. And in Thorndike v. Thorndike, 142 Ill. 450, 21 L. R. A. 71, 32 N. E. 510, it was held that a domestic creditor will not be enjoined from suing in a state where the statute of limitations has not barred the debt, although barred in the state of domicile. See, also, Carson v. Dunham, 149 Mass. 52, 14 Am. St. Rep. 397, 3 L. R. A. 203, 20 N. E. 312 (mere difference in law not sufficient); American Express Co. v. Fox, 135 Tenn. 489, Ann. Cas. 1918B, 1148, 187 S. W. 1117, citing this paragraph of the text (convenience of witnesses and difference as to law of contributory negligence, not sufficient grounds); Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 (not enough that the courts of domestic court has once taken jurisdiction, it may enjoin the parties from commencing proceedings elsewhere, the injunction being granted to protect the jurisdiction and to prevent a multiplicity of suits.<sup>157</sup> The enforcement of a foreign judgment obtained by fraud will sometimes be enjoined.<sup>158</sup> It must be borne in mind in all of the cases that the equity court acts only on the person, and not on the foreign tribunal. Hence, in order that its decree may have any effect, personal service of process must be made upon the defendant.

§ 2092. (§ 671.) Injunctions Against Executions.—In our discussion of equitable relief against judgments we have necessarily touched upon relief against executions. Where there is reason for relief against the former, there is, of course, ground for relief against the latter. In many cases, however, a judgment may be perfectly valid and yet there may be some vice in the

the other state would arrive at a different judgment, or that the defendant prefers a tribunal in which he supposes the decision will be more favorable); Illinois Life Ins. Co. v. Prentiss, 277 Ill. 383, 115 N. E. 554 (fact that in foreign jurisdiction three-fourths of jury may render verdict is not an invasion of complainant's rights, but a mere matter of procedure); Jones v. Hughes, 156 Iowa, 684, 42 L R. A. (N. S.) 502, 137 N. W. 1023.

157 Gage v. Riverside Trust Co., 86 Fed. 984; Home Ins. Co. v. Howell, 24 N. J. Eq. 238. See, also, French v. Hay, 22 Wall. 250, 22 L. Ed. 857; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545 (although foreign court had acquired jurisdiction first, it could not do complete justice because all the parties were not before it). See, further, O'Haire v. Burns, 45 Colo. 432, 132 Am. St. Rep. 191, 25 L. R. A. (N. S.) 267, 101 Pac. 755; Gordon v. Munn, 81 Kan. 537, 25 L. R. A. (N. S.) 917, 106 Pac. 286. Compare Illinois Life Ins. Co. v. Prentiss, 277 Ill. 383, 115 N. E. 554.

158 Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Stevens v. Central Nat. Bank, 144 N. Y. 50, 39 N. E. 68; Gray v. Richmond Bieycle Co., 167 N. Y. 348, 60 N. E. 663. But see Metcalf v. Gilmore, 59 N. H. 417, 47 Am. Rep. 217. See, further, Levin v. Gladstein, 142 N. C. 482, 115 Am. St. Rep. 747, 32 L. R. A. (N. S.) 905, 55 S. E. 371.

execution itself or in the levy which will warrant the interference of equity. The rule in such cases is that equity will interfere when there is no adequate remedy at law.<sup>159</sup> The main question to be determined, therefore, after the vice itself is admitted, is whether there is a complete and adequate remedy at law.

In cases involving personal property there is ordinarily a complete and adequate remedy at law, and therefore relief is as a rule refused. When personal property is illegally taken damages are supposed to be sufficient to fully compensate for all the injury done. 160

159 In the following cases relief was refused, the court holding that there is an adequate remedy at law: Ricks v. Richardson, 70 Miss. 424, 11 South. 935; Treat v. Wilson, 4 Kan. App. 586, 46 Pac. 322; Hitchcock v. Culver, 107 Ga. 184, 33 S. E. 35; Rounsaville v. McGinnis, 93 Ga. 579, 21 S. E. 123; Driggs & Co.'s Bank v. Norwood, 49 Ark. 136, 4 Am. St. Rep. 30, 4 S. W. 448; Parker v. Oxendine, 85 Mo. App. 212; Straub v. Simpson, 74 Mo. App. 230.

160 In Parsons v. Hartman, 25 Or. 547, 42 Am. St. Rep. 803, 30 L. R. A. 98, 37 Pac. 61, it was held that a judgment debtor has no right to enjoin the sale of his personal property under execution on the ground that it is exempt by law from sale under judicial process, unless the property possesses a special value to the judgment debtor alone, such as a keepsake or memento of any kind, the loss of which cannot be compensated in damages. To same effect see Henderson v. Bates, 3 Blackf. 460. In some states it has been held that an injunction will issue against an execution in a replevin suit when a bona fide offer is made to restore the property: Marks v. Willis. 36 Or. 1, 78 Am. St. Rep. 752, 58 Pac. 526; Eppinger v. Scott, 130 Cal. 275, 62 Pac. 460. In further support of the text, see Baxley v. Laster, 82 Ark. 236, 118 Am. St. Rep. 64, 12 Ann. Cas. 332, 10 L. R. A. (N. S.) 983, 101 S. W. 755 (fact that personal property is exempt does not justify injunction against garnishment); Florida Packing & Ice Co. v. Carney, 49 Fla. 293, 111 Am. St. Rep. 95 and note, 38 South. 602; Boone v. Van Gorder, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4 (execution sale of stock not enjoined at suit of equitable owner); Sturges v. Jackson, 88 Miss. 508, 117 Am. St. Rep. 754, 6 L. R. A. (N. S.) 491, 40 South. 547 (fact that wages are exempt does not justify injunction against garnishment, nor does the rule of the employer that it will discharge any employee whose wages are garnished).

Accordingly, actions of trespass, trover or replevin afford ample relief. In some cases, however, the property is of such a peculiar nature and has such a peculiar value to the owner, that damages are not adequate. Such, for instance, are cases of family relics and heirlooms. Where the judgment defendant is the complainant, the ground of resisting the levy is frequently that the property is exempt from execution. Even in such cases, equity will not interfere unless some special reason is shown for its interference. 161 In cases where the complainant is a third party claiming the property the courts are more liberal; but even there relief will be refused when damages are deemed adequate. However, when it is inequitable to allow an execution to proceed, relief will be granted in equity if for any reason except laches on the part of the complainant, relief cannot be had at law.162

§ 2093. (§ 672.) Same—Real Property.—In case of real property the relief is more freely granted. The judgment debtor will be given relief whenever the execution should not be enforced against certain portions of his property and he has no adequate remedy at law. A sale of property exempt from execution, or a sale under any invalid execution, passes no title to a purchaser; yet it casts a cloud upon the title which renders the land unsalable. It is upon this ground that the courts generally rest their jurisdiction. What constitutes a cloud

161 In the following cases relief was granted against executions on exempt property: Smith v. Gufford, 36 Fla. 481, 51 Am. St. Rep. 37, 18 South. 717; Morris v. Carnahan (Tex. Civ. App.), 31 S. W. 436; Stout v. La Follette, 64 Ind. 365; Ryan v. Parris, 48 Kan. 765, 30 Pac. 172. See, also, Sinsabaugh v. Dun, 214 Ill. 70, 73 N. E. 390 (wrongful levy on books of mercantile agency and disclosure of contents enjoined).

162 Thus, in Gibson v. McClay, 47 Neb. 900, 66 N. W. 851, one joint debtor was granted relief against an execution on the ground that the creditor had agreed to resort to the other debtors first.

on title is a mooted question in the various jurisdictions. 163 If, however, the sale is fair on its face and evidence must be introduced to show the invalidity, it is almost universally held that there is such a cloud as equity will prevent or remove. The question frequently arises where a debtor is entitled to a homestead exemption; and the courts uniformly hold that where a sale of a homestead will create a cloud on title relief will be granted. 164 And the suit may be brought by the holder of the equity of redemption when the homestead has been mortgaged. 165 Where realty is improperly sold in bulk when it is easily capable of subdivision, the owner may obtain an injunction, and especially where the result of sale in such a manner has been to sacrifice the property. 166 If a judgment has been satisfied, or an assignee of the judgment has contracted to save the debtor harmless, or if the judgment is neither a lien upon the property nor a personal charge upon the owner. relief will be granted to prevent a cloud on the title. 167 An injunction has issued to restrain the sale of public

<sup>163</sup> See post, chapter "Cloud on Title."

<sup>164</sup> Ward v. Callahan, 49 Kan. 149, 30 Pac. 176; Vogler v. Montgomery, 54 Mo. 577; Tucker v. Kenniston, 47 N. H. 267, 93 Am. Dec. 405; Warren v. Kohr, 26 Tex. Civ. App. 331, 64 S. W. 62; Farnim Co. Bank v. Lowenstein (Tex. Civ. App.), 54 S. W. 316; Leachman v. Capps, 89 Tex. 690, 36 S. W. 250; Capps v. Leachman (Tex. Civ. App.), 35 S. W. 397; Gardner v. Douglass, 64 Tex. 76. See, also, Stocker v. Curtis, 264 Ill. 582, 106 N. E. 441.

<sup>165</sup> Ingraham v. Dyer, 125 Mo. 491, 28 S. W. 840.

<sup>166</sup> Forbes v. Hall, 102 Ga. 47, 66 Am. St. Rep. 152, 28 S. E. 915. See Brady v. Carteret Realty Co., 67 N. J. Eq. 641, 110 Am. St. Rep. 502, 3 Ann. Cas. 421, 60 Atl. 938, where an injunction was issued until title could be determined, the judgment creditor having raised the question in order to buy cheaply.

<sup>167</sup> Phillips v. Kuhn, 35 Neb. 187, 52 N. W. 881; Plummer v. Talbott, 21 Ky. Law Rep. 30, 50 S. W. 1097; Predohl v. Sullivan, 80 N. W. 903, 59 Neb. 311. See, also, Updegraff v. Lucas, 76 Kan. 456, 13 Ann. Cas. 860, 93 Pac. 630, 94 Pac. 121 (execution on dormant judgment).

school property on execution, although absolutely no title would pass by a sale. A holder of a mechanic's lien who purchased the land has been allowed an injunction against a judgment creditor who levied on the land without reference to the lien. Relief will not be granted, however, when the validity of the title is in dispute; nor will an injunction issue to restrain a sale under foreclosure merely because the property will bring a better price if sold under partition. The fact that the plaintiff in an action against an insolvent corporation intends to levy execution upon property which the corporation had undertaken to convey to other parties before the insolvency, does not show any right in the defendant corporation to restrain such levy.

§ 2094. (§ 673.) Same — Property of Third Persons. It frequently happens that property of a third person is levied upon as belonging to the judgment debtor. In such cases the ordinary rules apply. An injunction will not lie to prevent the seizure or sale of ordinary personal property, for the owner has an adequate remedy at law.<sup>173</sup> When it is of peculiar value, however, relief

168 State ex rel. Board of Education v. Tiedemann, 69 Mo. 306, 33 Am. Rep. 498. In this case the court said: "It is true that relief could have been thus obtained, but this does not oust equitable jurisdiction in a case of this sort, for if it be the case that the public school-house was not vendible under execution, equity would interfere to prevent a cloud from being cast upon the title by reason of a void sale, and also to prevent a multiplicity of suits springing from such void act."

- 169 Bowling v. Garrett, 49 Kan. 504, 33 Am. St. Rep. 377, 31 Pac.
   135. In general, see Kirk v. United States, 124 Fed. 325.
  - 170 Crawford v. Lamar, 9 Colo. App. 83, 47 Pac. 665.
  - 171 Bradford v. Downs, 48 N. Y. Supp. 1051, 24 App. Div. 97.
  - 172 Miller v. Waldoborough Packing Co., 88 Me. 605, 34 Atl. 527.
- 173 Zanhizer v. Hefner, 47 W. Va. 418, 35 S. E. 4; Williams v. Farmers' Nat. Bank, 22 Tex. Civ. App. 581, 56 S. W. 261; Perrin v. Stevens (Tex. Civ. App.), 29 S. W. 927; Allen v. Windstandly, 135 Ind. 105, 34 N. E. 699; Van Norden v. Morton, 99 U. S. 378, 25

may be granted because damages cannot be accurately ascertained and will not compensate.<sup>174</sup> If multiplicity of suits will result, or any other distinct ground for equitable interference is shown, relief may be granted.<sup>175</sup> Sometimes the seizure of property may result in financial ruin to the owner, and involve the destruction of his business. Such, for instance, may be the case when the entire stock in trade of a party is seized. The same result is reached when part of a telegraph line is levied upon. In such cases the remedy at law is clearly inadequate and equitable relief will be granted.<sup>176</sup>

When real property of a third person is illegally levied upon relief is quite freely granted. The ground stated for interference in most of the cases is the prevention of a cloud on title. Generally a sale of such property is sufficient to constitute such a cloud.<sup>177</sup> In some states,

L. Ed. 453; Troy Fertilizer Co. v. Prestwood, 116 Ala. 119, 22 South. 262.

174 Zanhizer v. Hefner, 47 W. Va. 418, 35 S. E. 4 (dictum).

175 Halley v. Ingersoll, 14 S. D. 7, 84 N. W. 201. In Overton v. Warner, 68 Kan. 96, 74 Pac. 651, it was held that an injunction will issue against a sale of property in custodia legis.

176 Watson v. Sutherland, 72 U. S. (5 Wall.) 74, 18 L. Ed. 580; North v. Peters, 138 U. S. 271, 34 L. Ed. 936, 11 Sup. Ct. 346; McCreery v. Sutherland, 23 Md. 471, 87 Am. Dec. 578; Sickels v. Combs, 10 Misc. Rep. 551, 32 N. Y. Supp. 181; Funk v. Brooklyn Glass & Mfg. Co., 25 Misc. Rep. 91, 53 N. Y. Supp. 1086; Walker v. Hunt, 2 W. Va. 491, 98 Am. Dec. 779; Southwestern Tel. & Tel. Co. v. Howard, 3 Tex. Civ. App. 335, 22 S. W. 524. See, also, Haycock v. Tarver, 107 Ark. 458, 155 S. W. 918.

177 Bell v. Murray, 13 Colo. App. 217, 57 Pac. 488; Zimmerman v. Makepeace, 152 Ind. 199, 52 N. E. 992; Gale Mfg. Co. v. Sleeper, 70 Kan. 806, 79 Pac. 648; Bean v. Everett, 21 Ky. Law Rep. 1790, 56 S. W. 403; Broussard v. Le Blanc, 44 La. Ann. 880, 11 South. 460; Hart v. Conolly, 49 La. Ann. 1587, 22 South. 809; Natalie Anthracite Coal Co. v. Ryon, 188 Pa. St. 138, 41 Atl. 462, 43 Wkly. Not. Cas. 265; Hammond v. Martin, 15 Tex. Civ. App. 570, 40 S. W. 347; Quimby v. Slipper, 7 Wash. 475, 38 Am. St. Rep. 899, 35 Pac. 116; Provident Life & Trust Co. v. Mills, 91 Fed. 435; Moore v. Kleppish,

however, it is held that where there is a complete record title in the complainant, a sale under execution against a third party casts no cloud upon the title.<sup>178</sup> Accordingly in such states more must appear. Where such a judgment and execution have the effect of a writ of possession, there is a sufficient cloud to warrant interference.<sup>179</sup>

In accordance with the principles as laid down above, a wife has been allowed an injunction to prevent the sale of her separate property, 180 or of community prop-

104 Iowa, 319, 73 N. W. 830. In Bishop v. Moorman, 98 Ind. 1, 49 Am. Rep. 731, the court said: "The sale of land under color of judicial process is more than a mere fugitive trespass; it is the assertion of a permanent right to the land, and a full denial of the owner's title, and the rule is, that where there is an assertion of a permanent right to land the owner may maintain injunction if the right asserted is unfounded." See, also, post, chapter "Cloud on Title."

178 Pelican River Milling Co. v. Maurin, 67 Minn. 418, 69 N. W. 1149; Coughran v. Swift, 18 Ill. 414; Carlin v. Hudson, 12 Tex. 202, 62 Am. Dec. 521; Cook v. Texas & P. R'y Co., 3 Tex. Civ. App. 145, 22 S. W. 58; Paddock v. Jackson, 16 Tex. Civ. App. 655, 41 S. W. 700; Brown v. Ikard, 33 Tex. Civ. 661, 77 S. W. 967. See, also, West Jersey & S. R. Co. v. Smith, 69 N. J. Eq. 429, 60 Atl. 757, and cases cited, and Brum v. Ivins, 154 Cal. 17, 129 Am. St. Rep. 137, 96 Pac. 876; Payne v. Daviess County Savings Ass'n, 126 Mo. App. 593, 105 S. W. 15; Taylor v. Swearingen, 161 Mo. App. 467, 144 S. W. 160; Latham Co. v. Shelton, 57 Tex. Civ. App. 122, 122 S. W. 941. One in possession of land and claiming as owner is not entitled to restrain by injunction a sale of such land under execution sued out by a creditor of his grantor under the assumption that the title of the party in possession is fraudulent as to creditors. The bona fides of the conveyance can be fully tested and the rights of all claimants settled in a suit to recover the land by the purchaser at such execution sale: Southerland v. Harper, 83 N. C. 200.

179 Wofford v. Booker, 10 Tex. Civ. App. 171, 30 S. W. 67; Bushong v. Rector, 32 W. Va. 311, 25 Am. St. Rep. 817, 9 S. E. 225. See, also, Boswell v. Jordan, 112 Ark. 159, 165 S. W. 295.

180 Young v. First Nat. Bank, 4 Idaho, 323, 392, 39 Pac. 557; Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471; Bush v. Herring, 113 Iowa, 158, 84 N. W. 1036. But the wife cannot enjoin such an execu-

erty, on executions against the husband alone. 181 holder of an equitable interest, such as a cestui que trust<sup>182</sup> or one who has a contract of purchase, <sup>183</sup> may enjoin sale under execution against the holder of the mere naked legal title. One who has sold land with covenants of warranty has been allowed to enjoin a sale under execution when the judgment has been satisfied.<sup>184</sup> A mortgagee has been allowed to enjoin a sale when his mortgage has wrongfully been marked satisfied,<sup>185</sup> or when a sale would tend to disperse the prop-In some jurisdictions a holder of an equitable erty. 186 lien under a deed of trust has been allowed an injunction to prevent an absolute sale in disregard of such deed;187 but elsewhere it is held that a mortgagee has a mere lien and no title to be clouded, and therefore relief has been refused. 188 It has been held that an owner of a reversion in land cannot enjoin a sale under execution against a life tenant, because a sale passes

tion when the judgment is against her husband and herself on a joint note: Walters v. Cantrell (Tex. Civ. App.), 66 S. W. 790.

- 181 Grant v. Cole, 23 Wash. 542, 63 Pac. 263; Ross v. Howard, 25 Wash. 1, 64 Pac. 794.
  - 182 Hawkins v. Willard (Tex. Civ. App.), 38 S. W. 365.
- 183 Parks v. People's Bank, 97 Mo. 130, 10 Am. St. Rep. 295, 11
  S. W. 41; Rodriguez v. Buckley (Tex. Civ. App.), 30 S. W. 1123.
- 184 Huggins v. White, 7 Tex. Civ. App. 563, 27 S. W. 1066. See, also, Jackson Milling Co. v. Scott, 130 Wis. 267, 110 N. W. 184.
- 185 Ivory v. Kempner, 2 Tex. Civ. App. 474, 21 S. W. 1006 (see, also, sub nom. Kempner v. Ivory, 29 S. W. 538). In this case it was held that an injunction will be granted to restrain an execution sale when the evidence on which the right of the complainants depends is not of record, nor shown in the papers through which the right is derived.
- 186 Central Trust Co. of N. Y. v. Moran, 56 Minn. 188, 29 L. R. A. 212, 57 N. W. 471.
  - 187 Phillips v. Winslow, 57 Ky. (18 B. Mon.) 431, 68 Am. Dec. 729.
- 188 American Freehold L. & M. Co. v. Maxwell, 39 Fla. 489, 22South. 751; Covert v. Bray, 26 Ind. App. 671, 60 N. E. 709.

only the interest of the life tenant.<sup>189</sup> In all these cases the decisions must depend upon the views the courts hold on the doctrine of cloud on title. In at least one jurisdiction it has been held that an injunction will not issue to prevent a levy on the property of a third person until the officer has been given notice so that he can abandon the levy.<sup>190</sup> If a levy will result in a multiplicity of suits, an injunction may issue.<sup>191</sup>

§ 2095. (§ 674.) Same—Not for Mere Irregularities. An execution sale will not be enjoined nor set aside for mere irregularity in the process. As stated by a court of high authority, "The rule is very general that a court of equity will not interfere to vacate a sale under legal process on account of irregularity in the issue of process, or in its execution; but, as is properly said, 'the application ought to be made to the court issuing the writ, and if made elsewhere ought not to be entertained.' There must be accident, surprise, mistake, or fraud, or some fact or circumstance affecting the sale itself, and not resting on the irregularity of the process, or irregularity in its execution, before a court of equity will take jurisdiction to vacate it." As full relief can ordinarily be obtained by motion, there is no reason for equitable interference. 193 Accordingly, an injunction has been refused where relief was sought on the ground that part of the property levied upon did not belong to

<sup>189</sup> Stone v. Franklin, 89 Ga. 195, 15 S. E. 47.

<sup>190</sup> Hinkle v. Baldwin, 93 Mich. 422, 53 N. W. 534.

<sup>191</sup> Morgan v. Morgan, 3 Stew. (Ala.) 383, 21 Am. Dec. 638.

 <sup>192</sup> Gardner v. Mobile & N. W. R. R. Co., 102 Ala. 635, 48 Am.
 St. Rep. 84, 15 South. 271.

<sup>193</sup> Trieste v. Enslen, 106 Ala. 180, 17 South. 356; Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Parker v. Jones, 58 N. C. (5 Jones Eq.) 140, 75 Am. Dec. 441; Wilson v. Miller, 30 Md. 82, 96 Am. Dec. 568; Supreme Lodge of Order of Select Friends v. Carey, 57 Kan. 655, 47 Pac. 621; Dunson v. Spradley (Tex. Civ. App.), 40 S. W. 327.

the complainant, 194 or that an execution was issued to another county when no execution had been taken out in the county where the judgment was rendered,195 or where the judgment creditor will be entitled to another execution if one issued prematurely is enjoined. 196 When the individual personal property of a surviving partner, who is administrator of the partnership estate, is seized under execution on a judgment against the firm, a sale thereunder will not be restrained by injunction because the execution was issued in the name of a dead man, or the judgment, prior to the issuance of the execution, had been presented as a claim against the estate, and neither allowed nor disallowed, nor because the levy was made on individual personal property. 197 An injunction will not issue because of mere defect in the notice of sale, 198 nor because of a misdescription of the premises, when the land may be readily identified; 199 but where the description is so defective that the property will not bring a good price, equity will interfere.<sup>200</sup> The mere fact that property will not bring a good price if sold at the time is no ground, however, for equitable relief.201 Miscellaneous cases are appended in the note.202

<sup>194</sup> Corder v. Steiner (Tex. Civ. App.), 54 S. W. 277.

<sup>195</sup> Norwood v. Orient Ins. Co. (Tex. Civ. App.), 44 S. W. 188.

<sup>196</sup> Dayton v. Commercial Bank, 6 Rob. (La.) 17.

<sup>197</sup> Mark v. Stephens, 38 Or. 65, 84 Am. St. Rep. 750, 63 Pac. 824.

<sup>198</sup> Citizens' Nat. Bank v. Interior L. & I. Co., 14 Tex. Civ. App. 301, 37 S. W. 447.

<sup>199</sup> Boggess v. Lowery, 78 Ga. 539, 6 Am. St. Rep. 279, 3 S. E. 771.

<sup>200</sup> Johnson v. Hanye, 103 Ga. 542, 29 S. E. 914.

<sup>201</sup> Nashville Trust Co. v. Weaver, 102 Tenn. 66, 50 S. W. 763.

<sup>202</sup> An injunction has been allowed when an attorney has refused to accept the amount due on the judgment (Cooper v. Whaley, 90 Ga. 285, 15 S. E. 824); and where a previous execution has been satisfied (Lock v. Slusher, 102 Ky. 415, 43 S. W. 471; but see Abercrombie v. Knox, 3 Ala. 728, 37 Am. Dec. 721). An injunction was

issued to prevent the making of a sheriff's deed in violation of a promise to postpone a sale: Manning v. Lacey, 97 Ga. 384, 23 S. E. 845. A complaint to enjoin the levy of an execution issued upon a judgment of a justice of the peace upon the property of the replevin bail, on the ground that there is sufficient personal property of the judgment debtor to satisfy the judgment, and that the officer threatens to levy on the property of the replevin bail is sufficient: Elson v. O'Dowd, 40 Ind. 300. Compare Palladino v. Hilpert, 72 N. J. Eg. 270, 65 Atl. 721. Equity will enjoin a non-resident creditor who has consented to an assignment for benefit of creditors made in another state, from levying on the assigned estate, at the suit of the assignee: Chafee v. Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345. An injunction has issued to restrain execution on property mortgaged to the state: Brady v. Johnson, 75 Md. 445, 20 L. R. A. 737, 26 Atl. 49. The rule that prevails in some jurisdictions that only the court which rendered the judgment has power to stay proceedings thereon has no application where the execution defendant sues to enjoin trespass on property sold under execution: Humpich v. Drake, 19 Ky. Law Rep. 1782, 44 S. W. 632. Where there is no pretense that a creditor is threatening to levy on land not liable to execution, there is no ground for injunction: Ke-tuc-e-mun-guah v. McClure, 122 Ind. 541, 7 L. R. A. 782, 23 N. E. 1080.

## CHAPTER XXXII. REFORMATION AND CANCELLATION.

## ANALYSIS.

§§ 675-683. Reformation.

§ 675. Reformation for mutual mistake.

§ 676. Unilateral mistake-Fraud.

§ 677. Illustrations-Mistake of law.

§ 678. Illustrations—Continued.

§ 679. No reformation in favor of a volunteer.

§ 680. Negligence-Laches-Limitations.

§ 681. Parties against whom reformation may be had.

§ 682. Parol proof-Amount of proof.

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§§ 684-688. Cancellation.

§ 684. Scope of the remedy.

§ 684a. Rescission and cancellation for mistake.

§ 685. Adequate remedy by defense or action at law.

§ 686. Equitable relief where consideration of conveyance has failed—Rescission of "support deeds."

§ 687. Ratification-Laches.

§ 688. Restoration of consideration.

§ 2096. (§ 675.) Reformation for Mutual Mistake.—Reformation is appropriate in cases of mutual mistake,—that is, when an agreement has been made, or a transaction has been entered into or determined upon, as intended by all the parties interested, but in reducing such agreement or transaction to writing, through the mistake common to both parties, the written instrument fails to express the real agreement or transaction. In such a case the instrument may be corrected so that it shall truly represent the agreement or transaction actually made or determined upon according to the real purpose and intention of the parties.¹ It is to be ob-

1 Pom. Eq. Jur., §§ 870, 1376. Quoted in Shelby v. Creighton, 2 Neb. (Unof.) 264, 96 N. W. 382. These sections of Pom. Eq. Jur. are cited

served that the mistake which is ground for this relief must be in reducing the contract to writing. "In every

in Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Miles v. Miles, 84 Miss. 624, 37 South. 112; Ordway v. Chace, 57 N. J. Eq. 478, 42 Atl. Pom. Eq. Jur., § 1376, stating when reformation may be had, is quoted in Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 259; Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901; Dennis v. Northern Pac. R'y Co., 20 Wash. 320, 55 Pac. 210; quoted, also, in Hammer v. Lange, 174 Ala. 337, 56 South. 573; Knuckles v. J. D. Hughes Lumber Co. (Ky. App.), 116 S. W. 119; Cleveland v. Bateman, 21 N. M. 675, Ann. Cas. 1918E, 1011, 158 Pac. 648; Sayre v. Moir, 68 Or. 381, 137 Pac. 215; and cited in Barry v. Rownd, 119 Iowa, 105, 93 N. W. 67; Farmers' Loan & Tr. Co. v. Suydam, 69 Neb. 407, 95 N. W. 867; Griffin v. Fries, 23 Fla. 173, 11 Am. St. Rep. 351, 2 South. 266 (to the effect that equity has jurisdiction to re-establish deeds accidentally lost or destroyed); Kruse v. Koelzer, 124 Wis. 536, 102 N. W. 1072. Cited, also, in Consumers' Coal & Fuel Co. v. Yarbrough, 194 Ala. 482, 69 South. 897; Doniphan K. & S. R. Co. v. Missouri & N. A. R. Co., 104 Ark. 475, 149 S. W. 60; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317; Third Street Improvement Co. v. McLelland, 23 Cal. App. 369, 137 Pac. 1089; Crosby v. Andrews, 61 Fla. 554, Ann. Cas. 1913A, 420, 55 South. 57 (dissenting opinion); Remm v. Landon, 43 Ind. App. 91, 86 N. E. 973; Day v. Dyer, 171 Iowa, 437, 152 N. W. 53; Battle v. Claiborne, 133 Tenn. 286, 180 S. W. 584; Young v. Jones, 72 Wash. 277, 130 Pac. 90. Section 675 is cited in Merritt v. Coffin, 152 Ala. 474, 44 South. 622; Crosby v. Andrews, 61 Fla. 554, Ann. Cas. 1913A, 420, 55 South. 57 (dissenting opinion); Thraves v. Greenlees, 42 Okl. 764, 142 Pac. 1021. tions 675-683 are cited in Horne v. J. C. Turner Cypress Lumber Co., 55 Fla. 690, 45 South. 1016. Sections 675 et seq. are cited in Montgomery v. Perryman & Co., 147 Ala. 207, 119 Am. St. Rep. 61, 41 South. 838.

To the effect that an instrument may be reformed for mutual mistake, see, also, Beale v. Kyte, [1907] 1 Ch. 564 (error in description); Griffith v. Berkshire Power Co., 169 Fed. 734; Stromberg-Carlson Telephone Mfg. Co. v. Simmons, 185 Fed. 211; Williams v. American Ass'n, 197 Fed. 500, 118 C. C. A. 1 (wrong property conveyed); Medical Society of South Carolina v. Gilbreth, 208 Fed. 899; Dulo v. Miller, 112 Ala. 687, 20 South. 981; Sicard v. Guyllou, 147 Ala. 239, 41 South. 474 (errors in description); Peacock v. Bethea, 151 Ala. 141, 43 South. 864 (same); Phelan v. Tomlin, 164 Ala. 383, 51 South. 382; Wright v. Wright, 180 Ala. 343, 60 South. 931; Perry v. Sadler,

case, it must clearly and satisfactorily appear that the precise terms of the contract had been orally agreed

76 Ark. 43, 88 S. W. 832; Stinson v. Ray, 79 Ark. 592, 96 S. W. 141 (erroneous description); Craig v. Pendleton, 89 Ark. 259, 116 S. W. 209 (same); Morgan v. McCuin, 96 Ark. 512, 132 S. W. 459 (same); Vaught v. Paddock, 98 Ark, 10, 135 S. W. 331 (same); Capelli v. Dondero, 123 Cal. 324, 55 Pac. 1057; Kee v. Davis, 137 Cal. 456, 70 Pac. 294; Danielson v. Neal, 164 Cal. 748, 130 Pac. 716; Waratah Oil Co. v. Reward Oil Co., 23 Cal. App. 638, 139 Pac. 91 (omission of date); Merchants' Mut. Fire Ins. Co. of Colorado v. Harris, 51 Colo. 95, 116 Pac. 143 (insurance policy issued in wrong name); Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 138 Am. St. Rep. 171, 52 South. 799 (insurance policy); Capital City Bank v. Hilson, 64 Fla. 206, Ann. Cas. 1914B, 1211, 60 South. 189; Long v. Gilbert, 133 Ga. 691, 66 S. E. 894 (erroneous description); Shaw v. Fender, 138 Ga. 48, 74 S. E. 792; Kight v. Gaskin, 139 Ga. 379, 77 S. E. 390; Way v. Roth, 159 Ill. 162, 42 N. E. 321; Johnson v. Sherwood, 34 Ind. App. 490, 73 N. E. 180; Smelser v. Pugh, 29 Ind. App. 614, 64 N. E. 943; Prescott v. Hixon, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391; Harvey v. Hand, 48 Ind. App. 392, 95 N. E. 1020; Dalton v. Milwaukee Mech. Ins. Co., 126 Iowa, 377, 102 N. W. 120; Flynn v. Finch, 137 Iowa, 378, 114 N. W. 1058 (erroneous description); McCluskey v. Scott (Iowa), 124 N. W. 796 (omission of provision as to interest); Fullerton v. City of Des Moines, 147 Iowa, 254, 126 N. W. 159 (contract by municipal corporation); McCarl v. Travelers' Ins. Co., 151 Iowa, 669, 132 N. W. 12 (insurance policy); Slob v. De Mots, 153 Iowa, 411, 133 N. W. 358 (wrong amount, error in computation); Coleman v. Coleman, 153 Iowa, 543, 133 N. W. 755 (mistake as to legal meaning of language); Good Milking Machine Co. v. Galloway, 168 Iowa, 550, 150 N. W. 710; Hardy v. La Dow, 72 Kan. 174, 83 Pac. 401; John T. Stewart's Estate v. Falkenberg, 82 Kan. 576, 109 Pac. 170 (chattel mortgage, wrong party); Bronston's Adm'r v. Bronston's Heirs, 141 Ky. 639, 133 S. W. 584; McMee v. Henry, 163 Ky. 729, 174 S. W. 746; Cohen v. Numsen, 104 Md. 676, 65 Atl. 432; Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 84 N. E. 449 (signature as principal when signature as agent was intended); Holbrook v. Schofield, 211 Mass. 234, 98 N. E. 97 (error in description); Bronk v. Standard Mfg. Co., 141 Mich. 680, 105 N. W. 33 (contract of municipal corporation reformed to correspond to terms of resolution of city council); Stapleton v. Schaffer, 146 Mich. 346, 109 N. W. 665 (error in description); Lockwood v. Geier, 98 Minn. 317, 108 N. W. 877, 109 N. W. 245 (unintended clause eliminated); Norman v. Kelso Farmers' Mut. Fire Ins.

upon, and that the writing afterwards signed fails to be, as it was intended, an execution of such previous agree-

Co., 114 Minn. 49, 130 N. W. 13 (insurance policy describing wrong property); Eichelberger v. Cooper, 101 Miss. 253, 57 South. 808; Mc-Allister v. Richardson, 103 Miss. 418, 60 South. 570 (error in description); Tapley v. Herman, 95 Mo. App. 537, 69 S. W. 482; Redding v. Badger Lumber Co., 127 Mo. App. 625, 106 S. W. 557; St. Louis House & Window Cleaning Co. v. York Realty Co., 193 Mo. App. 28, 180 S. W. 576; Austin v. Brown, 75 Neb. 345, 106 N. W. 30 (erroneous description); Baker v. Montgomery, 78 Neb. 98, 110 N. W. 695 (omission of provision); Slack v. Craft (N. J. Eq.), 57 Atl. 1014; Mayer v. West Side Development Co., 78 N. J. Eq. 415, 79 Atl. 620; Dearborn v. Niagara Fire Ins. Co., 17 N. M. 223, 125 Pac. 606 (insurance policy, mistake in name of insured); Howard v. Tettelbaum, 61 Or. 144, 120 Pac. 373; Stafford v. Giles, 135 Pa. St. 411, 19 Atl. 1028; Hughes v. Payne, 22 S. D. 293, 117 N. W. 363 (omission of price, and time and manner of payment); Castle v. Gleason, 31 S. D. 590, 141 N. W. 516; Laufer v. Moppins, 44 Tex. Civ. App. 472, 99 S. W. 109 (mistake in description); First State Bank v. Jones, 107 Tex. 623, 183 S. W. 874 (erroneous recital of payment); Warner, Moore & Co. v. Western Assur. Co., 103 Va. 391, 49 S. E. 499; Lord v. Horr, 30 Wash. 477, 71 Pac. 23; Arthur D. Jones & Co. v. New England Mtg. Sec. Co., 38 Wash. 637, 80 Pac, 796; Preston v. Hill-Wilson Shingle Co., 50 Wash. 377, 97 Pac. 293; Murray v. Sanderson, 62 Wash. 477, 114 Pac. 424; Silbon v. Pacific Brewing & Malting Co., 72 Wash. 13, 129 Pac. 581; Smith v. Owens, 63 W. Va. 60, 59 S. E. 762; Hertzog v. Riley, 71 W. Va. 651, 77 S. E. 138; Melott v. West, 76 W. Va. 739, 86 S. E. 759; Rowell v. Smith, 123 Wis. 510, 3 Ann. Cas. 773, 102 N. W. 1 (semble). See, also, City of Defiance v. Schmidt, 123 Fed. 1 (mistake in using wrong seal on bonds corrected at suit of innocent holder); Barker v. Pullman's Palace Car Co., 124 Fed. 555; Henkleman v. Peterson, 154 Ill. 419, 40 N. E. 359. The remedy of reformation includes the compelling of execution of an instrument, where that has been omitted by mistake; Aetna Indemnity Co. v. Baltimore, S. P. & C. R. Co., 112 Md. 389, 136 Am. St. Rep. 389, 21 Ann. Cas. 268, 76 Atl. 251.

But the mere fact that the instrument varies from, or does not fully express, the whole agreement of the parties, is no ground for reformation; as, where a verbal stipulation is omitted intentionally on the faith of an assurance that it shall be as binding as though incorporated into the writing: See 2 Pom. Eq. Jur., § 854, and note, and cases cited, where this distinction is fully explained. Further

ment, but, on the contrary, expresses a different contract." A court of equity will not make a contract for

cases on this subject are: Great Western Mfg. Co. v. Adams, 176 Fed. 325, 99 C. C. A. 615 (plaintiff relied on explanation of meaning of deed contrary to its express language); Holland Blow Stave Co. v. Barclay, 193 Ala. 200, 69 South. 118 (parties omit a provision supposing that it could be proved by parol); Doniphan, K. & S. R. Co. v. Missouri & N. A. R. Co., 104 Ark. 475, 149 S. W. 60 (one party relies on other to perform something not included in agreement); White v. Shaffer, 130 Md. 351, 99 Atl. 66; Birch v. Baker, 81 N. J. Eq. 264, 86 Atl. 932; Hughes v. Payne, 27 S. D. 214, 130 N. W. 81; May v. Cearley (Tex. Civ. App.), 138 S. W. 165.

Reformation is proper, although the defect might have been aided by parol and so made available as a defense at law; Greene v. Dixon, 119 Ala. 346, 72 Am. St. Rep. 920, 24 South. 422.

Upon the subject of reformation in general, see monographic note in 65 Am. St. Rep. 481ff.

<sup>2</sup> Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 259, per Monks, J.; and see Electric Goods Mfg. Co. v. Koltonski, 171 Fed. 550 (what bill must show); Horne v. J. C. Turner Cypress Lumber Co., 55 Fla. 690, 45 South. 1016 (same), citing the text; Fife v. Cate, 84 Vt. 45, 77 Atl. 947. "Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts": Mackenzie v. Coulson, L. R. 8 Eq. 368. See, also, Whittemore v. Farrington, 76 N. Y. 452; Diman v. Providence, W. & B. R. Co., 5 R. I. 130; Barrow v. Barrow, 18 Beav. 5 (court will not interfere to make a settlement conformable with what would have been the contract between the parties if all the facts material to be known by them had been there present to their minds). See, further, Grieb v. Equitable Life Assurance Society, 189 Fed. 498 (defendant's fraudulent misrepresentations inducing the original contract not ground for reformation); Hammer v. Lange, 174 Ala. 337, 56 South. 573 (court cannot make a new contract for the parties, nor establish as a contract that which it is supposed they would have made if they had understood the facts); Tedford Auto Co. v. Thomas, 108 Ark. 503, 158 S. W. 500 (false statements inducing the contract not a ground for reformation); Potter v. Frank, 106 Me. 165, 76 Atl. 489; Robinson v. Korns, 250 Mo. 663, 157 S. W. 790; City of New York v. Matthews, 213 N. Y. 563, 108 N. E. 80; Frost v. Reagon, 32 Okl. 849, 124 Pac. 13 (mistake not in deed, but in an extrinsic fact which, if known, might have prevented the deed): Heffernan v. Burns, 175 Mich. 457, 141 N. W. 529.

the parties. The mistake may be either as to the contents or the effect of the instrument; but the mistake of both parties must be in regard to the same matter.

§ 2097. (§ 676.) Unilateral Mistake—Fraud.—It is generally laid down that reformation will not be awarded on account of a mere unilateral mistake,—a mistake of but one party—standing alone.<sup>5</sup> The reason

- 3 Page v. Higgins, 150 Mass. 27, 5 L. R. A. 152, 22 N. E. 63.
- 4 Page v. Higgins, 150 Mass. 27, 5 L. R. A. 152, 22 N. E. 63.
- 5 "If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it, as it was written, by mistake, when it exactly expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before; and the court would have been engaged in the singular office, for a court of equity, of doing right to one party, at the expense of a precisely equal wrong to the other": Diman v. Providence, W. & B. R. Co., 5 R. I. 130, per Ames, C. J. To the effect that mere unilateral mistake is not ground for reformation, see Gun v. McCarthy, L. R., Ir., 13 Ch. D. 304; Fulton v. Colwell, 112 Fed. 831, 50 C. C. A. 537, 110 Fed. 54; Kant v. Atlanta, B. & A. R'y Co., 189 Ala. 48, 66 South. 598; Mc-Millon v. Town of Flagstaff, 18 Ariz. 536, 164 Pac. 318 (vendor-intended to sell something else); Greenhaw v. Combs, 74 Ark. 336, 85 S. W. 768; Snelling v. Merritt, 85 Conn. 83, 81 Atl. 1039; Newell v. Hartman & Fehrenbach Brewing Co., 9 Del. Ch. 240, 80 Atl. 672 (one party did not understand legal effect of words used); Horne v. J. C. Turner Cypress Lumber Co., 55 Fla. 690, 45 South. 1016; Quiggle v. Vining, 125 Ga. 98, 54 S. E. 74; Jordy v. Dunlevie, 139 Ga. 325, 77 S. E. 162; Bivins v. Kerr, 268 Ill. 164, 108 N. E. 996; Williams v. Hamilton, 104 Iowa, 423, 65 Am. St. Rep. 475, and monographic note, 73 N. W. 1029; Hesson v. Hesson, 121 Md. 626, 89 Atl. 107; White v. Shaffer, 130 Md. 351, 99 Atl. 66; Whitworth v. Lowell, 178 Mass. 43, 59 N. E. 760; Winston v. City of Pittsfield, 221 Mass. 356, 108 N. E. 1038; Dougherty v. Dougherty, 204 Mo. 228, 102 S. W. 1099; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099 (mistake must be mutual); Doniel v. Commercial Fire Ins. Co., 34 N. J. Eq. 30; Koch v. Commonwealth Ins. Co. of New York, 87 N. J. Eq. 90, 99 Atl. 920; Christopher Co. v. 23d St. Co., 149 N. Y. 51, 43 N. E. 538; Moran v. McLarty, 75 N. Y. 25; Salomon v. North

is that in such a case there is no meeting of minds—no contract.<sup>6</sup> A court of equity has no power to alter or reform an agreement, since that would in reality be making a contract for the parties. It is only the instrument evidencing the agreement that can be reformed. A unilateral mistake may be a ground for rescission, and

British & Mercantile Ins. Co., 215 N. Y. 214, L. R. A. 1917C, 106, 109 N. E. 121 (see instructive dissenting opinion by Seabury, J.); Baynes v. Harris, 160 N. C. 307, 76 S. E. 230; Wilson v. Scarboro, 163 N. C. 380, 79 S. E. 811; Britton v. Metropolitan Life Ins. Co. of New York, 165 N. C. 149, Ann. Cas. 1915D, 363, 80 S. E. 1072; Fehlberg v. Cosine, 16 R. I. 162, 13 Atl. 110; Forrester v. Moon, 100 S. C. 157, 84 S. E. 532; Cole v. Kjellberg (Tex. Civ. App.), 141 S. W. 120; Murray v. Sanderson, 62 Wash. 477, 114 Pac. 424; Smith v. Board of Education, 76 W. Va. 239, 85 S. E. 513; Grant Marble Co. v. Abbott, 142 Wis. 279, 124 N. W. 264.

Among innumerable dicta and decisions to the effect that the mistake must be mutual, see United States v. Milliken Imprinting Co., 202 U. S. 168, 50 L. Ed. 980, 26 Sup. Ct. 572; Folmar v. Lehman-Durr Co., 147 Ala. 472, 41 South. 750; Varner v. Turner, 83 Ark. 131, 102 S. W. 1111; Day v. Dyer, 171 Iowa, 437, 152 N. W. 53; Miller v. Stuart, 107 Md. 23, 68 Atl. 273; J. P. Eustis Mfg. Co. v. Saco Brick Co., 201 Mass. 391, 87 N. E. 596; Kinyon v. Cunningham, 146 Mich. 430, 109 N. W. 675; Pastorino v. Palmer, 163 Mich. 265, 128 N. W. 188; Miles v. Shreve, 179 Mich. 671, 146 N. W. 374; C. H. Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773; Lesser v. Demarest (N. J. Eq.), 72 Atl. 14; First Nat. Bank of Elida v. Hartford Fire Ins. Co., 17 N. M. 334, 127 Pac. 1115; Clements v. Life Ins. Co. of Virginia, 155 N. C. 57, 70 S. E. 1076; Hope v. Bourland, 21 Okl. 864, 98 Pac. 580; Owen v. City of Tulsa, 27 Okl. 264, 111 Pac. 320; Thraves v. Greenlees, 42 Okl. 764, 142 Pac. 1021; Stein v. Phillips, 47 Or. 545, 84 Pac. 793; Bower v. Bowser, 49 Or. 182, 88 Pac. 1104: Smith v. Interior Warehouse Co., 51 Or. 578, 94 Pac. 508, 95 Pac. 499; Ames v. Moore, 54 Or. 274, 101 Pac. 769; Boak v. New York Life Ins. Co., 226 Pa. 493, 75 Atl. 713; Waslee v. Rossman, 231 Pa. 219, 80 Atl. 643; Crim v. O'Brien, 69 W. Va. 754, 73 S. E. 271. The text, section 676, is cited to this effect in Crosby v. Andrews, 61 Fla. 554, Ann. Cas. 1913A, 420, 55 South. 57 (dissenting opinion).

6 The text is quoted in Salomon v. North British & Mercantile Ins. Co., 215 N. Y. 214, L. R. A. 1917C, 106, 109 N. E. 121, dissenting opinion of Seabury, J.

sometimes cancellation will be decreed. In a few cases, where the facts seemed to warrant it, courts have made a decree for cancellation conditional upon a refusal of the defendant to consent to reformation. This, however, is an instance of the flexibility of the equitable jurisdiction rather than an extension of the remedy of reformation. Where, however, the instrument does not express the true intent of the parties, owing to mistake on one side coupled with fraud or inequitable conduct on the other, relief will be freely given. The ground of the

7 Garrard v. Frankel, 30 Beav. 445; Paget v. Marshall, L. R. 28 Ch. D. 255.

8 See Pom. Eq. Jur., § 1376. This section of Pom. Eq. Jur. is cited to this effect in Crookston Imp. Co. v. Marshall, 57 Minn. 333, 47 Am. St. Rep. 612, 59 N. W. 294; also, in Grieb v. Equitable Life Assur. Society, 189 Fed. 498; Stricklin v. Kimbrell, 193 Ala. 211, 69 South. 14; Venable v. Burton, 129 Ga. 537, 59 S. E. 253; Cox v. Beard, 75 Kan. 369, 89 Pac. 671; Hesson v. Hesson, 121 Md. 626, 89 Atl. 107; Chelsea Nat. Bank v. Smith, 74 N. J. Eq. 275, 69 Atl. 533; and quoted in Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 259; Earl v. Van Natta, 29 Ind. App. 532, 64 N. E. 901; Dennis v. Northern Pac. R'y Co., 20 Wash. 320, 55 Pac. 210; also, in Hand v. Cox, 164 Ala. 348, 51 South. 519. The text, above, is quoted in Markwart v. Kliewer, 75 Or. 574, 147 Pac. 553. Where, then, the defendant was aware not only that the instrument did not express the real agreement, but that the plaintiff was ignorant of the discrepancy between the instrument and the agreement, the case is one for reformation. "A party who admits that an instrument which a court of equity is asked to reform does not set forth the agreement as it was actually made, and as the other party believed it did, will not be heard to say that he intentionally brought about, or silently acquiesced in, the discrepancy between the instrument and the agreement as made": Keister v. Myers, 115 Ind. 312, 17 N. E. 161. In support of the jurisdiction, see Cleghorn v. Zumwalt, 83 Cal. 155, 23 Pac. 294 (code provision expressing the general rule of equity); Town of Essex v. Day, 52 Conn. 483; Palmer v. Hartford Fire Ins. Co., 54 Conn. 488, 9 Atl. 248; Southern States Fire Ins. Co. v. Vann, 69 Fla. 544, 68 South. 645 (insurance policy); Dannelly v. Cuthbert, Oil Co., 131 Ga. 694, 63 S. E. 257; Gabbett v. Hinman, 137 Ga. 143, 72 S. E. 924; Goodrich v. Fogarty, 130 Iowa, 223, 106 N. W. 616; Scott v. Spurr, 169 Ky. 575, 184 S. W. 866; Efta v. Swanson, 109

jurisdiction in this case is the fraud of the defendant, rather than the mere mistake of the plaintiff.

§ 2098. (§ 677.) Illustrations — Mistake of Law. — "If, . . . after making an agreement, in the process of reducing it to a written form the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity [may grant reformation], to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made; but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mis-

Minn. 94, 123 N. W. 56, 115 Minn. 373, 132 N. W. 335; Lloyd v. Hulick, 69 N. J. Eq. 784, 115 Am. St. Rep. 624, 63 Atl. 616; Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co., 74 N. J. Eq. 635, 70 Atl. 380 (relying on representation that misstatement of the actual contract in the insurance policy was merely formal); Welles v. Yates, 44 N. Y. 525; Kilmer v. Smith, 77 N. Y. 226, 33 Am. Rep. 613; Sykes v. Life Ins. Co. of Virginia, 148 N. C. 13, 61 S. E. 610 (misrepresentation as to terms of insurance policy); Torrey v. McFadyen, 165 N. C. 237, 81 S. E. 296 (seller led purchaser to believe that agreement was a contract where it was only an option); Bradshaw v. Provident Trust Co., 81 Or. 55, 158 Pac. 274; Fotheringham v. Lockhart, 30 S. D. 394, 138 N. W. 804. See, also, Home Ins. Co. v. Virginia-Carolina Chem. Co., 109 Fed. 681; Fritz v. Fritz, 94 Minn. 264, 102 N. W. 705; Le Comte v. Freshwater (Carson), 56 W. Va. 336, 49 S. E. 238 (reformation for fraud or mistake). Reformation may be granted, though it does not clearly appear whether the mistake was mutual—the defendant not noticing the error—or unilateral—the defendant observing the error and failing to disclose the fact to the plaintiff; Lionel C. Simpson Plumbing & Heating Co. v. Geschke, 76 N. J. Eg. 475, 79 Atl. 427; Zarecki v. Guarantee Realty Co., 82 N. J. Eq. 489, 89 Atl. 513; Gross Construction Co. v. Hales, 37 Okl. 131. 129 Pac. 28.

take as to the legal meaning and operation of the terms or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases; but the rule is not confined to these instances."

§ 2099. (§ 678.) Illustrations—Continued.—''If one should execute a release so broad in its terms as to release his rights in property, of which he was wholly ignorant, and which was not in contemplation of the parties at the time the bargain for the release was made," a court of equity may either cancel the release or by reformation, restrain its application as intended. <sup>10</sup> Where the same mutual mistake has been repeated in each one of a chain of conveyances, under such circumstances as to entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and entitle the last vendee to a reformation against the original grantor. <sup>11</sup> Similarly, it has been held that if there is a mutual mistake in a

- 9 Pom. Eq. Jur., § 845, and cases cited. See, also, Hunt v. Rhodes, 1 Pet. 1, 7 L. Ed. 27; Chicago & A. R'y Co. v. Green, 114 Fed. 676; Orr v. Echols, 119 Ala. 340, 24 South. 357 (quoting Pom. Eq. Jur., § 845); Dinwiddie v. Self, 145 Ill. 290, 33 N. E. 892; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688 (quoting Pom. Eq. Jur., § 845); Rogers v. Castle, 51 Minn. 428, 53 N. W. 651; Canedy v. Marcy, 13 Gray, 373.
- 10 Cholmondeley v. Clinton, 2 Mer. 352; Dungers v. Angove, 2 Ves. 304; Dambmann v. Schulting, 75 N. Y. 55; Cleghorn v. Zumwalt, 83 Cal. 155, 23 Pac. 294.
- 11 The text is quoted in Goulding Fertilizer Co. v. Blanchard, 178 Ala. 298, 59 South. 485; and cited in Woodlawn Realty & Development Co. v. Hawkins, 186 Ala. 234, 65 South. 183. See, also, Blackburn v. Randolph, 33 Ark. 119; Tillis v. Smith, 108 Ala. 264, 19 South. 374, and cases cited; Mays v. Morrell, 65 Or. 558, 132 Pac. 714 (not necessary to correct mistakes in all the instruments in the chain of title); May v. Adams, 58 Vt. 74, 3 Atl. 187; Fond du Lac Land Co. v. Meiklejohn, 118 Wis. 340, 95 N. W. 142.

mortgage in the description of property, and the same mistake is continued in the foreclosure decree and in the sheriff's deed to the foreclosure purchaser, equity will go back to the original transaction and reform the mortgage and decree as well as the deed, so as to make them conform to the intention of the parties concerned;<sup>12</sup> though in other cases such comprehensive relief, under these circumstances, has been refused.<sup>13</sup>

Relief will not be given when the contract, as reformed, will have the same effect as before, nor if even after reformation it will still be invalid; 14 and it

12 Busey v. Moraga, 130 Cal. 586, 62 Pac. 1081; Quivey v. Parker, 37 Cal. 465; Greeley v. De Cottes, 24 Fla. 475, 5 South. 239; Greer v. Watson, 170 Ala. 334, 54 South. 487; Goulding Fertilizer Co. v. Blanchard, 178 Ala. 298, 59 South. 485 (but no reformation where purchaser did not intend to buy land other than that described in mortgage); Bradshaw v. Atkins, 110 Ill. 323; and see Dillard v. Jones, 229 Ill. 119, 11 Ann. Cas. 82, 82 N. E. 206 (reformation for mutual mistake in description running through all papers in a judicial proceeding); or if such relief is impossible, the purchaser may be quieted in his possession against the mortgagor: Waldron v. Letson, 15 N. J. Eq. 126. See Fisher v. Villamil, 62 Fla. 472, Ann. Cas. 1913D, 1003, 39 L. R. A. (N. S.) 90, and note, 56 South. 559 (mortgage on wrong parcel foreclosed; proper course is to cancel foreclosure deed, reform the mortgage, and have a new foreclosure); Harper v. Combs, 61 W. Va. 561, 56 S. E. 902.

13 Stephenson v. Harris, 131 Ala. 470, 31 South. 445, and cases cited (too late to reform the decree); Jackson v. Lucas, 157 Ala. 51, 131 Am. St. Rep. 17, 47 South. 224 (cannot reform the mortgage); Miller v. Kolb, 47 Ind. 220.

14 Gardner v. Knight, 124 Ala. 273, 27 South. 298 (effect would remain the same); McCrary v. Williams, 127 Ala. 251, 28 South. 695 (mortgage would remain inoperative if corrected); Day v. Shiver, 137 Ala. 185, 33 South. 831 (not reformed as to description, because void as given for husband's debts). See, also, Montgomery v. Perryman & Co., 147 Ala. 207, 119 Am. St. Rep. 61, 41 South. 838 (invalid mortgage by a guardian not reformed); Whitley v. Willingham & Bell, 176 Ala. 264, 57 South. 816 (contract not reformed to enable plaintiff to obtain nominal damages for its breach); Christian Church v. Littleville Camp No. 258, W. O. W., 185 Ala. 80, 64 South. 9 (conveyance as reformed would be void for uncertainty); Dessart v.

has been held that it will not be awarded to give a party a remedy exactly equivalent to one he has lost by his own laches.<sup>15</sup>

§ 2100. (§ 679.) No Reformation in Favor of a Volunteer.—As a general rule, equity will not interfere in favor of a volunteer. Hence no relief will be awarded to a grantee in an imperfect conveyance which is not supported by either a valuable or meritorious consideration, against either the grantor or his representatives. <sup>16</sup> A creditor taking the instrument either in pay-

Bonynge, 10 Ariz. 37, 85 Pac. 723 (trustee under trust-deed must show that debt has not been paid before he is entitled to reformation); Buford v. Chichester, 69 W. Va. 213, 71 S. E. 120 (reformation would not change the meaning or legal effect of the instrument).

In general, that reformation will be refused when it would be futile, or of no value to plaintiff, see Holland Blow Stave Co. v. Barclay, 193 Ala. 200, 69 South. 118; Grieb v. Equitable Life Assurance Society, 189 Fed. 498; Harvey v. Hand, 48 Ind. App. 392, 95 N. E. 1020; St. Louis House & Window Cleaning Co. v. York Realty Co., 193 Mo. App. 28, 180 S. W. 576; Macey v. Furman, 90 Wash. 580, 156 Pac. 548; Gilbert v. Auster, 135 Wis. 581, 116 N. W. 177.

15 Daggett v. Ayer, 65 N. H. 82, 18 Atl. 169. The text is cited in Wright v. Isaacks, 43 Tex. Civ. App. 223, 95 S. W. 55.

16 Christian Church v. Littleville Camp No. 258, W. O. W., 185 Ala. 80, 64 South. 9; Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005 (grantee in voluntary conveyance not entitled to relief against heirs of grantor); Powell v. Powell, 27 Ga. 36, 73 Am. Dec. 724; Gould v. Glass, 120 Ga. 50, 47 S. E. 505; McWhorter v. O'Neal, 123 Ga. 247, 51 S. E. 288; Turner v. Newell, 129 Ga. 89, 58 S. E. 657 (donor cannot consent to reformation if it tends to interfere with the rights and just demands of a judgment creditor); Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767; Wait v. Smith, 92 Ill. 385; Henry v. Henry, 215 Ill. 205, 74 N. E. 126; Comstock v. Coon, 135 Ind. 642, 35 N. E. 909; Harvey v. Hand, 48 Ind. App. 392, 95 N. E. 1020; Else v. Kennedy, 67 Iowa, 376, 25 N. W. 290; Shears v. Westover, 110 Mich. 505, 68 N. W. 266; Henderson v. Dickey, 35 Mo. 120; Gwyer v. Spaulding, 33 Neb. 573, 50 N. W. 681; Powell v. Morisey, 98 N. C. 426, 2 Am. St. Rep. 343, 4 S. E. 185; Clark v. Hindman, 46 Or. 67, 79 Pac. 56; Langley v. Kesler, 57 Or. 281, 110 Pac. 401, 111 Pac. 246 (husband, as bounty, intended to take deed in name of wife ment or as collateral security, is not a volunteer, within the meaning of this rule.<sup>17</sup> In some jurisdictions it is said that the rule is subject to the exception, that after the death of the donor equity will interfere to rectify a disposition which is clearly proved to have failed, through mistake, to carry out the donor's intention.<sup>18</sup> While reformation will not generally be granted in favor of a volunteer grantee, it will be given to a donor who shows that, through mistake, his deed does not carry out his intention.<sup>19</sup>

## § 2101. (§ 680.) Negligence — Laches—Limitations. The mere neglect or omission to read or know the con-

and himself; deed ran to him alone; wife not entitled to reformation); Eaton v. Eaton, 15 Wis. 259; Willey v. Hodge, 104 Wis. 81, 76 Am. St. Rep. 852, 80 N. W. 75. "If there is a mistake or a defect, it is a mere failure in a bounty, which, as the grantor was not bound to make, he is not bound to correct": Adair v. McDonald, 42 Ga. 506.

The doctrine of "meritorious" consideration in equity is described, in another connection, in 2 Pom. Eq. Jur., §§ 588-590. For instance of reformation decreed in favor of one to whom the donor stood in loco parentis, see Huss v. Morris, 63 Pa. St. 367 (grandchildren); reformation of misdescription in deed from husband to wife, Partridge v. Partridge, 220 Mo. 321, 132 Am. St. Rep. 584, 119 S. W. 415.

- 17 Comstock v. Coon, 135 Ind. 640, 35 N. E. 909; Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 259; Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539; Miller v. Savage, 60 N. J. Eq. 204, 46 Atl. 632.
- 18 M'Mechan v. Warburton, L. R., Ir., 1 Ch. D. 435; Mattingly v. Speak, 4 Bush, 316; Miller v. Beardslee, 175 Mich. 414, 141 N. W. 566; Spencer v. Spencer, 115 Miss. 71, 75 South. 770; Huss v. Morris, 63 Pa. St. 367. See, however, Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005; Triesback v. Tyler, 62 Fla. 580, 56 South. 947; Legate v. Legate, 249 Ill. 359, 94 N. E. 498; Willey v. Hodge, 104 Wis. 81, 76 Am. St. Rep. 852, 80 N. W. 75.
- Jones v. McNealy, 139 Ala. 379, 101 Am. St. Rep. 38, 35 South.
   Crockett v. Crockett, 73 Ga. 647; Kelly v. Hamilton, 135 Ga. 505, 69 S. E. 724; Andrews v. Andrews, 12 Ind. 348; Day v. Day, 84
   N. C. 408; Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187.

tents of a written instrument is not necessarily a bar to reformation. The relief is proper when the instrument fails to conform to the agreement between the parties, through mutual mistake or mistake coupled with fraud, however the mistake may have been induced.<sup>20</sup> The doctrine of laches is applicable to these suits, and in some jurisdictions the statute of limitations is expressly made applicable. The rule is here, as in all cases of fraud or mistake, that the time does not begin to run

20 The text is quoted in Martin v. Hempstead County Levee Dist. No. 1, 98 Ark. 23, 135 S. W. 453; Taylor v. Godfrey, 62 W. Va. 677, 59 S. E. 631; and cited in Bradshaw v. Provident Trust Co., 81 Or. 55, 158 Pac. 274 (failure to read deed does not bar relief); Crosby v. Andrews, 61 Fla. 554, Ann. Cas. 1913A, 420, 55 South. 57 (dissenting opinion). See 2 Pom. Eq. Jar., § 856, and notes, where this subject is fully discussed. It is there shown that the defense, the plaintiff's negligence, is appropriate to the remedy of rescission rather than of reformation. In support of the text, see, also, Albany City Sav. Inst. v. Burdick, 87 N. Y. 40; Hitchins v. Pettingill, 58 N. H. 3; West v. Suda, 69 Conn. 60, 36 Atl. 1015 (failure to read is not negligence per se); Story v. Gammell, 68 Neb. 709, 94 N. W. 982; Smelser v. Pugh, 29 Ind. App. 614, 64 N. E. 943. See, also, Farwell v. Home Ins. Co., 136 Fed. 93, 68 C. C. A. 557; Shields v. Mongollon Exploration Co., 137 Fed. 539, 541, 70 C. C. A. 123; Los Angeles & R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029 (an instructive opinion); Overland Southern Motor Co. v. Maryland Casualty Co., 147 Ga. 63, 92 S. E. 931; Panhandle Lumber Co. v. Rancour, 24 Idaho, 603, 135 Pac. 558; Nichols & Shepard Co. v. Berning, 37 Ind. App. 109, 76 N. E. 776; Parchen v. Chessman, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469; Lloyd v. Hulick, 69 N. J. Eq. 784, 115 Am. St. Rep. 624, 63 Atl. 616; Goerke Co. v. Diskon (N. J. Eq.), 75 Atl. 780 (fraud); Grav v. Jenkins (James), 151 N. C. 80, 65 S. E. 644; Bill v. McJones (Jones), 151 N. C. 85, 65 S. E. 646 (acceptance of deed induced by misrepresentations); Holden v. Law Union & Rock Ins. Co., 63 Or. 253, 127 Pac. 547 (failure of insured to read policy); Harry v. Hamilton (Tex. Civ. App.), 154 S. W. 637; Rosenbaum v. Evans, 63 Wash. 506, 115 Pac. 1054. But see contra, Reid, Murdock & Co. v. Bradley, 105 Iowa, 220, 74 N. W. 896; Grieve v. Grieve, 15 Wyo. 358, 11 Ann. Cas. 1162, 9 L. R. A. (N. S.) 1211, 89 Pac. 569.

until discovery of the mistake or until it ought to have been discovered.<sup>21</sup>

21 The text is quoted in Martin v. Hempstead County Levee Dist. No. 1, 98 Ark. 23, 135 S. W. 453; and cited in Louis Werner Sawmill Co. v. Sessoms, 120 Ark. 105, 179 S. W. 185. In general, see Bloomer v. Spittle, L. R. 13 Eq. 427; Ward v. Waterman, 85 Cal. 488, 24 Pac. 930; Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 259; Carter v. Leonard, 65 Neb. 670, 91 N. W. 574; Grand View Bldg. Ass'n v. Northern Assur. Co., 73 Neb. 149, 102 N. W. 246 (statute of limitations applies); Van Houten v. Van Houten, 68 N. J. Eq. 358, 59 Atl. 555; Sable v. Maloney, 48 Wis. 331, 4 N. W. 479; Citizens' Mut. Fire Ins. Co. v. Conowingo Bridge Co., 116 Md. 422, 82 Atl. 372. In the following recent cases there was laches: Aken v. Bullard, 134 Ga. 665, 68 S. E. 482 (twenty-three years' delay); White v. Shaffer, 130 Md. 351, 99 Atl. 66; Tazewell Coal & Iron Co. v. Gillespie, 113 Va. 134, 75 S. E. 757 (seventeen years' delay, great increase in value of land and depreciation of the consideration); Gillespie v. Davis, 116 Va. 630, 82 S. E. 705 (fifty-four years' delay, forty-fold increase in value); Harper v. Combs, 61 W. Va. 561, 56 S. E. 902 (twelve years' delay must be excused).

Ignorance of the mistake excused delay in the following cases: Peacock v. Bethea, 151 Ala. 141, 43 South. 864; Danielson v. Neal, 164 Cal. 748, 130 Pac. 716 (though error in deed could have been discovered from its face); Snelling v. Merritt, 85 Conn. 83, 81 Atl. 1039; Venable v. Burton, 129 Ga. 537, 59 S. E. 253; Kelly v. Hamilton, 135 Ga. 505, 69 S. E. 724 (thirty years); Harvey v. Hand, 48 Ind. App. 392, 95 N. E. 1020, 1023 (twelve years); Parchen v. Chessman, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469; Carroll v. Ryder, 34 R. I. 383, 83 Atl. 845.

Delay did not amount to laches in Beale v. Kyte, [1907] 1 Ch. 564; Long v. Gilbert, 133 Ga. 691, 66 S. E. 894 (plaintiff in possession, and defendant not prejudiced); Doty v. Sandusky Portland Cement Co. of Ohio, 46 Ind. App. 440, 91 N. E. 569 (nine years' delay not prejudicial to defendant); Harvey v. Hand, 48 Ind. App. 392, 95 N. E. 1020, 1023; Sicher v. Rambousek, 193 Mo. 113, 91 S. W. 68; Cox v. Hall, 54 Mont. 154, 168 Pac. 519 (delay for less than statutory period not usually laches); Teague v. Sowder, 121 Tenn. 132, 114 S. W. 484 (remainderman not chargeable with laches during life of life-tenant); Young v. Jones, 72 Wash. 277, 130 Pac. 90. For a detailed treatment of the subject of laches, see ante, volume I, chapter I.

§ 2102. (§ 681.) Parties Against Whom Reformation may be had.—Reformation may be had against a party to an instrument, and against anyone taking from him without consideration or with notice.<sup>22</sup> Accordingly, a purchaser or mortgagee who takes with notice is in the same position as the original party, so far as this remedy is concerned.<sup>23</sup> A bona fide purchaser for value, and without notice, however, is not subject to the equity of the party injured by the mistake, and there can be no reformation against him.<sup>24</sup> In most jurisdictions, the equity for a reformation is superior to the liens of subsequent attaching and judgment creditors of the defendant.<sup>25</sup>

In states where a married woman's deed must be executed with certain formalities, no reformation on account of defects arising from non-compliance with statu-

22 Cole v. Fickett, 95 Me. 265, 49 Atl. 1066; Kerchner v. Frazier,
106 Ga. 437, 32 S. E. 351; Citizens' Nat. Bank v. Judy, 146 Ind.
322, 43 N. E. 259. See, also, cases in succeeding notes.

23 In the following cases subsequent parties taking with notice were held subject to the equity; Thalheimer v. Lockert, 76 Ark. 25, 88 S. W. 591; Simpson v. Montgomery, 25 Ark. 365, 99 Am. Dec. 228; Adams v. Stevens, 49 Me. 362; Craig v. Pendleton, 89 Ark. 259, 116 S. W. 209; Mattox v. Davis (Tex. Civ. App.), 106 S. W. 169. Of course no reformation can be had as against innocent third parties not in privity with the original parties: Adams v. Baker, 24 Nev. 162, 77 Am. St. Rep. 799, 51 Pac. 252.

<sup>24</sup> See 2 Pom. Eq. Jur., §§ 735-785, and especially § 776; Garrard v. Frankel, 30 Beav. 445; Davidson v. Davidson, 42 Ark. 362; Boone v. Graham, 215 Ill. 511, 74 N. E. 559; Cross v. Bean, 81 Me. 525, 17 Atl. 710; Goode v. Riley, 153 Mass. 585, 28 N. E. 228.

25 See 2 Pom. Eq. Jur., 4th ed., §§ 721-724, and notes, and especially note (d) to § 721. In many jurisdictions where, by the express terms of the statute, these liens are superior to prior unrecorded conveyances or mortgages, the equity arising from a mistake, being an unrecordable interest, is held, notwithstanding the statute, to be superior to the subsequent recorded lien: See 2 Pom. Eq. Jur., § 721, note (a). In general, see Fort Smith Milling Co. v. Mikles, 61 Ark. 123, 32 S. W. 493; Kerchner v. Frazier, 106 Ga. 437, 32 S. E. 351; Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539.

tory provisions will be decreed, since it would not only contravene the policy of the law but require her to make a contract which she has not made.<sup>26</sup> A mere mistaken description in her executed conveyance may, however, by the preponderance of authority be corrected against her;<sup>27</sup> and in some states where there are no disabilities upon a married woman's power to contract and convey, an instrument may be corrected as against her to the same extent as against any other person.<sup>28</sup>

§ 2103. (§ 682.) Parol Proof—Amount of Proof.—It is the generally established rule in the United States that parol evidence of mistake is admissible in all cases and for all purposes, notwithstanding the fundamental doctrine of the law of evidence that parol proof is not

26 Henderson v. Kirkland, 127 Ala. 185, 28 South. 674 (semble); Barrett v. Tewksbury, 9 Cal. 13 (defective acknowledgment); Breit v. Yeaton, 101 Ill. 242; Hamar v. Medsker, 60 Ind. 413 (dictum); McReynolds v. Grubb, 150 Mo. 352, 73 Am. St. Rep. 448, 51 S. W. 822; Cannon v. Beatty, 19 R. I. 524, 34 Atl. 1111; Justis v. English, 30 Gratt. 565. See, also, Gebb v. Rose, 40 Md. 387. To the effect that an instrument cannot be reformed so as to include a homestead, see O'Malley v. Ruddy, 79 Wis. 147, 24 Am. St. Rep. 702, 48 N. W. 116; Gotfredson Bros. Co. v. Dusing, 145 Wis. 659, 129 N. W. 647.

27 Hamar v. Medsker, 60 Ind. 413; Stevens v. Holman, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670; Herring v. Fitts, 43 Fla. 54, 99 Am. St. Rep. 108, 30 South. 804; Christensen v. Hollingsworth, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211; Snell v. Snell, 123 Ill. 403, 5 Am. St. Rep. 526, 14 N. E. 684; Parish v. Camplin, 139 Ind. 1, 37 N. E. 607; Durham v. Luce (Tex. Civ. App.), 140 S. W. 850. But see Bowden v. Bland, 53 Ark. 53, 22 Am. St. Rep. 179, 13 S. W. 420; Morris v. Covey, 104 Ark. 226, 148 S. W. 257; Wiseman v. Crislip, 72 W. Va. 340, 78 S. E. 107.

28 Christman v. Colbert, 33 Minn. 509, 24 N. W. 301 ("if it ever was a rule of law in this state that the deed of a married woman could not be reformed, it must be abrogated by our statutes, by which married women are, with comparatively unimportant exceptions, put upon the footing of femes sole as respects property and capacity to contract"); Mills v. Driver, 72 Ark. 534, 81 S. W. 1058.

admissible between the parties to vary a written instrument, and notwithstanding that the effect of the parol evidence may be to enlarge the scope of an instrument required by the statute of frauds to be in writing.<sup>29</sup>

"The authorities all require that the parol evidence of the mistake, and of the alleged modification, must be most clear and convincing, . . . or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of the evidence, but only upon a certainty of the error."

29 See 2 Pom. Eq. Jur., §§ 857-868, where the subject is discussed at length. Important recent cases, in addition to those there cited, are (§ 862) Macomber v. Peckham, 16 R. I. 485, 17 Atl. 910; Goode v. Riley, 153 Mass. 585, 28 N. E. 228; (§ 863) Metropolitan Lumber Co. v. Lake Superior etc. Co., 101 Mich. 577, 60 N. W. 278 (part performance of parol variation); (§ 867) following the Massachusetts rule; Macomber v. Peckham, 16 R. I. 485, 17 Atl. 910. In general, see, also, Harvey v. Hand, 48 Ind. App. 392, 95 N. E. 1020; Coleman v. Coleman, 153 Iowa, 543, 133 N. W. 755; American Potato Co. v. Jeanette Bros. Co., 174 N. C. 236, 93 S. E. 795.

30 Pom. Eq. Jur., § 859; quoted with approval in Hertzler v. Stephens, 119 Ala. 333, 24 South. 521. "Until beyond reasonable controversy, the mistake is made to appear, the writing must remain the sole expositor of the intent and agreement of the parties': Hinton v. Insurance Co., 63 Ala. 488. "To reform a deed for alleged fraud or mistake requires more than a bare preponderance of evidence": Stroupe v. Bridger (Iowa), 90 N. W. 704; Merchants' Nat. Bank v. Murphy, 125 Iowa, 607, 101 N. W. 441; Royer Wheel Co. v. Miller, 20 Ky. Law Rep. 1831, 50 S. W. 62; Mikiska v. Mikiska, 90 Minn. 258, 95 N. W. 910; Crookston Imp. Co. v. Marshall, 57 Minn. 333, 47 Am. St. Rep. 612, 59 N. W. 294; Fritz v. Fritz, 94 Minn. 264, 102 N. W. 705; Tillar v. Wilson, 79 Ark. 256. 96 S. W. 381; Hesson v. Hesson, 121 Md. 626, 89 Atl. 107. The evidence must be "clear, unequivocal and satisfactory": Chapman v. Dunwell, 115 Iowa, 533, 88 N. W. 1067. See, also, Farwell v. Home Ins. Co., 136 Fed. 93, 68 C. C. A. 557; Barker v. Pullman Co., 134 Fed. 70, 67 C. C. A. 196; A. J. Dwyer Pine Land Co. v. White§ 2104. (§ 683.) Decree. — A decree declaring the mistake and ordering reformation is generally sufficient to pass title, especially in the jurisdictions where, by statute, a decree is given the effect of a conveyance.<sup>31</sup>

man, 92. Minn. 55, 99 N. W. 362; Duecker v. Goeres, 104 Wis. 29, 80 N. W. 91; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099; further, see Folmar v. Lehman-Durr Co., 147 Ala. 472, 41 South. 750; Sellers v. Grace, 150 Ala. 181, 43 South. 716; Snelling v. Merritt, 85 Conn. 83, 81 Atl. 1039; Strout v. Lewis, 104 Me. 65, 71 Atl. 137; Potter v. Frank, 106 Me. 165, 76 Atl. 489; Aetna Indemnity Co. v. Baltimore, S. P. & C. R. Co., 112 Md. 389, 136 Am. St. Rep. 389, 21 Ann. Cas. 268, 76 Atl. 251; Torrey v. Mc Fadyen, 165 N. C. 237, 81 S. E. 296; Stein v. Phillips, 47 Or. 545, 84 Pac. 793; Battle v. Claiborne, 133 Tenn. 286, 180 S. W. 584; Gillespie v. Davis, 116 Va. 630, 82 S. E. 705; Rosenbaum v. Evans, 63 Wash. 506, 115 Pac. 1054; Crim v. O'Brien, 69 W. Va. 754, 73 S. E. 271. "The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points": Hearne v. Marine Ins. Co., 20 Wall. 488, 22 L. Ed. 395; Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547; Griffin v. Société etc. Co., 53 Fla. 801, 44 South. 342; Jones v. Jones, 88 Miss. 784, 41 South. 373; Clark v. Hadley (Tenn. Ch.), 64 S. W. 403 (must be practically beyond a reasonable doubt). While it is frequently said that the mistake must be proved beyond a reasonable doubt, the courts do not generally require the degree of proof required by the criminal law: Southard v. Curley, 134 N. Y. 148, 30 Am. St. Rep. 642, 16 L. R. A. 561, 31 N. E. 330 (reviewing the authorities); Wall v. Meilke, 89 Minn. 232, 94 N. W. 688. But see Fessenden v. Ockington, 74 Me. 123. To the effect that a mere conflict of evidence does not necessitate refusal of relief, see Sullivan v. Moorhead, 99 Cal. 157, 33 Pac. 796, Owsley v. Matson, 156 Cal. 401, 124 Pac. 983 (though no witness testifies to personal knowledge of how mistake occurred); Aetna Ins. Co. v. Brannon (Tex. Civ. App.), 91 S. W. 614. That the evidential force of the writing itself varies according to the circumstances of the case, see Biser v. Bauer, 205 Fed. 229, 123 C. C. A. 417. It has been said that the decision of the trial court is conclusive upon the appellate court: Sullivan v. Moorhead, 99 Cal. 157, 33 Pac. 796; but the accuracy of this dictum is more than doubtful.

31 White v. White, L. R. 15 Eq. 235. For a collection of the statutes giving a decree the effect of a conveyance, see ante, volume I, chapter I.

In a few instances, however, a conveyance by the defendant has been thought necessary.<sup>32</sup> The principle that when equity once acquires jurisdiction it will be retained for full relief is applicable, and consequently additional equitable relief, such as specific performance, foreclosure, or legal relief in damages, may be awarded in the same suit.<sup>33</sup> Under the reformed procedure as it exists

32 Malmesbury v. Malmesbury, 31 Beav. 407; Smith v. Greeley, 14 N. H. 378; Craig v. Kittredge, 23 N. H. 231; Gillespie v. Moon, 2 Johns. Ch. 585, 602.

33 Upon this general subject, see Pom. Eq. Jur., §§ 231-242. Upon the application of the principle to reformation suits, see Pom. Eq. Jur., 4th ed., § 238, notes 3 and (a); Bieler v. Dreher, 129 Ala. 384, 30 South. 22 (removing cloud on title); Sicard v. Guyllou, 147 Ala. 239, 41 South. 474 (enjoining ejectment suit); Craig v. Pendleton, 89 Ark. 259, 116 S. W. 209 (foreclosure of trust deed); Martin v. Hempstead County Levee Dist. No. 1, 98 Ark. 23, 135 S. W. 453; Kee v. Davis, 137 Cal. 456, 70 Pac. 294 (specific performance); Messer v. Hibernia Savings & Loan Society, 149 Cal. 122, 84 Pac. 835 (specific performance); Taylor v. Glens Falls Ins. Co., 44 Fla. 273, 32 South. 887 (recovery on insurance policy); Capital City Bank v. Hilson, 64 Fla. 206, Ann. Cas. 1914B, 1211, 60 South. 189 (specific performance); Shaw v. Fender, 138 Ga. 48, 74 S. E. 792 (injunction against breach of contract); Christensen v. Hollingsworth, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211 (foreclosure of mortgage); Hallam v. Corlett, 71 Iowa, 446, 32 N. W. 449 (specific performance); Flynn v. Finch, 137 Iowa, 378, 114 N. W. 1058; Palmer Steel & Iron Co. v. Heat, Light & Power Co., 160 Ind. 232, 66 N. E. 690 (damages); Castleman-Blakemore Co. v. Pickrell & Craig Co., 163 Ky. 750, 174 S. W. 749 (reformation and damages); Scott v. Spurr, 169 Ky. 575, 184 S. W. 866 (specific performance); O'Keefe v. Irvington Real Estate Co., 87 Md. 196, 39 Atl. 428 (specific performance); Aetna Indemnity Co. v. Baltimore, S. P. & C. R. Co., 112 Md. 389, 136 Am. St. Rep. 389, 21 Ann. Cas. 268, 76 Atl. 251; Lockwood v. Geir, 98 Minn. 317, 108 N. W. 877, 109 N. W. 245 (cancellation by virtue of the clause inserted, giving an option to cancel); Floars v. Aetna Life Ins. Co., 144 N. C. 232, 11 L. R. A. (N. S.) 357, 56 S. E. 915 (reformation and damages); Hughes v. Payne, 22 S. D. 293, 117 N. W. 363 (specific performance); Castle v. Gleason, 35 S. D. 98, 150 N. W. 895; Howell v. McMurry Lumber Co., 62 Tex. Civ. App. 584, 132 S. W. 848. That an insurance policy in many of the states, the legal relief may be granted without any actual equitable decree. Thus, a plaintiff may "sue upon a written agreement, setting forth the facts entitling him to a reformation, and seeking to recover the amount due upon the instrument as reformed. The judgment actually rendered is merely a legal judgment for the recovery of debt or damages, the equitable relief of a reformation not being actually decreed, but being assumed; the purely legal relief is awarded exactly as though the prior equitable relief had been in terms granted."<sup>34</sup>

§ 2105. (§ 684.) Cancellation; Scope of the Remedy. The equitable remedies of cancellation, rescission, surrender up, and discharge of instruments are one and the same remedy, depending upon the same rules.<sup>35</sup> They are frequently accompanied by an injunction against a suit at law upon the instrument,<sup>36</sup> or against the negotiation or transfer of the instrument to other persons.<sup>37</sup> The chief occasions giving rise to the exercise of this

may be reformed after loss, and judgment given for the loss in the same suit, see Southern States Fire Ins. Co. v. Vann, 69 Fla. 544, 68 South. 645; Dearborn v. Niagara Falls Ins. Co., 17 N. M. 223, 125 Pac. 606; McIntosh v. North State F. I. Co., 152 N. C. 50, 136 Am. St. Rep. 818, 67 S. E. 45; Holden v. Law Union & Rock Ins. Co., 63 Or. 253, 127 Pac. 547; Gaskill v. Northern Assur. Co., 73 Wash. 668, 132 Pac. 643.

34 Pom. Eq. Jur., § 357. See, also, Pom. Eq. Jur., §§ 87, 183; Pom. Code Rem., § 80; Gaskill v. Northern Assur. Co., 73 Wash. 668, 132 Pac. 643; Coats v. Camden Fire Ins. Ass'n, 149 Wis. 129, 135 N. W. 524.

35 "The decree for cancellation generally includes a direction for a surrender up, and, if necessary, for a discharge of record": Pom. Eq. Jur., § 1375, and note; § 1377, note 1, which see as to the jurisdiction in England to decree the delivery up of muniments of title, and other instruments of a peculiar and exceptional character, to the persons entitled to their custody and possession.

<sup>36</sup> Pom. Eq. Jur., § 1363, and note.

<sup>37</sup> Pom. Eq. Jur., § 1363, and note, § 1340, § 221.

jurisdiction are mistake,<sup>38</sup> fraud (including constructive fraud, in its manifold varieties), and illegality; but this enumeration is by no means exhaustive.<sup>39</sup>

§ 2106. (§ 684a.) Rescission and Cancellation for Mistake.—Where a writing purports to embody an agreement which in fact was never made, because there was no "meeting of the minds," no offer and acceptance of the same thing, cancellation of the instrument is an appropriate remedy; 40 indeed, it is merely an extension of the principle of reformation to the case where the

38 Pom. Eq. Jur., section 1377, is cited to this effect in Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317; Remm v. Landon, 43 Ind. App. 91, 86 N. E. 973; Abbott v. Dow, 133 Wis. 533, 113 N. W. 960.

39 The text of Pom. Eq. Jur., as to the occasions giving rise to the jurisdiction, is quoted in McCracken v. McBee, 96 Ark. 251, 131 S. W. 450; Haydon v. St. Louis & S. F. R. Co., 117 Mo. App. 76, 93 S. W. 833. For the elements constituting actual fraud that will be relieved against in equity, see 2 Pom. Eq. Jur., § 872-907; constructive fraud, §§ 922-974; illegality, §§ 929-942; application of the maxim in pari delicto, etc., §§ 401-403, 939-942, 916. For special rules relating to the rescission of settlements and compromises, see 2 Pom. Eq. Jur., §§ 850, 855; awards, §§ 871, 919; judgments, §§ 871, 914, and note, 919, and ante, chapter XXXI. As to canceling conveyances in fraud of creditors, see 2 Pom. Eq. Jur., §§ 966-974, and post, chapter on "Creditors' Bills."

40 Page v. Higgins, 150 Mass. 27, 5 L. R. A. 152, 22 N. E. 63, 2 Ames, Cas. Eq. Jur., 188; Bivins v. Kerr, 268 Ill. 164, 108 N. E. 996; Dzuris v. Pierce, 216 Mass. 132, 103 N. E. 296; Crowe v. Lewin, 95 N. Y. 423 (defendant conveyed what he did not own and did not mean to sell; defendant bought what he meant to buy, but was ignorant of defendant's lack of title); Wirsching v. Grand Lodge of F. & A. M. of N. J., 67 N. J. Eq. 711, 3 Ann. Cas. 442, 56 Atl. 713, 63 Atl. 1119 (grantee mistaken as to one fact, grantor as to another). "Cancellation [for mistake] is appropriate when there is an apparently valid written agreement or transaction embodied in writing, while in fact, by reason of a mistake of both or one of the parties, . . . no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters": 2 Pom. Eq. Jur., § 870.

antecedent contract had no existence at all. Cancellation or rescission is more common in instances where there is a formal assent, but a mistake, shared by both parties to the contract, as to some fundamental matter forming the inducement to the contract. Thus, both parties may be mistaken as to the very existence<sup>41</sup> or identity<sup>42</sup> of the subject-matter of the contract; in such cases rescission is freely granted. It is also very freely and frequently granted where there is a mistake of both parties as to a collateral matter which constitutes the very basis of the contract and the inducement to its formation.<sup>43</sup> In general, however, mutual mistake as to

- 41 Subject-matter of the contract had no existence, but both parties supposed that it existed and treated on that understanding: Hitchcock v. Giddings, 4 Price, 135, 2 Ames, Cas. Eq. Jur., 192 (sale of remainder which had been destroyed by a recovery); Conturier v. Hastie, 5 H. L. C. 673; Allen v. Hammond, 11 Pet. (U. S.) 63, 9 L. Ed. 633 (contract for future services in establishing a claim against a foreign government, the claim having already been allowed); Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61 (lease of land for mining coal, which proves to contain no coal); Edwards v. Trinity & B. V. R'y Co., 54 Tex. Civ. App. 334, 118 S. W. 572.
- 42 Mistake as to identity of the subject-matter: Frazer v. State Bank of Decatur, 101 Ark. 135, 141 S. W. 941; Hutchinson v. Bambas, 249 Ill. 624, 94 N. E. 987; Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156 (property sold was not the property examined by both parties and supposed by both to be conveyed); Abbott v. Dow, 133 Wis. 533, 113 N. W. 960 (contract described another parcel than that agreed to be sold; rescission at suit of vendee, vendor having parted with the parcel agreed upon).
- 43 Scott v. Coulson, [1903] 2 Ch. 249, 2 Ames, Cas. Eq. Jur., 195 (assignment of life insurance policy relieved against, both parties erroneously supposing that the insured was still living); Great Northern R.'y Co. v. Fowler, 136 Fed. 118, 69 C. C. A. 106 (mistake of parties to release as to character of personal injuries); Traders' Ins. Co. of Chicago v. Aachen & M. Fire Ins. Co., 150 Cal. 370, 8 L. R. A. (N. S.) 844, 89 Pac. 109 (insurance company surrendered covering note in ignorance of prior fire); Johnson v. Withers, 9 Cal. App. 52, 98 Pac. 42 (mistake as to amount of mineral in place); Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094 (a most instructive

a mere collateral matter not of the essence of the contract, when the sources of information are open to both parties alike, is not a ground for relief.<sup>44</sup> A mere unilateral mistake, however, as to a matter inducing the contract affords no ground for the relief of rescission,<sup>45</sup>

opinion by Angellotti, C. J.; mutual ignorance of fact that the lot leased by plaintiff, which was valueless unless wooden buildings could be erected, had just been placed within the fire limits); Tatman v. Philadelphia, B. & W. R'y Co., 10 Del. Ch. 105, 85 Atl. 716 (mistake of parties to release as to character of plaintiff's personal injuries); Long v. Inhabitants of Athol, 196 Mass. 497, 17 L. R. A. (N. S.) 96, 82 N. E. 665; Pacific Mut. Life Ins. Co. v. Glaser, 245 Mo. 377, 45 L. R. A. (N. S.) 222, 150 S. W. 549 (mutual ignorance of fact that applicant for life insurance had been rejected by another company); McIsaac v. McMurray, 77 N. H. 466, L. R. A. 1916B, 769, 93 Atl. 115 (mistake of parties to release as to character of plaintiff's personal injuries); McCrea v. Hinkson, 65 Or. 132, 131 Pac. 1025 (price computed on supposed acreage, shortage of nearly onehalf); Riegel v. American Life Ins. Co., 140 Pa. St. 193, 23 Am. St. Rep. 225, 11 L. R. A. 857, 21 Atl. 392 (surrender of life insurance policy relieved against, both parties erroneously supposing that the insured was still living); Briggs v. Watkins, 112 Va. 14, 70 S. E. 551; Zoerb v. Paetz, 137 Wis. 59, 117 N. W. 793; Moehlenpah v. Mayhew, 138 Wis. 561, 119 N. W. 826 (both parties believing that life tenant was alive). Compare Cogswell v. Boston M. R. R. (N. H.), 101 Atl. 145 (release intended to cover all injuries). Rescission for mistake of law as to a party's right or interest: See 2 Pom. Eq. Jur., §§ 847, 849, 850.

44 Sample v. Bridgforth, 72 Miss. 293, 16 South. 876, 2 Ames, Cas. Eq. Jur., 207; Hecht v. Batcheller, 147 Mass. 335, 9 Am. St. Rep. 708, 17 N. E. 651, 2 Ames, Cas. Eq. Jur., 212 (mistake as to value); Cavanagh v. Tyson, Weare & Marshall Co., 227 Mass. 437, 116 N. E. 818.

45 Steinmeyer v. Schroeppel, 226 Ill. 9, 117 Am. St. Rep. 224, and note, 10 L. R. A. (N. S.) 114, 80 N. E. 564 (careless mistake in computation of price); Vallentyne v. Immigration Land Co., 95 Minn. 195, 5 Ann. Cas. 212, and note, 103 N. W. 1028; Welch Pub. Co. v. Johnson Realty Co., 78 W. Va. 350, L. R. A. 1917A, 200, 89 S. E. 707 (mistake of vendor as to size of lot). As to plaintiff's negligence in not discovering the mistake, see 2 Pom. Eq. Jur., § 856; Bidder v. Carville, 101 Me. 59, 115 Am. St. Rep. 303, 63 Atl. 303;

though such mistake is sometimes accepted, in cases involving considerable hardship, as a defense to specific performance; 46 but a mistake of one party, if known to and taken advantage of by the other, has sometimes been successfully asserted by way of affirmative as well as defensive relief. 47

§ 2107. (§ 685.) Adequate Remedy by Defense or Action at Law.—"The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary to protect or maintain equitable primary estates, interests, or rights; where, however, the estate, interest, or right is legal, the jurisdiction always exists, but its exercise depends upon the adequacy of the legal remedies,—a party being left to his affirmative or defensive remedy at law, where full and complete justice can thereby be done. 48... A

Stone v. Moody, 41 Wash. 680, 5 L. R. A. (N. S.) 799, 84 Pac. 617, 85 Pac. 346.

46 See post, § 781.

47 Gunn v. McCarthy, 2 Ames, Cas. Eq. Jur., 238; Morgan v. Owens, 228 Ill. 598, 81 N. E. 1135; Hudson Structural Steel Co. v. Smith & Rumery Co., 110 Me. 123, 43 L. R. A. (N. S.) 654, 85 Atl. 384; and see Crosby v. Andrews, 61 Fla. 554, Ann. Cas. 1913A, 420, 55 South. 57.

48 Pom. Eq. Jur., § 1377, and note 1; quoted in Seymour Water Co. v. City of Seymour, 163 Ind. 120, 70 N. E. 514; cited in Mosier v. Walter, 17 Okl. 305, 87 Pac. 877; Big Huff Coal Co. v. Thomas, 76 W. Va. 161, 85 S. E. 171. The text, above, and the present note, are cited in Braddy v. Elliott, 146 N. C. 578, 125 Am. St. Rep. 523, 16 L. R. A. (N. S.) 1121, 60 S. E. 507. It should be borne in mind that in England the exercise of the jurisdiction which exists in all cases of fraud, whatever the nature of the remedy invoked, depends, not on the inadequacy of the legal defense or remedy, but on considerations of convenience merely, governed by the circumstances of each case: See Pom. Eq. Jur., § 912, and notes; Hoare v. Bremridge, L. R. 8 Ch. App. 22; Traill v. Baring, 4 De Gex, J. & S. 318. This broad view of the jurisdiction where cancellation is sought because of fraud appears to be followed (but not very consistently) by a few courts in this country. It appears to be the view in Alabama

doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and canceled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference;<sup>49</sup> but it is now well settled that jurisdiction will be exercised in such cases,<sup>50</sup> except where the invalidity of the instrument is apparent on its face."<sup>51</sup>

Subject to this limitation, the remedy at law is usually inadequate, and the jurisdiction of equity exercised

(Merritt v. Ehrman, 116 Ala. 278, 22 South. 514); in Michigan (John Hancock Mut. L. Ins. Co. v. Dick, 114 Mich. 337, 43 L. R. A. 566, 72 N. W. 179); in New Jersey (Anderson v. Eggers, 61 N. J. Eq. 85, 47 Atl. 727; Hubbard v. International Merc. Agency, 68 N. J. Eq. 434, 59 Atl. 24); Vanderbilt v. Mitehell, 72 N. J. Eq. 910, 14 L. R. A. (N. S.) 304, 67 Atl. 97 (reversing 63 Atl. 1107, cancellation of a fraudulent birth certificate; an instructive case); and in Massachusetts, since the statute conferring full equity jurisdiction (Nathan v. Nathan, 166 Mass. 294, 44 N. E. 221, and cases cited; see, also, Gargans v. Pope, 184 Mass. 571, 100 Am. St. Rep. 575, 69 N. E. 343) and perhaps in a few other states (see 6 Cyc. 291, note 31); but is generally rejected in other jurisdictions: See Pom. Eq. Jur., § 914.

49 Pom. Eq. Jur., § 1377, and note 3, citing Ryan v. Mackmath, 3 Brown Ch. 15; Hilton v. Barrow, 1 Ves. 284; Franco v. Bollon, 3 Ves. 368, and Bromley v. Holland, 5 Ves. 610, 618.

50 Pom. Eq. Jur., § 1377, and note 4, citing many English cases. As illustrations of the cancellation of instruments void because forged, see Sharon v. Hill, 20 Fed. 1, 36 Fed. 337; Schmidt v. West, 104 Fed. 272; Alexander v. Davis, 42 W. Va. 465, 26 S. E. 291; In re Cooper, 20 Ch. D. 611; State v. Warner Valley Stock Co., 56 Or. 283, 106 Pac. 780, 108 Pac. 861.

51 Pom. Eq. Jur., § 1377, and note 5; quoted in Fitzmaurice v. Mosier, 116 Ind. 365, 9 Am. St. Rep. 854, 16 N. E. 175, 19 N. E. 180; McCracken v. McBee, 96 Ark. 251, 131 S. W. 450; cited in Otis v. Gregory, 111 Ind. 504, 13 N. E. 39; Multnomah County v. Portland Cracker Co., 49 Or. 345, 90 Pac. 155. See, also, Simpson v. Lord Howden, 3 Mylne & C. 97; Peirsoll v. Elliott, 6 Pet. 95, 8 L. Ed. 332; O'Connell v. Noonan, 1 App. Cas (D. C.) 332; Venice v. Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; S. L. Sheldon Co. v. Mayers, 81 Wis. 627, 51 N. W. 1082.

as a matter of course, (1) where the invalid instrument creates a cloud on title to land.<sup>52</sup> (2) Where the instrument is negotiable and not yet mature, "because in such cases if the present unlawful holder, although the legal defense to an action by him would be perfect, should transfer the security to a bona fide purchaser, such legal defense would be cut off."<sup>53</sup> In this case, it is usual to enjoin the transfer of the instrument, as well as to order its surrender.<sup>54</sup>

Where, however, the instrument against which the complainant claims a defense does not fall within either of these classes—where it is not a cloud upon the title to land, and where there is no danger that the defense will be lost by the transfer of the instrument to a bona fide purchaser,—there is the sharpest conflict among the authorities as to the propriety of the remedy of cancellation. On the one hand it is held, in a considerable

- 52 See post, chapter XXXVI. The text of Pom. Eq. Jur., section 1377, is cited to this effect in State v. Warner Valley Stock Co., 56 Or. 283, 106 Pac. 780, 108 Pac. 861. For distinction between cancellation of a deed on the ground of fraud and on the ground of cloud on title, see City of Atlanta v. Jones, 135 Ga. 376, 69 S. E. 571; Nowakowski v. Sobeziak, 270 Ill. 622, 110 N. E. 809.
  - 53 Pom. Eq. Jur., § 221, and note 8; § 1377, and note 7.
- 54 Pom. Eq. Jur., § 1340, note 1; § 1360, note 4; Smith v. Aykwell, 3 Atk. 566; Breathwit v. Rogers, 32 Ark. 758; Hairalson v. Carson, 111 Ga. 57, 36 S. E. 319; Maclean v. Fitzsimmons, 80 Mich. 336, 45 N. W. 145; Paterson v. Baker, 51 N. J. Eq. 49, 26 Atl. 324; Scott v. Menasha, 84 Wis. 73, 54 N. W. 263. See, however, Vannatta v. Lindley, 198 Ill. 40, 92 Am. St. Rep. 270, 64 N. E. 735 (effect of statute); Rosen v. Mayer, 224 Mass. 494, 113 N. E. 217; North Allis Tp. v. Allis Tp., 142 Mich. 137, 105 N. W. 139; Fairbanks' Adm'r v. Keiser, 86 Vt. 210, 84 Atl. 610; Atkinson v. Cain, 61 W. Va. 355, 123 Am. St. Rep. 984, 56 S. E. 519. If the defense to the negotiable instrument is one (such as forgery) that is available against a bona fide purchaser, the jurisdiction is not exercised as a matter of course, but depends on the same considerations as to the adequacy of the defense at law which govern the cases of overdue or nonnegotiable instruments.

group of cases, that the danger of loss of evidence in support of the defense, through the intentional delay of the holder of the instrument in bringing suit thereon, is sufficient to warrant the exercise of the jurisdiction;<sup>55</sup>

55 The text is quoted and followed in Head v. Oglesby, 175 Ky. 613, 194 S. W. 793 (notes given on sale of stock). See Martin v. Graves, 5 Allen, 601 (quoted in 1 Pom. Eq. Jur., § 221, note 7); Commercial Ins. Co. v. McLoon, 14 Allen, 351 (insurance policy); Fuller v. Percival, 126 Mass. 381 (promissory note, overdue, obtained by fraud); Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 107 Am. St. Rep. 791, 79 Pac. 601 (citing Pom. Eq. Jur., § 1377); Sharon v. Hill, 20 Fed. 1 (forged contract of marriage); Schmidt v. West, 104 Fed. 272 (forged note); Nathan v. Nathan, 166 Mass. 294, 44 N. E. 221; Fitzmaurice v. Mosier, 116 Ind. 363, 9 Am. St. Rep. 854, 16 N. E. 175, 19 N. E. 180 (negotiable instrument, after maturity, canceled for mistake); Fred Macey Co. v. Macey, 143 Mich. 138, 5 L. R. A. (N. S.) 1036, 106 N. W. 722; Slingerland v. Slingerland, 109 Minn. 407, 124 N. W. 19 (ante-nuptial contract). For further instances see 2 Pom. Eq. Jur., § 914, note 3. Some federal courts have found support for assuming jurisdiction on the extraordinary ground that the action to which complainant would be called upon to make defense might be an action in a state court: Mutual Life Ins. Co. v. Pearson, 114 Fed. 395, 397; United States L. Ins. Co. v. Cable, 98 Fed. 761, 763, 39 C. C. A. 264; Mutual Life Ins. Co. v. Blair, 130 Fed. 971. These cases have been practically overruled, however, in the late case of Cable v. United States Life Ins. Co., 191 U. S. 288, 48 L. Ed. 232, 24 Sup. Ct. 74.

It is the rule in England that there is no jurisdiction to cancel or enjoin suit upon an instrument on the ground of danger of loss of evidence to support the defense, where that defense is one that does not render the contract void in its inception: Thornton v. Knight, 16 Sim. 509; Cooper v. Joel, 1 De Gex, F. & J. 240; Brooking v. Maudslay, L. R. 38 Ch. D. 636. This distinction does not appear to be followed by the American courts; where the relief is denied in cases of defenses arising subsequent to the inception of the contract, the denial is put upon the usual ground, that the danger is not so apparent as to warrant equitable interposition; see Connecticut Ins. Co. v. Home Ins. Co., 17 Blatchf. 142, Fed. Cas. No. 3107 (cancellation granted of insurance policy for breach of condition to remain temperate); Connecticut Ins. Co. v. Bear, 26 Fed. 582 (same, cancellation refused); Lewis v. Tobias, 10 Cal. 574 (payment of note;

and this, too, even where the holder of the instrument has already brought suit at law upon it, since the prosecution of such suit is within his control, and may be delayed or withdrawn, and another brought at a time when an unconscionable advantage may be taken. <sup>56</sup> But on the whole, the majority of the cases repudiate the idea that the mere danger of loss of evidence to support a future defense is a sufficient ground for immediate relief in equity against the instrument, unless some special circumstances are shown which render such delay more than ordinarily hazardous; <sup>57</sup> and a

cancellation refused); Erickson v. First Nat. Bank, 44 Neb. 622, 48 Am. St. Rep. 753, 28 L. R. A. 577, 62 N. W. 1078 (alteration; cancellation refused).

56 The text is quoted in Head v. Oglesby, 175 Ky. 613, 194 S. W. 793. See Ferguson v. Fisk, 28 Conn. 501; Buxton v. Broadway, 45 Conn. 540 ("on this question we can consider only what means of redress the law itself furnishes the petitioner, and not what he may chance to get through the indulgence of the respondent"); United States L. Ins. Co. v. Cable, 98 Fed. 761, 39 C. C. A. 264; Manning v. Berdan, 135 Fed. 159; Andrews v. Frierson, 134 Ala. 626, 33 South. 6; John Hancock M. L. Ins. Co. v. Dick, 114 Mich. 337, 43 L. R. A. 566, 72 N. W. 179.

57 In many of the cases, the fact that the testimony of witnesses may be perpetuated under statutory provisions is assigned as a reason for holding that there is no danger of loss of evidence. See, in general, Cable v. United States Life Ins. Co., 191 U. S. 288, 48 L. Ed. 188, 24 Sup. Ct. 74; Home Ins. Co. v. Stanchfield, 1 Dill. 424, 12 Fed. Cas. No. 6660 (insurance policy; suit to cancel for fraud brought after loss); Globe Mut. L. Ins. Co. v. Reals, 79 N. Y. 202 (same); Connecticut Mut. L. Ins. Co. v. Bear, 26 Fed. 582 (insurance policy, forfeited by breach of condition to remain temperate); Cincinnati etc. R. Co. v. McKeen, 64 Fed. 36, 24 U. S. App. 218, 12 C. C. A. 14 (negotiable instrument after maturity; illegality); Griesa v. Mutual Life Ins. Co., 169 Fed. 509, 94 C. C. A. 635, reversing Mutual Life Ins. Co. v. Griesa, 156 Fed. 398 (insurance policy, after death of insured); Niagara Fire Ins. Co. of New York v. Adams, 198 Fed. 822, 117 C. C. A. 464 (though the state practice permits such a suit to be brought); Lewis v. Tobias, 10 Cal. 574 (overdue note; payment); Miller v. Kittenbach, 18 Idaho, 253, 138 Am. St. Rep. fortiori, refuse to interfere where an action at law has already been begun upon the instrument, and the defense may be interposed therein.<sup>58</sup>

192, 109 Pac. 505 (guaranty); Vannatta v. Lindley, 198 Ill. 40, 92 Am. St. Rep. 270, 64 N. E. 735: Erickson v. First Nat. Bank, 44 Neb. 622, 48 Am. St. Rep. 753, 38 L. R. A. 377, 62 N. W. 1078 (altered note); Allerton v. Belden, 49 N. Y. 373 (usurious note); Venice v. Woodruff, 62 N. Y. 462, 20 Am. Rep. 495 (unauthorized municipal bonds); Trimble v. Minnesota Threshing Co., 10 Okl. 578, 64 Pac. 8 (quoting Pom. Eq. Jur., § 914); Johnson v. Swanke, 128 Wis. 68, 8 Ann. Cas. 544, 5 L. R. A. (N. S.) 1048, 107 N. W. 481 (non-negotiable note). For further instances, see 2 Pom. Eq. Jur., § 914, note 3.

But other circumstances may exist which render the complainant's remedy by defense to a future suit on the instrument inadequate. The most important of such circumstances is, that the complainant is exposed to a multiplicity of suits, either successive suits by the one defendant (as in Mutual Life Ins. Co. v. Pearson, 114 Fed. 395), or numerous independent suits by separate holders of different instruments, the defenses to which present but a single issue of fact or law, which may be determined in equity by a single suit to which all the holders are made parties defendant: See 1 Pom. Eq. Jur., 4th ed., § 261, note (pp. 467-470); Springport v. Teutonia Sav. Bank, 75 N. Y. 397; Louisville N. A. & C. R. Co. v. Ohio Val. I. & C. Co., 57 Fed. 42, 45; cf. Farmington Village Corp. v. Sandy R. Nat. Bank, 85 Me. 46, 26 Atl. 965 (jurisdiction declined because no vexatious litigation appeared to be threatened, and equitable relief was therefore unnecessary); Scott v. McFarland, 70 Fed. 280 (no common question for decision).

58 Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 174 (unauthorized municipal bonds); Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Sunset Tel. & Tel. Co. v. Williams, 162 Fed. 301, 22 L. R. A. (N. S.) 374, 89 C. C. A. 281; Shain v Belvin, 79 Cal. 262, 21 Pac. 747; Chase's Ex'r v. Chase, 50 N. J. Eq. 143, 24 Atl. 914; Quebec Bank v. Weyand, 30 Ohio St. 126; Sailors v. Woelfle, 118 Tenn. 755, 12 L. R. A. (N. S.) 881, 102 S. W. 1109.

But here, too, exceptional circumstances may render a defense in the actions already brought an inadequate protection; as where several separate suits have been brought against complainant by persons claiming to be assignees of an instrument executed by him, and his defense is fraud in obtaining the instrument; interpleader cannot be had, since complainant denies any liability on the instruIn another group of cases, in many of which the complainant is a vendee of land or chattels, the question of inadequacy of the legal remedy concerns, not a legal defense in a future action against the complainant, but the alternative legal remedy that may be pursued by him, as for recovery of the purchase price, of damages for deceit, and the like. This question, in the main, depends upon the special circumstances of the individual case.<sup>59</sup> It is well established that a stockholder

ment; and if left to his defense at law, he must try several actions to secure a single right: McHenry v. Hazard, 45 N. Y. 580.

59 See cases collected by the author in 6 Cyc. 295-297; Boyce v. Grundy, 3 Pet. 210, 7 L. Ed. 655 (rescission at suit of defrauded vendee of land; explained in Buzard v. Houston, 119 U. S. 347, 30 L. Ed. 451, 7 Sup. Ct. 249. See, also, Powell v. City of Louisville, 141 Fed. 960, 73 C. C. A. 276 (suit by owner of municipal securities, based on fraud; legal remedy adequate); American Shipbuilding Co. v. Commonwealth S. S. Co., 215 Fed. 296, 131 C. C. A. 596 (suit by vendee of vessel; legal remedy inadequate under the circumstances); First State Bank v. Spencer, 219 Fed. 503, 135 C. C. A. 253 (suit by trustee in bankruptcy to recover a preference; money judgment sought, legal remedy adequate). It is the general rule that a vendee of land in possession under a warranty deed cannot have rescission on the ground of defective title, unless in a case of fraud, but is confined to the remedy at law upon the covenants of his deed; see Parker v. Parker, 93 Ala. 80, 9 South. 426; Sherwood v. Salmon, 5 Day (Conn.), 439, 5 Am. Dec. 167; Campbell v. Whittington, 5 J. J. Marsh. (Ky.) 96, 20 Am. Dec. 241; Miller v. Miller, 47 Minn. 546, 612, 50 N. W. 612, and cases cited; Reed v. Rogers, 19 N. M. 177, 141 Pac. 611; Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554; Ryerson v. Willis, 81 N. Y. 277; Thompson v. Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Decker v. Schulze, 11 Wash. 47, 48 Am. St. Rep. 858, 27 L. R. A. 335, 39 Pac. 261; Reuter v. Lowe, 86 Wis. 106, 56 N. W. 472. But see Matthews v. Crowder, 111 Tenn. 737, 69 S. W. 779 (equity may grant relief when grantor insolvent); Hunt v. Davis, 98 Ark. 44, 135 S. W. 458 (relief in equity where fraud); Mills v. Morris, 156 Wis. 38, 145 N. W. 369 (same). See, also, Fields v. Clayton, 117 Ala. 538, 67 Am. St. Rep. 189, 23 South. 530.

In general, in cases of non-performance or defective performance of an executory contract by one party, entitling the other party to

may procure the cancellation of a subscription obtained by fraud, since a remedy which did not destroy his *status* as stockholder would leave him subject to liabilities imposed by law.<sup>60</sup>

abandon it, the legal remedy is adequate: Blake v. Pine Mountain Iron etc. Co., 76 Fed. 624, 43 U. S. App. 490, 22 C. C. A. 430; Jackson v. Jackson, 222 Ill. 46, 6 L. R. A. (N. S.) 785, 78 N. E. 19 (deed to wife in consideration of marriage, and of her promise to be a kind and faithful wife, not rescinded for partial failure of consideration); Haydon v. St. Louis & S. F. R. Co., 222 Mo. 126, 121 S. W. 15; Braddy v. Elliott, 146 N. C. 578, 125 Am. St. Rep. 523, 16 L. R. A. (N. S.) 1121, 60 S. E. 507; Roy v. Harney Peak T. M. M. & M. Co., 21 S. D. 140, 130 Am. St. Rep. 706, 9 L. R. A. (N. S.) 529, 110 N. W. 106 (violation of condition subsequent not expressed in the deed); Cowley v. Northern Pac. R'y Co., 68 Wash. 558, 41 L. R. A. (N. S.) 559, 123 Pac. 998 (grant of land to railroad in return for agreement to give an annual pass over the road; seven years later, free passes made illegal by federal statute; no rescission of deed); Hewett v. Dole, 69 Wash. 163, 124 Pac. 374; Forster v. Flack, 140 Wis. 48, 121 N. W. 890. See, also, ante, note 55. On the other hand, a group of cases in which the circumstances have often rendered legal relief inadequate, and rescission by a decree in equity the only suitable remedy, is that of defective performance by water companies of their agreements to furnish municipalities with water in stipulated quantities; see Farmers' L. & T. Co. v. Galesburg, 133 U. S. 156, 33 L. Ed. 573, 10 Sup. Ct. 316; City of Columbus v. Mercantile Trust & Deposit Co. of Baltimore, 218 U. S. 645, 54 L. Ed. 1193, 31 Sup. Ct. 105; Winfield v. Winfield Water Co., 51 Kan. 70, 32 Pac. 663; Grand Haven v. Grand Haven Waterworks Co., 99 Mich. 106, 57 N. W. 1075; Light etc. Co. v. Jackson, 73 Miss. 598, 19 South. 771. Other cases in which non-performance justified rescission in equity: Neenan v. Otis Elevator Co., 194 Fed. 414, 114 C. C. A. 376 (agreement by assignee of patent to put invention into use); Collins v. Abel, 151 Ala. 207, 125 Am. St. Rep. 24, 44 South. 109 (mining lessee fails to develop the property); Howerton v. Kansas Natural Gas Co., 81 Kan. 553, 34 L. R. A. (N. S.) 34, 106 Pac. 47 (gas lease; an instructive opinion); Jennings v. Southern Carbon Co., 73 W. Va. 215, 80 S. E. 368 (oil lease).

60 Benton v. Ward, 47 Fed. 253; Bosley v. National Mach. Co.,
123 N. Y. 550, 25 N. E. 990; Negley v. Hagerstown etc. Co., 86 Md.
692, 39 Atl. 506; Bosher v. Richmond etc. Land Co., 89 Va. 455, 37
Am. St. Rep. 879, 16 S. E. 360. See, also, Southern States Fire &

§ 2108. (§ 686.) Equitable Relief Where Consideration of Conveyance has Failed—Rescission of "Support Deeds." It is, of course, the general rule that the mere failure by a grantee to perform a promise, which formed the whole or part of the consideration inducing an executed conveyance, gives rise to no right of rescission in the grantor, either at law or in equity, unless such promise amounts to a condition; and it is a rule of construction that, in case the language or intention is doubtful, "the promise or obligation of the grantee will be construed to be a covenant, limiting the grantor to an action thereon, and not a condition subsequent, with the right to defeat the conveyance." This rule

Casualty Ins. Co. v. Whatley, 173 Ala. 101, 55 South. 620; Dennette v. Boston Securities Co., 206 Mass. 401, 92 N. E. 498; Chamberlain v. Trogden, 148 N. C. 139, 16 Ann. Cas. 177, 61 S. E. 628 (as to rescission after insolvency of the corporation); Gress v. Knight, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834 (same); Meholin v. Carlson, 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755 (no rescission after suit brought by receiver). See 2 Pom. Eq. Jur., § 881, and cases cited.

61 This paragraph is cited and paraphrased in Abbott v. Sanders, 80 Vt. 179, 130 Am. St. Rep. 974, 12 Ann. Cas. 898, 13 L. R. A. (N. S) 725, 66 Atl. 1032; cited, also, in Kinney v. Kinney, 221 N. Y. 133, 116 N. E. 772.

62 The text is quoted in Dixon v. Milling, 102 Miss. 449, 43 L. R. A. (N. S.) 916, 59 South. 804 (rescission of support deed not granted); and cited in Hewett v. Dole, 69 Wash. 163, 124 Pac. 374 (mere failure to pay purchase price will not entitle vendor to rescission). See, also, Piedmont Land Imp. Co. v. Piedmont F. etc. Co., 96 Ala. 389, 11 South. 332; Chicago T. & M. R. Co. v. Titterington, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472. See, also, Priest v. Murphy (Ark.), 144 S. W. 921 (conveyance in consideration of support of grantor's children); Shafer v. Shafer (Mo.), 190 S. W. 323. It is assumed, of course, in the present discussion that the deed is not voidable for fraud, undue influence, violation of trust, or of an actual confidential relation (as in Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029), or other well-recognized ground for rescission.

63 Chicago T. & M. R. Co. v. Titterington, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472. The text is quoted in Dixon v. Milling, 102 Miss. 449, 43 L. R. A. (N. S.) 916, 59 South. 804.

has been found to work a great hardship in the frequent cases where an aged person has conveyed all his property to a son or other relative on the consideration, often oral, that the grantee shall support and care for the grantor during the remainder of the grantor's life, and the grantee, while retaining the land, has abandoned the performance of his obligation. Legal relief by periodic suits for damages is manifestly inadequate; and many courts have sought to evade the operation of the rule and afford the grantor some equitable relief that should include the reinvesting of his title to the land. Thus, the courts of Illinois, in a series of cases, have decreed rescission, based on a legal presumption of the grantee's fraudulent intention, at the time of procuring the conveyance, to fail in the performance of his obligation.64 In Wisconsin and Indiana the grantee's promise, though oral, is treated as a condition subsequent, on breach of which the grantor has the right of re-entry, and, generally, the right to have his title quieted or the cloud

64 Frazier v. Miller, 16 Ill. 48; Oard v. Oard, 59 Ill. 45; Kusch v. Kusch, 143 Ill. 353, 32 N. E. 267; Cooper v. Gum, 152 Ill. 471, 39 N. E. 267; McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559; Fabrice v. Von der Brelie, 190 Ill. 460, 60 N. E. 835; Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699 (no cancellation unless a substantial failure on grantee's part). See, also, Hensan v. Cooksey, 237 Ill. 620, 127 Am. St. Rep. 345, 86 N. E. 1107 (actual fiduciary relation of grantee to grantor); Williams v. Langwill, 241 Ill. 441, 25 L. R. A. (N. S.) 932, 89 N. E. 642 (no rescission when performance is prevented by grantor); Russell v. Robbins, 247 Ill. 510, 139 Am. St. Rep. 342, 93 N. E. 324; Chamberlin v. Sanders, 268 Ill. 41, 108 N. E. 666 (grantor's drunkenness and filthy habits account for his eviction without any presumption of fraudulent intent); Berry v. Heiser, 271 Ill. 264, 111 N. E. 99 (right to cancel is personal to grantor); Spangler v. Yarborough, 23 Okl. 806, 138 Am. St. Rep. 856. 101 Pac. 1107. It logically results from this theory that when the original grantee dies and there is a subsequent failure of performance on the part of the grantee's children, there can be no rescission, since the court can indulge no presumption of fraudulent intention on their part in procuring the deed: Stebbins v. Petty, 209 Ill. cast thereon by the conveyance removed.<sup>65</sup> In a number of other states the courts have not been at pains to bring the case within the analogy of any principle of general application, but have granted cancellation or a reconveyance on the mere ground of the hardship of the situation and the inadequacy of the legal remedy of damages,<sup>66</sup> thus adding to the long list of construc-

291, 101 Am. St. Rep. 243, 70 N. E. 673. Since the hardship is the same in this case, it is regrettable that the Illinois courts did not discover some less artificial reason in support of the equity jurisdiction assumed by them in these cases.

65 Wanner v. Wanner, 115 Wis. 196, 91 N. W. 671; Glocke v. Glocke, 113 Wis. 303, 57 L. R. A. 458, 89 N. W. 118 (reviewing earlier cases); Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156; Cree v. Sherfy, 138 Ind. 354, 37 N. E. 787. See, also, Huffman v. Rickets, 60 Ind. App. 526, 111 N. E. 322; Adkins v. Adkins, 171 Ky. 762, 188 S. W. 843 (remedy is personal to grantor); Mash v. Bloom, 130 Wis. 366, 118 Am. St. Rep. 1028, 110 N. W. 203, 268; Krahn v. Goodrich, 164 Wis. 600, 160 N. W. 1072 (agreement is personal to grantee); Danielson v. Danielson, 165 Wis. 171, 161 N. W. 787.

66 Penfield v. Penfield, 41 Conn. 474; Patterson v. Patterson, 81 Iowa, 626, 47 N. W. 768; Lane v. Lane, 106 Ky. 530, 50 S. W. 857; Lockwood v. Lockwood, 124 Mich. 627, 83 N. W. 613; Reid v. Burns, 13 Ohio St. 49; Lowman v. Crawford, 99 Va. 688, 40 S. E. 17; Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. 730. See, also, Martinez v. Martinez, 57 Colo. 292, 141 Pac. 469; Anderson v. Reed, 20 N. M. 202, L. R. A. 1916B, 862, 148 Pac. 502; Martin v. Hall, 115 Va. 358, 79 S. E. 320; Gardner v. Frederick, 96 Wash. 324, 165 Pac. 85; White v. Bailey, 65 W. Va. 573, 23 L. R. A. (N. S.) 232, 64 S. E. 1019 (rescission proper, though a lien is reserved, and the deed contains a clause of re-entry). In Grant v. Bell, 26 R. I. 288, 58 Atl. 951 (Stinness, C. J.), the agreement was stated to create an implied trust, and reconveyance was decreed; but no analogy is suggested to other species of constructive trusts, and the cases cited in the opinion of this able judge contain no hint of such a theory. the interesting case of Keister v. Cubine, 101 Va. 768, 45 S. E. 285, it was held that, while it is "the right and duty of a court of equity to take jurisdiction in this class of cases, because the remedy is manifestly inadequate at law," rescission is not appropriate under all circumstances. In this case the grantee had faithfully performed her part of the contract until her death; and the default in performtive frauds a new and independent species. In still other states equitable relief in this class of cases is refused, in obedience to the general rule stated at the beginning of this paragraph.<sup>67</sup>

§ 2109. (§ 687.) Ratification — Laches. 68—One who ratifies a transaction, after obtaining knowledge of the facts, cannot come into equity for cancellation. This doctrine rests "upon a distinct principle of public policy, that all that justice or equity requires for the relief of a party having such cause to impeach a contract is that he should have but one fair opportunity, after full knowl-

ance was not that of her heirs, who were infants, but of her surviving husband, who was not a party to the contract. The decree placed the property in the hands of a receiver, to be administered primarily for the support of the grantor, and, after that, for the benefit of the infant heirs. In Oregon, also, where it is held that cancellation is not a permissible remedy for the non-performance, the court will make the support of the grantor a charge upon the property: Patton v. Nixon, 33 Or. 159, 52 Pac. 1048. See, also, Lewis v. Wilcox, 131 Iowa, 268, 108 N. W. 536 (lien declared when rescission not warranted); Bruer v. Bruer, 109 Minn. 260, 28 L. R. A. (N. S.) 608, 123 N. W. 813; Kinney v. Kinney, 221 N. Y. 133, 116 N. E. 772, citing this section of the text; Cuthbertson v. Morgan, 149 N. C. 72, 62 S. E. 744; Abbott v. Sanders, 80 Vt. 179, 130 Am. St. Rep. 974, 12 Ann. Cas. 898, 13 L. R. A. (N. S.) 725, 66 Atl. 1032, citing the text; Davis v. Davis, 81 Vt. 259, 130 Am. St. Rep. 1035 and note, 69 Atl. 876. It appears to the author that less violence is done to established principles by thus raising a lien or charge ex æquo et bono in the grantor's favor than by annulling the deed on any of the grounds suggested; notwithstanding the general rule that the "grantor's lien," as such, "does not exist in behalf of any uncertain, contingent, or unliquidated demand"; 3 Pom. Eq. Jur., § 1251, and notes.

67 Gardner v. Knight, 124 Ala. 273, 27 South. 298; Brand v. Power, 110 Ga. 522, 36 S. E. 53; Anderson v. Gaines, 156 Mo. 664, 57 S. W. 726. See, also, McElroy v. Masterson, 156 Fed. 36, 84 C. C. A. 202; Schott v. Schott, 168 Cal. 342, 143 Pac. 595; Dixon v. Milling, 102 Miss. 449, 43 L. R. A. (N. S.) 916, 59 South. 804; Shafer v. Shafer (Mo.), 190 S. W. 323.

68 Sections 687, 688, are cited in Minter v. Hawkins, 54 Tex. Civ. App. 228, 117 S. W. 172.

edge of the rights, to decide whether he will affirm and take the benefits of the contract, or disaffirm it and demand the consequent redress.''<sup>69</sup> Ratification may be either express, or implied from the conduct of the parties.<sup>70</sup> Any dealing between the parties inconsistent with an intention to rescind,<sup>71</sup> such as payment or receipt of the purchase price,<sup>72</sup> taking the benefits of the contract, or exercising dominion over the property,<sup>73</sup>

69 Emma Silver Min. Co. v. Emma Silver Min. Co. of New York, 7 Fed. 401, per Choate, Dist. J.

70 Savery v. King, 5 H. L. Cas. 627, 2 Jur., N. S., 503, 25 L. J. Ch. 482, 4 Wkly. Rep. 571; Litchfield v. Browne, 70 Fed. 141, 36 U. S. App. 130, 17 C. C. A. 28; Baker v. Maxwell, 99 Ala. 584, 14 South. 568; Olivas v. Olivas, 61 Cal. 382; McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559; Tarkington v. Purvis, 128 Ind. 182, 9 L. R. A 607, 25 N. E. 879; Blackman v. Wright, 96 Iowa, 541, 65 N. W. 843; Parsons v. McKinley, 56 Minn. 464, 57 N. W. 1134; Arnold v. Hagerman, 45 N. J. Eq. 186, 14 Am. St. Rep. 712, 17 Atl. 93; Dennis v. Jones, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913; Town of Cherry Creek v. Becker, 123 N. Y. 161, 25 N. E. 369; Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156. See Pom. Eq. Jur., §§ 897, 916, 964, for a full statement of the doctrine of ratification.

71 In general, see St. Louis etc. R. Co. v. Terre Haute etc. R. Co., 33 Fed. 440; Day v. Ft. Scott Inv. Co., 153 Ill. 293, 38 N. E. 567; Blackman v. Wright, 96 Iowa, 541, 65 N. W. 843; State Bank of Iowa Falls v. Brown, 142 Iowa, 190, 134 Am. St. Rep. 412, 119 N. W. 81 (obtaining renewals of purchase-money notes); Munich Re-Insurance Co. v. United Surety Co., 113 Md. 200, 77 Atl. 579; Paine v. Harrison, 38 Minn. 346, 37 N. W. 588; Georgia Pac. R. Co. v. Brooks, 66 Miss. 583, 6 South. 467; Bostick v. Haynie (Tenn. Ch.), 36 S. W. 856.

72 The text is cited to this effect in Cash v. Thomas (Okl.), 161 Pac. 220. See, also, Litchfield v. Browne, 70 Fed. 141, 36 U. S. App. 130, 17 C. C. A. 28 (receipt of payment); Hatch v. Ferguson, 57 Fed. 972 (same); Roseboom v. Corbitt, 196 Fed. 627, 116 C. C. A. 301; Howle v. North Birmingham Land Co., 95 Ala. 389, 11 South, 15 (payment); Bell v. Keepers, 39 Kan. 105, 17 Pac. 785 (payment); Dennis v. Jones, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913 (payment); Finch v. Garrett, 109 Va. 114, 63 S. E. 417.

73 Shappirio v. Goldberg, 192 U. S. 232, 48 L. Ed. 419, 24 Sup. Ct. 259 (no relief when purchaser collected rents after discovery of

and the like, after knowledge of the facts, is evidence, more or less conclusive, of a ratification. The act must be unequivocal, however, and must show an election to retain the property, after discovering the deceit, before the right to rescind is gone.<sup>74</sup>

The doctrine of laches applies to this, as to all other equitable remedies. Consequently, unexcused delay, coupled with other circumstances, such as change of position, loss of evidence, and the like, will bar relief.<sup>75</sup>

fraud); Stuart v. Hayden, 72 Fed. 402, 36 U. S. App. 462, 18 C. C. A. 618 (suing for damages for deceit); Bement v. La Dow, 66 Fed. 185; Dent v. Long, 90 Ala. 172, 7 South. 640; Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 97 Pac. 414, 420 (vendee endeavors to sell); Thiemann v. Heinze, 120 Mo. 630, 25 S. W. 533; Kaup v. Schinstock, 88 Neb. 95, 129 N. W. 184; Dennis v. Jones, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913; Whitney v. Bissell, 75 Or. 28, L. R. A. 1915D, 257, 146 Pac. 141; Temple Nat. Bank v. Warner (Tex. Civ. App.), 31 S. W. 239; Le Vine v. Whitehouse, 37 Utah, 260, Ann. Cas. 1912C, 407, 109 Pac. 2.

74 Graybill v. Drennen, 150 Ala. 227, 43 South. 568; McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559; Voorhees v. Campbell, 275 Ill. 292, 114 N. E. 147 (payment of taxes not a ratification); Tarkington v. Purvis, 128 Ind. 182, 9 L. R. A. 607, 25 N. E. 879; Chase v. Wolgamot, 137 Iowa, 128, 114 N. W. 614 (not estopped by failure to rescind on partial discovery of defects); Read v. Loftus, 82 Kan. 485, 31 L. R. A. (N. S.) 457, 108 Pac. 850 (remaining in possession in reliance on vendor's promise to clear title); Allen v. Wilmington etc. R. Co., 106 N. C. 515, 11 S. E. 576, 820; Fitzgerald v. Frankel, 109 Va. 603, 64 S. E. 941 (confirmation of fraudulent transaction only allowed to stand on clearest evidence); Whitcomb v. Sager, 82 Wash. 572, 144 Pac. 922; Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156.

75 For a discussion of the subject of laches in general, see ante, volume I, chapter I. See, also, Wagg v. Herbert, 215 U. S. 546, 54 L. Ed. 321, 30 Sup. Ct. 218 (twenty-five months not laches); Russell v. Russell, 129 Fed. 434; Richardson v. Lowe, 149 Fed. 625, 626, 79 C. C. A. 317; Church v. Swetland, 243 Fed. 289, 156 C. C. A. 69; Treadwell v. Torbert, 122 Ala. 297, 25 South. 216; Gayle v. Pennington, 185 Ala. 53, 64 South. 572; People v. California Safe Deposit & Trust Co., 19 Cal. App. 414, 126 Pac. 516, 520; Garstang v. Skinner, 165 Cal. 721, 134 Pac. 329; Sears v. Hicklin, 13 Colo. 143, 21 Pac.

Where the right to rescind arises out of undue influence, no ratification can be inferred and no laches can be imputed so long as the original undue influence remains.<sup>76</sup>

§ 2110. (§ 688.) Restoration of Consideration.—In order to obtain relief, the complainant must restore the other party to the condition in which he stood before the transaction.<sup>77</sup> This requirement is based upon the

1022; Halm v. Wright (Colo.), 168 Pac. 36; Strothers v. Leigh, 151 Iowa, 214, 130 N. W. 1019; Rohr v. Shaffer, 178 Iowa, 943, 160 N. W. 279; New York Life Ins. Co. v. Weaver's Adm'r, 114 Ky. 295, 70 S. W. 628; Culton v. Asher, 149 Ky. 659, 149 S. W. 946; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308, 53 N. E. 894; Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257 (mere submission to injury does not take away right of action; instructive opinion by Jaggard, J.); Faulkner v. Wassmer, 77 N. J. Eq. 537, 30 L. R. A. (N. S.) 872, 77 Atl. 341; Chase v. Chase, 20 R. I. 202, 37 Atl. 804; Du Pont v. Du Bos, 52 S. C. 244, 29 S. E. 665; Cottrell v. Watkins, 89 Va. 801, 37 Am. St. Rep. 897, 19 L. R. A. 754, 17 S. E. 328. When the statute of limitations is applicable, it generally runs from the discovery of the fraud: Chicago, T. & M. C. R'y Co. v. Titterington, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472.

76 Pom. Eq. Jur., § 964, and cases cited. See, also, Gowland v. De Faria, 17 Ves. 20; Thompson v. Thompson, 132 Ind. 288, 31 N. E. 529. Nor while the party is still under the influence of fraudulent representations: Voorhees v. Campbell, 275 Ill. 292, 114 N. E. 147.

77 The text is quoted in Rosenthyne v. Matthews-McCulloch Co. (Utah), 168 Pac. 957. Nearly the whole of this paragraph is quoted in Gidney v. Chappell, 26 Okl. 737, 110 Pac. 1099. This paragraph is cited in Fairbanks, Morse & Co. v. Walker, 76 Kan. 903, 17 L. R. A. (N. S.) 558, 92 Pac. 1129 (duty to restore, not absolutely, but as far as possible or as the merits demand); Henry v. Henry, 73 Neb. 746, 103 N. W. 441, 107 N. W. 789 (on removing cloud on title of a void mortgage, must refund money advanced). In general, see Neblett v. Macfarland, 92 U. S. 101, 23 L. Ed. 471; Jenson v. Toltec Ranch Co., 174 Fed. 86, 98 C. C. A. 60 (ultra vires transactions); Grider v. American Freehold Land M. Co., 99 Ala. 281, 42 Am. St. Rep. 58, 12 South. 775; Hanchey v. Southern Home B. & L. Ass'n, 140 Ala. 245, 37 South. 272; Goodrich v. Lathrop, 94 Cal. 56, 28 Am. St. Rep. 91, 29 Pac. 329; Green v. Duvergey, 146 Cal. 379, 80 Pac. 234 (substantial restoration sufficient); Rubie Combination

maxim that he who seeks equity must do equity. In cases of fraud, if the defendant's act has prevented a complete restoration of the status quo, he cannot, in jus-

G. M. Co. v. Princess Alice G. M. Co., 31 Colo, 158, 71 Pac. 1121; Central Life Assur. Society v. Mulford, 45 Colo. 240, 100 Pac. 423; Bowden v. Achor, 95 Ga. 243, 22 S. E. 254; Eldredge v. Palmer, 185 Ill. 618, 76 Am. St. Rep. 59, 57 N. E. 770; Wenegar v. Bollenbach, 180 Ill. 222, 54 N. E. 192; Mitchell v. Mitchell, 263 Ill. 165, 104 N. E 1037; Tarkington v. Purvis, 128 Ind. 182, 9 L. R. A. 607, 25 N. E. 879; Jackson v. Lynn, 94 Iowa, 151, 58 Am. St. Rep. 386, 62 N. W. 704; Halley v. Winchester Diamond Lodge, 97 Ky. 438, 17 Ky. Law Rep. 293, 30 S. W. 999; Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004; Jandorf v. Patterson, 90 Mich. 40, 51 N. W. 352; Metropolitan Life Ins. Co. v. Freedman, 159 Mich. 114, 32 L. R. A. (N. S.) 298, 123 N. W. 547 (insurance company, suing to cancel policy for fraud, must return premiums, although insured could not sue to recover them); Brown v. Norman, 65 Miss. 369, 7 Am. St. Rep. 663, 4 South. 293; Bell v. Campbell, 123 Mo. 1, 45 Am. St. Rep. 505, 25 S. W. 359; Pidcock v. Swift, 51 N. J. Eq. 405, 27 Atl. 470; Bliss v. Linden Cemetery Ass'n, 85 N. J. Eq. 501, 96 Atl. 1001 (an instructive case; rescission of the whole transaction being impossible, cancellation of an ultra vires covenant allowed on equitable terms); Alexander v. Donohoe, 14B N. Y. 203, 38 N. E. 263; Callanan v. Keeseville etc. R. Co. (Powers), 199 N. Y. 268, 92 N. E. 747 (restoration of benefits received after suit begun); Donovan v. Dickson, 37 N. D. 404, 164 N. W. 27; State v. Blize, 37 Or. 404, 61 Pac. 735; Du Pont v. Du Bos, 52 S. C. 244, 29 S. E. 665; Rowan v. Texas Orchard Development Co. (Tex. Civ.), 181 S. W. 871; Nalle v. Virginia Midland R. Co., 88 Va. 948, 14 S. E. 759; Bonsal v. Camp, 111 Va. 595, 69 S. E. 978; Christian v. Vance, 41 W. Va. 754, 24 S. E. 596; Prickett v. Muck, 74 Wis. 199, 42 N. W. 256; Hammond v. Erickson, 135 Wis. 570, 116 N. W. 173. For a statement of the reasons for the rule, see Pom. Eq. Jur., § 910. See, also, Neblett v. Macfarland, 92 U. S. 101, 23 L. Ed. 471, where the court said, per Hunt, J.: "The court proceeds on the principle that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction."

As to restoration by an insane person, see 2 Pom. Eq. Jur., § 946; on cancellation of a usurious security, see 1 Pom. Eq. Jur., § 391; 2 Pom. Eq. Jur., § 937.

tice, urge this fact as a defense to the rescission;<sup>78</sup> but in other cases, such as mistake, it would seem reasonable that the status quo should be completely restored as a condition of equitable relief.<sup>79</sup> Even in an action at law, "if the thing received by the defrauded party be of no value, or if by reason of the act of the fraudulent party a return be rendered impossible, a return or tender is unnecessary.<sup>80</sup> So, also, where by natural causes or reasonable use the value of the property is diminished, and perhaps where it is necessarily destroyed in discovering the fraud, the fraudulent party must receive it in its depreciated condition." Neither is a party obliged

78 The text is quoted in Taylor v. Taylor, 259 Ill. 524, 102 N. E. 1086; and cited in Hayton v. Clemans, 30 Idaho, 25, 165 Pac. 994. See Masson v. Bovet, 1 Denio, 69, 43 Am. Dec. 651; Hammond v. Pennock, 61 N. Y. 145. See, also, Voorhees v. Campbell, 275 Ill. 292, 114 N. E. 147; Brown v. Norman, 65 Miss. 369, 7 Am. St. Rep. 663, 4 South. 293 (an important case); Paquin v. Milliken, 163 Mo. 79, 63 S. W. 417, 1092; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; Davis v. Mitchell, 72 Or. 165, 142 Pac. 788; Coffee v. Ruffin, 4 Cold. (Tenn.) 487.

- 79 The text is quoted in Taylor v. Taylor, 259 Ill. 524, 102 N. E. 1086. See, also, Buckner v. Pacific etc. R. Co., 53 Ark. 16, 13 S. W. 332; Stringer v. Keokuk etc. R. Co., 59 Iowa, 277, 13 N. W. 308; Bedell v. Bedell, 3 Hun, 580, 6 Thomp. & C. 324. But see Goodrich v. Lathrop, 94 Cal. 56, 28 Am. St. Rep. 91, 29 Pac. 321, where it was held sufficient, in rescission by a vendee for innocent mistake, for him to return the property in the condition in which he received it, although its value had depreciated. In this case the plainest dictates of justice would seem to have required that the complainant should compensate the vendor to the extent of the depreciation in value.
- 80 See cases cited in note 78, ante. See, also, Freeman v. Reagan, 26 Ark. 378; Findlay v. Baltimore Trust & G. Co., 97 Md. 716, 55 Atl. 379; Adams v. Reed, 11 Utah, 480, 40 Pac. 720.
- 81 Brown v. Norman, 65 Miss. 369, 7 Am. St. Rep. 663, 4 South. 293. The text is cited to this effect in Commonwealth S. S. Co. v. American Shipbuilding Co., 197 Fed. 780 (consideration has decreased in value); American Shipbuilding Co. v. Commonwealth S. S. Co., 215 Fed. 296, 131 C. C. A. 596; Hayton v. Clemans, 30 Idaho, 25, 165 Pac. 994. See, also, Neblett v. Macfarland, 92 U. S. 101, 23 L. Ed.

to return that which he will be entitled to retain, even though cancellation be decreed.<sup>82</sup>

As to whether a return or tender of the consideration, whether money or other property, must be made

471; Goodrich v. Lathrop, 94 Cal. 56, 28 Am. St. Rep. 91, 29 Pac. 329 (mistake; see note 79, above, for criticism of this case); Cohen v. Ellis, 16 Abb. N. C. 320; Bolton v. Prather, 35 Tex. Civ. 295, 80 S. W. 666. See, also, Felt v. Bell, 205 Ill. 213, 68 N. E. 794; and the recent cases: Bell v. Burkhalter, 176 Ala. 62, 57 South. 460 (infant need not restore consideration consumed or wasted); Jefferson v. Rust, 149 Iowa, 594, 128 N. W. 954 (as to restoration by person of unsound mind); Basye v. Paola Refining Co., 79 Kan, 755, 131 Am. St. Rep. 346, and note, 25 L. R. A. (N. S.) 1302, 101 Pac. 658 (money equivalent where property partially destroyed); United Zinc Cos. v. Harwood, 216 Mass. 474, Ann. Cas. 1915B, 948, 103 N. E. 1037 (mines partially worked); Payne v. Hiram Lindsey Co., 71 Wash. 293, 128 Pac. 678 (deterioration pending suit); Hall v. Bank of Baldwin, 143 Wis. 303, 127 N. W. 969. "Nor, if the property is of a perishable nature, is the holder bound to keep it in a state of preservation until the bill is filed. A party seeking to set aside a sale of shares is not bound to pay calls on them to prevent forfeiture after filing his bill; nor is it fatal to his right to rescission that some of the shares have been thus perfected": Neblett v. Macfarland, 92 U. S. 101, 23 L. Ed. 471.

82 The text is quoted in Taylor v. Taylor, 259 Ill. 524, 102 N. E. 1086; and cited to this effect in Collier v. Collier, 137 Ga. 658, Ann. Cas. 1913A, 1110, 74 S. E. 275. See, also, Conner v. Craig, 216 Fed. 729, 132 C. C. A. 639; Matteson v. Wagoner, 147 Cal. 739, 82 Pac. 436 (overruling Marten v. Burns Wine Co., 99 Cal. 355, 356, 33 Pac. 1107); Taylor v. Colley, 138 Ga. 41, 74 S. E. 694; Fulton v. Fisher, 151 Iowa, 429, 131 N. W. 662; Reggio v. Warren, 207 Mass. 525, 20 Ann. Cas. 1244, 32 L. R. A. (N. S.) 340, 93 N. E. 805; Winter v. Kansas City Cable Co., 160 Mo. 159, 61 S. W. 606 (suit to set aside settlement of a claim); Page Belting Co. v. Prince, 77 N. H. 309, 91 Atl. 961; Kley v. Healy, 127 N. Y. 555, 28 N. E. 593 (suit to cancel release); Texas & P. R'y Co. v. Jowers (Tex. Civ. App.), 110 S. W. 946: Hollenback v. Shoyer, 16 Wis. 499 (suit to set aside discharge of mortgage). See, on this subject, Rockwell v. Capital Traction Co., 25 App. Cas. (D. C.) 98, 4 Ann. Cas. 648, and note. And the complainant need not tender the purchase price received by him when, if he is successful in the suit, the defendant will be required to account for profits far in excess of such price; Billings v. Aspen M. & S. Co., 51 Fed. 338, 10 U. S. App. 1, 2 C. C. A. 252.

before suit, the courts are very evenly divided. Many of the courts have, in dealing with this question, completely lost sight of the plain distinction between the equitable remedy of rescission or cancellation (where, as in all equity decrees, complete relief is awarded to the defendant as well as to the plaintiff), and the legal remedies, based upon rescission of a contract by the act of a party thereto,83 where, in the act of rescission itself, the plaintiff must restore or attempt to restore the consideration, since, in legal theory, the ex parte act of rescission reinvests him with the legal title to the thing for the possession of which he subsequently sues, and must, therefore, be conditioned upon a surrender of the thing already received by him in pursuance of the transaction which he thus avoids. Restoration or tender before suit is thus a necessary element in legal rescission, but is wholly superfluous as a prerequisite to the commencement of a suit in equity for rescission or cancellation; and insistence upon it as such prerequisite often works a complete denial of justice.84 In nearly half the

83 "A court of equity entertains a suit for the express purpose of procuring a contract or conveyance to be canceled, and renders a decree conferring in terms that exact relief. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and . . . the legal judgment proceeds upon the assumption that one of the parties had himself rescinded the contract or conveyance prior to the suit, and that he was justified in doing so": 1 Pom. Eq. Jur., § 110, and note 1. The distinction is very fully and clearly explained in Brown v. Norman, 65 Miss. 369, 7 Am. St. Rep. 663, 4 South. 293.

84 Where, for example, the complainant has spent the money consideration received by him before discovery of the fraud. The text is cited in Hayton v. Clemans, 30 Idaho, 25, 165 Pac. 944; Cearley v. May, 106 Tex. 442, 167 S. W. 725; and the above passage summarized in Taylor v. Taylor, 259 Ill. 524, 102 N. E. 1086. As correctly holding that a tender or offer of restoration before suit is not necessary, see Barker v. Walters, 8 Beav. 92; Jervis v. Berridge, L. R. 8 Ch. 351; Thackrah v. Haas, 119 U. S. 499, 30 L. Ed. 486, 7 Sup. Ct. 311; Twin Lakes Land & Water Co. v. Dohner, 242 Fed. 399, 155 C. C. A.

states, however, where the question has arisen, it has been settled that the legal requisite of tender applies in full force to the equitable remedy of rescission or cancellation,<sup>85</sup> except in the few circumstances mentioned above, where return of the consideration is impossible and is excused.<sup>86</sup>

175; King v. Livingston Mfg. Co., 192 Ala. 269, 68 South, 897; Holland v. Hotchkiss, 162 Cal. 366, L. R. A. 1915C, 492, 123 Pac. 258; Hayton v. Clemans, 30 Idaho, 25, 165 Pac. 994; Wenegar v. Bollenbach, 180 Ill. 222, 54 N. E. 192 (but see Rigdon v. Walcott 141 Ill. 649, 31 N. E. 158); McCorkell v. Karhoff, 90 Iowa, 545, 58 N. W. 813; Fagan v. Hook, 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981; Thayer v. Knote, 59 Kan. 181, 52 Pac. 433 (but see State v. Williams, 39 Kan. 517, 18 Pac. 727); Allen v. Riley, 71 Kan. 378, 114 Am. St. Rep. 481, 6 Ann. Cas. 158, 80 Pac. 952; Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004; Jandorf v. Patterson, 90 Mich. 40, 51 N. W. 352; Carlton v. Hulett, 49 Minn. 308, 51 N. W. 1053; Haydon v. St. Louis & S. F. R. Co., 117 Mo. App. 76, 93 S. W. 833; Thorpe v. Packard, 73 N. H. 235, 60 Atl. 432; Du Bois v. Nugent, 69 N. J. Eq. 145, 60 Atl. 339; Berry v. American Cent. Ins. Co., 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254; Callanan v. Keeseville etc. R. Co. (Powers), 199 N. Y. 268, 92 N. E. 747; Clark v. O'Toole, 20 Okl. 319, 94 Pac. 547; Owen v. Jones, 68 Or. 311, 136 Pac. 332; Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; O'Dell v. Burnham, 61 Wis. 562, 21 N. W. 635; Hansen v. Allen, 117 Wis. 61, 93 N. W. 805; Hall v. Bank of Baldwin, 143 Wis. 303, 127 N. W. 969. In a few cases it is also held that the complainant need not offer in his bill to do equity, since such offer is superfluous: Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Thorpe v. Packard, 73 N. H. 235, 60 Atl. 432.

85 The text is cited in Hayton v. Clemans, 30 Idaho, 25, 165 Pac. 994. See Reeves v. Corning, 51 Fed. 774; Horwitz v. La Roche (Tex. Civ.), 107 S. W. 1148; Alaska & Chicago C. Co. v. Solner, 123 Fed. 855, 59 C. C. A. 662; Buena Vista Fruit etc. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386; Godding v. Decker, 3 Colo. App. 198, 32 Pac. 832; Bowden v. Achor, 95 Ga. 243, 22 S. E. 254; Burgett v. Teal, 91 Ind. 260; Harkness v. Cleaves, 113 Iowa, 140, 84 N. W. 1033; Ryan v. Nuce, 67 W. Va. 485, 68 S. E. 110. For additional cases, see 6 Cyc. 312, 313. Though the requisite of tender before suit is established by a long series of cases in Indiana, it is there held that it is not necessary to comply with all the formalities of a legal tender: Tarkington v. Purvis, 128 Ind. 182, 9 L. R. A. 607, 25 N. E. 879.

86 See above, notes 80 and 81.

## CHAPTER XXXIII.

## ASSIGNMENT OF DOWER; AND ESTABLISH-MENT OF DISPUTED BOUNDARIES.

## ANALYSIS.

§§ 689-693. Assignment of dower.

§ 689. Legal remedies.

§ 690. Origin and grounds of the equitable jurisdiction.

§ 691. The jurisdiction now concurrent.

§ 692. Advantages of the equitable procedure.

§ 693. Exclusive jurisdiction over dower in equitable estates.

§§ 694-700. Establishment of disputed boundaries.

§ 694. In general.

§ 695. Grounds for relief-Fraud.

§ 696. Same—Multiplicity of suits.

§ 697. Same—Relationship between parties.

§ 698. Same-Miscellaneous.

§ 699. Requisites of bill.

§ 700. Nature of relief.

§ 2111. (§ 689.) Assignment of Dower—Legal Remedies.—"The right known as the wife's right of dower was purely legal, and was asserted at law through the writ of right of dower, and the writ of dower unde nihil habet, both of which were in the nature of real actions. As early as the reign of Queen Elizabeth, courts of equity began to assume jurisdiction over cases of dower, but only tentatively, and as ancillary to proceedings at law. This jurisdiction, originally narrow and auxiliary, has, by the course of decision, and on familiar equitable principles, been expanded to the extent of affording complete relief between the parties."

<sup>,1</sup> Wild v. Wells, 1 Dick, 3; Toth. 82.

<sup>&</sup>lt;sup>2</sup> Pom. Eq. Jur., § 1380.

§ 2112. (§ 690.) Origin and Grounds of the Equitable Jurisdiction.—"Equitable interposition in cases of dower was at first invoked for the removal of impediments in the way of recovery at law. As the title deeds to real estate were held by heirs, devisees, or trustees, it would be important, and even necessary, for the widow, on the event of a contest of her dower, to resort to equity, for the purpose of ascertaining the lands of which her husband had been seised during marriage. To accomplish this purpose, a bill of discovery would be entertained in equity; and where the land of the husband was an undivided interest in a greater portion, equity would decree a partition in aid of the assignment to the widow of her dower.3 This jurisdiction was, in its earlier stages, strictly auxiliary; and if no obstacle in the way of recognition and assignment of dower at law was disclosed, the equitable proceedings would be arrested.4 The equitable jurisdiction, having once attached, was not slow in maturing so as to confer full relief. When the widow came into equity for a discovery respecting the title deeds to her husband's estate, which were in the hands of the heir, it was held that she should have complete relief.<sup>5</sup> If her title to dower was denied, it would be incumbent upon her to establish such title at law. Equity would, for that purpose, retain the bill for a reasonable time, and upon the determination of the issue at law in the widow's favor, would proceed to administer final relief."6

<sup>3</sup> Moor v. Black, Cas. t. Talb. 126.

<sup>4</sup> Shute v. Shute, Prec. Ch. 111.

<sup>5</sup> Curtis v. Curtis, 2 Brown Ch. 620, 631, 632.

<sup>6</sup> Pom. Eq. Jur., § 1381; Curtis v. Curtis, 2 Brown Ch. 620; Mundy v. Mundy, 2 Ves. 122, 128; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Rockwell v. Morgan, 13 N. J. Eq. 384; Ocean Beach Ass'n v. Brinley, 34 N. J. Eq. 438; Swaine v. Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318. And assuming the widow's title to be established or conceded, equity will not only assist her by way of discovery and assignment,

§ 2113. (§ 691.) The Jurisdiction Now Concurrent. "Although it was thus, at one time, supposed that the jurisdiction of equity was ancillary, and could not attach in the absence of impediments at law, it is now well settled that courts of equity have concurrent jurisdiction in cases of legal dower, or dower in legal estates." When "the seisin of the husband and the title of the wife are admitted by the answer, the court will proceed at once to assign dower, and to take an account of the mesne profits since the death of the husband, if it is a case in which the widow would be entitled to damages at law." Where, however, the title is denied, the court will retain the bill, and direct a suit to try the title, and will then give her possession and decree such other relief as she may be entitled to on the right thus established.

but will decree her a due share of the mesne profits, and this, not from the time of the demand merely, but from the time when her title accrued: Pom. Eq. Jur., § 1381, note; Dormer v. Fortescue, 3 Atk. 124, 130 (dictum); Chase's Case, 1 Bland, 206, 17 Am. Dec. 277; Hazen v. Thurber, 4 Johns. Ch. 604; Keith v. Trapier, Bail. Eq. 63; Phinney v. Johnson, 15 S. C. 158.

7 Pom. Eq. Jur., § 1382. "In a leading case the question was presented on the pleadings, which failed to disclose any impediment in the way of a proceeding at law, but the court determined in favor of the jurisdiction: Mundy v. Mundy, 2 Ves. 122": Pom. Eq. Jur., § 1382, note. See, in general, Herbert v. Wren, 7 Cranch, 370, 3 L. Ed. 374; Thomas v. Thomas, 73 Iowa, 657, 35 N. W. 693; Beeman v. Kitzman, 124 Iowa, 86, 99 N. W. 171; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Badgley v. Bruce, 4 Paige, 98; Swaine v. Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318. See, also, Bishop v. Woodward, 103 Ga. 281, 29 S. E. 968. See, also, in support of the text, Yarbrough v. Yarbrough (Ala.), 75 South. 932; Johnson v. Johnson, 84 Ark. 307, 105 S. W. 869; Sprague v. Stevens, 32 R. I. 361, 79 Atl. 972.

<sup>8</sup> Badgley v. Bruce, 4 Paige, 98. See, also, Mundy v. Mundy, 2 Ves. 122.

<sup>9</sup> Mundy v. Mundy, 2 Ves. 122; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Badgley v. Bruce, 4 Paige, 98.

- § 2114. (§ 692.) Advantages of the Equitable Procedure.--"The advantages of the equitable procedure are obvious. An outstanding term could be removed and satisfied; 10 a partition in the case of undivided interests could be decreed, and an account could be taken;<sup>11</sup> fraudulent conveyances could be canceled;<sup>12</sup> and antagonistic claims to the subject-matter could be determined without multiplicity of suits. Equity will also award damages which could not be recovered at law on an application for dower. At law, if the tenant dies after judgment, and before assessment of damages, the damages are lost to the widow; and if she herself dies before such assessment of damages, her personal representatives are without recourse. In these instances, the widow, or her personal representatives, by a resort to equity, obtain adequate relief."13
- § 2115. (§ 693.) Exclusive Jurisdiction Over Dower in Equitable Estates.—"In England since the statute of 3 and 4 William IV.,14 and in the United States from an early day, equity has assumed an exclusive jurisdiction over claims for dower in equitable estates. Where the husband's estate was an equity of redemption, the widow may proceed against the mortgagee by a bill in equity to redeem." The right of a widow who has joined in a mortgage to redeem therefrom exists until it

<sup>10</sup> Dormer v. Fortescue, 3 Atk. 124, 130.

<sup>11</sup> Herbert v. Wren, 7 Cranch. 370, 3 L. Ed. 374; Hill v. Gregory, 56 Miss. 341.

<sup>&</sup>lt;sup>12</sup> Jones v. Van Doren, 130 U. S. 684, 32 L. Ed. 1077, 9 Sup. Ct. 685; Swaine v. Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318.

<sup>13</sup> Pom. Eq. Jur., § 1382. See Curtis v. Curtis, 2 Brown Ch. 620, 632; Jones v. Jones, 71 Wis. 514, 38 N. W. 88.

<sup>14</sup> Chapter 105.

<sup>15</sup> Pom. Eq. Jur., § 1383. See McMahan v. Kimball, 3 Blackf. 1; Gibson v. Crehore, 3 Pick, 475; Farwell v. Cotting, 8 Allen, 211; Chiswell v. Morris, 14 N. J. Eq. 101; Eldridge v. Eldridge, 14 N. J. Eq. 195; Denton v. Nanny, 8 Barb. 618.

has been cut off by a strict foreclosure or until the expiration of the statutory time for redemption after a foreclosure by judicial sale. It is merely a right to redeem. Where the husband's estate was a portion of the assets of a partnership, and where the settlement of the partnership affairs has been unconscionably protracted, the widow may appeal to equity for relief. If the husband should die seised of land on which a part of the purchase-money was due, the widow may resort to equity for a sale of the land in satisfaction of the unpaid balance, and for her dower in the surplus. On the conversion of the husband's estate into money, equity will award to the widow her proportionate share. And where the husband has sought, by fraudulent conveyances, to defeat the wife's dower, equity will, on her ap-

<sup>16</sup> Farwell v. Cotting, 8 Allen, 211.

<sup>17 &</sup>quot;Against the mortgagee or his assignee her right is only in equity, and it is only by a bill in equity, and paying her due proportion of the debt, that she can avail herself of her right; and without doubt the executors and administrators, if there be personal estate whereby the debt may be discharged, may be compelled to contribute their just proportion in order to liberate the estate for the heirs, or for the creditors, if it should be for their interest to have the estate redeemed, and to enable the widow to have her dower": Gibson v. Crehore, 3 Pick. 475. See, also, Chiswell v. Morris, 14 N. J. Eq. 101 ("But in equity she may redeem pro tanto, and may thus recover her dower upon the payment of such portion of the encumbrance, or subject to such deduction on account of the encumbrance as is equitable and just"). To the effect that she must pay the entire debt, see McMahan v. Kimball, 3 Blackf. 1.

<sup>18</sup> Goodburn v. Stevens, 1 Md. Ch. 420.

<sup>19</sup> The widow "cannot have dower assigned to her without paying the money so secured.... But she is entitled to dower upon this being done, and, if it be not done, she is entitled to have the land sold for the payment of the debt, and to be endowed of one-third of the money arising from such sale after the payment of the debt": Thompson v. Cochran, 7 Humph. 72, 46 Am. Dec. 68. See, also, Daniel v. Leitch, 13 Gratt. 195.

<sup>20</sup> Higbie v. Westlake, 14 N. Y. 281.

plication, grant appropriate relief.<sup>21</sup> The widow's right of dower, while yet unmeasured and unassigned, may be transferred by her, or reached by her judgment creditors, and her voluntary transferee, or the receiver appointed in aid of the judgment creditor, may maintain a suit in equity to have the dower assigned to him.<sup>22</sup> The assignment of dower is usually effected by a reference to a master and a commission, and the share is set out by metes and bounds. Where an account is needed, it may be taken by means of a similar reference. In

21 Bear v. Stahl, 61 Mich. 203, 28 N. W. 69; Davis v. Davis, 5 Mo. 183; Rice v. Waddell, 168 Mo. 99, 67 S. W. 605 (conveyance in fraud of statutory dower right); Swaine v. Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318; Tate v. Tate, 1 Dev. & B. Eq. 22; London v. London, 1 Humph. 1; Jones v. Jones, 71 Wis. 514, 38 N. W. 88. See, also, Manikee v. Beard, 85 Ky. 20, 2 S. W. 545 (gift of personalty in fraud of wife's statutory right). It has been held that the wife may obtain relief by having the conveyance set aside during the lifetime of her husband: Petty v. Petty, 4 B. Mon. 215, 39 Am. Dec. 501. As to what conveyances by the husband are not fraudulent, see Hamilton v. Smith, 57 Iowa, 15, 42 Am. Rep. 39, 10 N. W. 276; Fennessey v. Fennessey, 84 Ky. 519, 4 Am. St. Rep. 210, 2 S. W. 158. As to the defense of a bona fide purchase for value without notice, against the widow suing in equity for her dower, see 2 Pom. Eq. Jur., § 765; Blain v. Harrison, 11 Ill. 384. To the effect that it is not a defense: Ridgeway v. Newbold, 1 Harr. (Del.) 385; Campbell v. Murphy, 2 Jones Eq. 357; Larrowe v. Beam, 10 Ohio, 498.

22 Strong v. Clem, 12 Ind. 37, 74 Am. Dec. 200 (may be enforced by transferee); McMahon v. Gray, 150 Mass. 289, 15 Am. St. Rep. 202, 5 L. R. A. 748, 22 N. E. 923 (may be reached by creditors' bill); McKenzie v. Donald; 61 Miss. 452 (right is assignable); Payne v. Becker, 87 N. Y. 153 (suit to admeasure dower may be brought by receiver to whom right assigned); Tompkins v. Fonda, 4 Paige, 448 (may be reached by creditors' bill); Stewart v. McMartin, 5 Barb. 438 (same); Pope v. Mead, 99 N. Y. 201, 1 N. E. 671 (right is assignable); Boltz v. Stoltz, 41 Ohio St. 540 (may be reached by creditors' bill). But see Maxon v. Nancy, 14 R. I. 641, holding that right cannot be reached by creditors' bill.

Conservation of inchoate right of dower in equitable estate of husband.—See Brown v. Brown, 82 N. J. Eq. 40, 88 Atl. 186.

many of our states summary proceedings have been provided by statute for the assignment of dower; especially where the widow's right thereto is not contested."<sup>23</sup>

§ 2116. (§ 694.) Establishment of Disputed Boundaries — In General.—"Where the boundaries between two adjacent parcels of land, even when held by their respective owners under purely legal titles, have become confused or obscure, equity has, from an early period, exercised a jurisdiction to settle them.<sup>24</sup> Whether this jurisdiction originated in the consent of the parties, and proceeded by analogy to the writs de rationalibus divisis and de perambulatione facienda used at law,<sup>25</sup> or arose in avoidance of a multiplicity of suits,<sup>26</sup> has been discussed; but the determination of the question remains uncertain and conjectural. The mere fact, however, that certain boundaries are in controversy is not of itself

<sup>23</sup> Pom. Eq. Jur., § 1383.

<sup>24</sup> Wake v. Conyers, 1 Eden, 331, 2 Lead. Cas. Eq., 4th Am. ed. 850, 853, 860; Mullineux v. Mullineux, Toth. 39; Pickering v. Kimpton, Toth. 39; Boteler v. Spelman, Finch, 96; Perry v. Pratt, 31 Conn. 433.

<sup>25 &</sup>quot;There are two writs in the register concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of this jurisdiction by the Court of Chancery took its commencement. The first is the writ de rationalibus divisis. The other writ the de perambulatione facienda. Both Lord Northington and Lord Thurlow, without referring to this writ or commission as the origin of the jurisdiction of the court, have yet expressed an opinion, that consent was the ground on which it had been at first exercised. The next step would probably be to grant the commission on the application of one party who showed an equitable ground for obtaining it; such as, that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And, to its exercise on such an equitable ground, no objection has ever been made": Speer v. Crawter, 2 Mer. 410, 417.

<sup>26</sup> Wake v. Conyers, 1 Eden, 331, 2 Lead. Cas. Eq., 4th Am. ed., 850, 853, 860.

sufficient to authorize the interference of equity; and upon such a showing, the parties would be left to their rights and remedies at law. Courts of equity will not interpose to ascertain boundaries, unless, in addition to a naked confusion of the controverted boundaries, there is suggested some peculiar equity, which has arisen from the conduct, situation, or relations of the parties."<sup>27</sup> It

27 Pom. Eq. Jur., § 1384; cited in Davis v. Tremain, 205 N. Y. 236, 98 N. E. 383. "All the cases where the court has entertained bills for establishing boundaries, have been where the soil itself was in question, or where there might have been a multiplicity of suits. This court has, in my opinion . . . no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud; or confusion, where one party has ploughed too near the other, or the like": Wake v. Conyers, 1 Eden, 331, 2 Lead. Cas. Eq., 4th Am. ed., 850. See, also, Miller v. Warmington, 1 Jacob & W. 484; Speer v. Crawter, 2 Mer. 410; Ashurst v. McKenzie, 92 Ala. 484, 9 South. 262 (citing Pom. Eq. Jur., §§ 1384, 1385); Wetherbee v. Dunn, 36 Cal. 249; Perry v. Pratt, 31 Conn. 433; Wolcott v. Robbins, 26 Conn. 236; Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464; Pendry v. Wright, 20 Fla. 828; Fraley v. Peters, 12 Bush. 469; Scott v. Means, 80 Ky. 460; Walker v. Leslie, 90 Ky. 642, 14 S. W. 682; Wykes v. Ringleberg, 49 Mich. 567, 14 N. W. 498; Wilson v. Hart, 98 Mo. 618, 12 S. W. 249 (quoting a portion of Pom. Eq. Jur., § 1384); Humboldt County v. Lander County, 22 Nev. 248, 58 Am. St. Rep. 750, 26 L. R. A. 749, 38 Pac. 578 (citing Pom. Eq. Jur., § 1384); De Veney v. Gallagher, 20 N. J. Eq. 33; Wolfe v. Scarborough, 2 Ohio St. 361; King v. Brigham, 23 Or. 262, 18 L. R. A. 361, 31 Pac. 601 (dictum, citing Pom. Eq. Jur., §§ 1384, 1385); Love v. Morrill, 19 Or. 545, 24 Pac. 916 (dictum, citing Pom. Eq. Jur., §§ 1384, 1385); Norris's Appeal, 64 Pa. St. 275; Tillmes v. Marsh, 67 Pa. St. 507; McCreery Land & Inv. Co. v. Myers, 70 S. C. 282, 49 S. E. 848 (code provides adequate remedy for most cases); Hale v. Darter, 5 Humph. 79; Topp v. Williams, 7 Humph. 569; Nye v. Hawkins, 65 Tex. 600 (citing Pom. Eq. Jur., § 1384); Collins v. Sutton, 94 Va. 127, 26 S. E. 415 (citing Pom. Eq. Jur., § 1384); Robinson v. Moses (Va.), 34 S. E. 48; Stuart's Heirs v. Coalter, 4 Rand. 74, 15 Am. Dec. 731; Deane v. Turner, 113 Va. 236, 74 S. E. 165; Hill v. Proctor, 10 W. Va. 59; Cresap v. Kemble, 26 W. Va. 603; Burns v. Mearns, 44 W. Va. 744, 30 S. E. 112. See, also, Goff v. Goff, 78 W. Va. 423, 89 S. E. 9 has been held that equity will not take jurisdiction merely because the dispute is as to the boundary line between two counties; the same principles govern as in the case of private boundaries.<sup>28</sup>

§ 2117. (§ 695.) Grounds for Relief—Fraud.—Fraud of the party against whom relief is sought by way of

(where description in deed did not give lost line, but merely said it should run so as to inclose seventeen acres, equity should take jurisdiction). To the effect that equity has no jurisdiction merely because the boundaries are disputed and difficult of ascertainment, see Bresler v. Pitts, 58 Mich. 347, 25 N. W. 311.

The jurisdiction has been extended by statute in some jurisdictions, so that relief may be granted in the absence of any peculiar equity: Perry v. Pratt, 31 Conn. 433. Under the statute in Oregon, "the jurisdiction of equity is extended to a class of cases of disputed boundary, where no equitable circumstance attaches itself to the controversy. Under it, a court of equity may intervene in any case in which title is not involved, where the boundary is confused or obscure, and a controversy exists between the owners of the adjacent lands to ascertain such boundary and fix its location. It is of no consequence, to sustain such jurisdiction, that the confusion of the boundary about which the controversy exists was not occasioned by the fraud or misconduct of the defendant, but was the result of accident or lapse of time, or was produced by natural causes, or the like": King v. Brigham, 23 Or. 262, 18 L. R. A. 361, 31 Pac. 601. But the statute limits the jurisdiction to the ascertainment of the boundary. The equity court cannot try the title: School District No. 70 v. Price, 23 Or. 294, 31 Pac. 657; Miner v. Caples, 23 Or. 303, 31 Pac. 655; Love v. Morrill, 19 Or. 545, 24 Pac. 916; Dice v. McCauley, 22 Or. 456, 30 Pac. 160.

For a good statement as to what amounts to a confusion of boundaries, see Boyd v. Dowie, 65 Barb. 237: "A confusion of boundaries exists when by the deeds thereof, or the acts of the owners or occupants of the same, the boundaries cannot be ascertained with reasonable certainty by one party alone, or except by the judgment or opinions of men, after an examination of the deeds and the premises with a surveyor, aided perhaps by the examination of witnesses."

28 Humboldt County v. Lander County, 22 Nev. 248, 58 Am. St. Rep. 750, 26 L. R. A. 749, 38 Pac. 578, citing Pom. Eq. Jur., § 1384. See, however, Sierra County v. Nevada County, 155 Cal. 1, 99 Pac. 371.

establishment of boundaries affords a sufficient ground for equitable interference.<sup>29</sup> Thus, where a party tears up a dam, fills up a mill-race and plows it over, so as to efface the boundary, against the remonstrance of the other party, equity will grant relief by issuing a commission to re-mark the side of the race. An account for loss of profits will also be decreed.<sup>30</sup> But where the boundaries are defined upon the minutes of the United States Land Office, and cannot be affected by the alleged fraudulent conduct of the other party, relief will be denied.<sup>31</sup>

§ 2118. (§ 696.) Same — Multiplicity of Suits. — Where a settlement of the boundaries in dispute cannot be had at law without a multiplicity of suits, relief may be obtained in equity.<sup>32</sup> Thus, where it would be necessary to bring a great number of actions against different parties in order to fix the boundaries and establish plaintiff's right, relief may be awarded.<sup>33</sup> Where, however, the issues in the different cases are distinct, equity will

<sup>29</sup> Pom. Eq. Jur., § 1385. Most of the cases are mere dicta on this point, but there is an entire harmony. See Speer v. Crawter, 2 Mer. 410; Ashurst v. McKenzie, 92 Ala. 484, 9 South. 262 (citing Pom. Eq. Jur., §§ 1384, 1385); Perry v. Pratt, 31 Conn. 433; Fraley v. Peters, 12 Bush, 469; Hill v. Proctor, 10 W. Va. 59. See, also, Hays v. Bouchelle, 147 Ala. 212, 119 Am. St. Rep. 64, and note, 41 South. 518. For a case squarely in point, see Guice v. Barr, 130 Ala. 570, 30 South. 563, citing Pom. Eq. Jur., §§ 1384, 1385 ("The gradual encroachment upon the lands of complainant by defendant by moving the fence which marked the line between them, and thus obliterating the boundary, entitled, if proven, the complainant to a commission, and therefore to the exercise of the power of a court of equity").

<sup>30</sup> Merriman v. Russell, 2 Jones Eq. 470.

<sup>31</sup> Pendry v. Wright, 20 Fla. 828.

<sup>32</sup> Pom. Eq. Jur., \$\sqrt{\hat{\hat{\hat{\hat{\hat{\hat{\hat{0}}}}}}} \text{385}; Wake v. Conyers, 1 Eden, 331, 2 Lead. Cas. Eq., 4th Am. ed., 850; De Veney v. Gallagher, 20 N. J. Eq. 33; Boyd v. Dowie, 65 Barb. 237.

<sup>33</sup> Marquis of Bute v. Glamorganshire Canal Co., 1 Phill. Ch. 681; Beatty v. Dixon, 56 Cal. 622 (nineteen defendants).

not interfere, and will leave the parties to their remedies at law.<sup>34</sup>

- § 2119. (§ 697.) Same Relationship Between Parties.—Where there is such a relation between the parties as to make it incumbent upon one of them to preserve the boundaries, and a confusion occurs, equity will relieve. Thus, a tenant contracts, among other obligations resulting from the relation of landlord and tenant, to keep his property distinct from his landlord's; and if he fails to do so, a commission to ascertain the boundary may issue.<sup>35</sup> A copyholder in England is under the same obligation.<sup>36</sup> Relief is given not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers or as purchasers with notice.<sup>37</sup>
- § 2120. (§ 698.) Same Miscellaneous. "In the case of a rent-charge, where, by reason of a confusion of the boundaries, the remedy of distress is defeated, a court of equity will issue a commission to fix the boundaries.<sup>38</sup> Where several parcels of land allotted to the

<sup>34</sup> Bouverie v. Prentice, 1 Brown Ch. 200.

<sup>35</sup> Pom. Eq. Jur., § 1385; Attorney-General v. Fullerton, 2 Ves. & B. 263; Aston v. Lord Exeter, 6 Ves. 288 ("Certainly it is a duty upon a tenant to keep the boundaries; and this court will aid the reversioner to distinguish them; and will even give him as much land, if they cannot be distinguished"); Speer v. Crawter, 17 Ves. 216; Godfrey v. Littel, 1 Russ. & M. 59, 2 Russ. & M. 630; Attorney-General v. Stephens, 6 De Gex, M. & G. 111, 133. But the circumstance of tenancy gives no jurisdiction when the confusion arose prior to its beginning: Miller v. Warmington, 1 Jacob & W. 484. For a general statement of the duty to maintain boundaries as a ground for relief, see Ashurst v. McKenzie, 92 Ala. 484, 9 South. 262.

<sup>36</sup> Duke of Leeds v. Earl of Strafford, 4 Ves. 180; Clayton v. Cookes, 2 Atk. 449.

<sup>37</sup> Attorney-General v. Stephens, 6 De Gex, M. & G. 111.

<sup>38</sup> Boreman v. Yeat, cited 1 Ch. Cas. 145; Duke of Leeds v. Powell, 1 Ves. Sr. 171. See, also, North v. Earl of Strafford, 3 P. Wms. 148.

holders of certain officers were for a number of years in the possession of a single occupant, who held all the offices, it would seem that a confusion of boundaries resulting from such holding would furnish a sufficient ground for the equitable relief."<sup>39</sup>

§ 2121. (§ 699.) Requisites of Bill.—A bill seeking the establishment of a boundary must show clearly that without the assistance of the court the boundaries cannot be found.<sup>40</sup> It is the duty of the parties to use the means at hand for settling the question before resorting to equity. The plaintiff must establish a clear legal title to some land in the possession of the defendant. Possession of at least some portion in the defendant is essential.<sup>41</sup> All parties interested, whether their estates are present or future, remainder-men and reversioners, should be made parties to the bill.<sup>42</sup>

39 Pom. Eq. Jur., § 1385; Kennedy v. Trott, 6 Moore, P. C. C. 449, 467.

40 Miller v. Warmington, 1 Jacob & W. 484 ("the bill states, that there are no marks and bounds to distinguish one part from the other; and though there may be none that are visible and apparent to the eye, yet it does not follow that, by addressing themselves to old people acquainted with the place, or by examining the tenant, they might not separate the two parts. The court would expect this to be clearly established before it would interfere"). In Nye v. Hawkins, 65 Tex. 600, it was said: "When a plaintiff is able to aver the true locality of a boundary line and that the natural objects, called for in a deed to fix its true locality, still exist, and does so aver, he then shows a case, in which, within the meaning of the law, no confusion of boundary can exist."

41 Pom. Eq. Jur., § 1385; cited in Watkins v. Childs, 80 Vt. 99, 11 Ann. Cas. 1123, 66 Atl. 805. See Godfrey v. Littel, 1 Russ. & M. 59, 2 Russ. & M. 630; Attorney-General v. Stephens, 6 De Gex. M. & G. 111 (possession must be shown); Nye v. Hawkins, 65 Tex. 600; Ashurst v. McKenzie, 92 Ala. 484, 9 South. 262.

42 Rayley v. Best, 1 Russ. & M. 659 (all parties interested are proper parties). The text is cited in Watkins v. Childs, 80 Vt. 99, 11 Ann. Cas. 1123, 66 Atl. 805.

§ 2122. (§ 700.) Nature of Relief.—When a ground for relief appears, the court will, by commission, ascertain the boundaries, if practicable. If, however, this is not practicable, the court may do justice between the parties by assigning reasonable boundaries, or by setting out lands of equal value.<sup>43</sup> In some cases an account for loss of profits may be decreed as incidental to the other relief.<sup>44</sup>

43 Hill v. Proctor, 10 W. Va. 59; Attorney-General v. Fullerton, 2 Ves. & B. 263; Ashurst v. McKenzie, 92 Ala. 484, 9 South. 262 (citing Pom. Eq. Jur., § 1385). The decree in Duke of Leeds v. Earl of Strafford, 4 Ves. 180, illustrates the nature of the relief. "Direct a Commission to issue . . . ; and let the Commissioners distinguish, which of the said copyhold lands are compounded, and which are uncompounded, and distinguish the above copyhold lands from the freehold lands of the Defendant within the said manor; and ascertain the boundaries thereof; and the Commissioners are to set out, distinguish, divide, and ascertain, the same by metes and bounds accordingly; and if by reason of the confusion of boundaries, or alteration of names, or any other circumstances, the said Commissioners shall not be able to distinguish or ascertain the particular copyholds or any of them, in that case they are to set out such a quantity of lands now in the possession of the Defendant the Earl of Strafford within the said manor, as may be of equal value with the said copyhold lands, or so much thereof as cannot be distinguished or ascertained as aforesaid."

44 Merriman v. Russell, 2 Jones Eq. 470.

## CHAPTER XXXIV. PARTITION.

## ANALYSIS.

- § 701. Partition-In general.
- § 702. Common-law remedy.
- § 703. Equitable jurisdiction.
- § 704. Property subject to partition—In general.
- § 705. Personal property.
- § 706. Future estates.
- § 707. Incorporeal and other property.
- § 708. Limitations on the right to partition.
- § 709. Who is entitled to partition.
- § 710. Effect of disseizin.
- § 711. Disseizin—Rule in equity.
- § 712. Disputed title.
- § 713. Parties defendant.
- § 714. Persons under disability.
- § 715. Holders of particular estates and interests.
- § 716. Estates of persons not in being.
- § 717. Incidental relief in equity—In general.
- § 718. Owelty of partition.
- § 719. Improvements.
- § 720. Accounting.
- § 721. Mode of partition.
- § 722. Partition by means of sale.

§ 2123. (§ 701.) Partition—In General.—In its original and technical meaning, partition signified the division by co-parceners or co-heirs among themselves of lands which had descended by common law or by custom. Its later signification included the division of lands, tenements and hereditaments by joint tenants and tenants in common. The term has now come to mean the division or allotment made among several persons of real or personal property belonging to them as co-owners. Parti-

tion may be either voluntary, by agreement of the parties acting directly or through arbitrators, or compulsory, by means of judicial proceedings. While originally only courts of law recognized the right to partition, courts of equity very early assumed a concurrent jurisdiction. Under modern modified statutory procedure the right is generally enforced by a special action in courts having both legal and equitable jurisdiction.

§ 2124. (§ 702.) Common-law Remedy. — When an inheritance descended to more than one heir, and they could come to no agreement among themselves concerning the division, a proceeding might be instituted by a writ of partition, in which a division would be made and each heir be put in possession of a certain portion in severalty. "At common law, the writ of partition lay only in case of lands held in co-parcenary." Its use was confined solely to co-parceners or to one co-parcener against a third person claiming title from a co-parcener. The remedy was afterwards extended by statute to joint tenancies and tenancies in common, and included not only estates of inheritance, but also estates for life or for years and estates in which some of the co-tenants held for life or years and others held estates of inheri-

For the matters added, in this chapter, to the text and notes of Pom. Eq. Jur. (2d ed.), §§ 1386-1390, the author is indebted to the able assistance of Prof. Eugene A. Gilmore, of the University of Wisconsin Law Department.

<sup>1 &</sup>quot;The reason given was, that as tenancy in co-parcenary arose by operation of law, it was only proper that the law should afford the means of relief, but as the relationship of joint tenants and tenants in common was one voluntarily assumed, it must continue until the parties themselves terminated it": 4 Pom. Eq. Jur., § 1386, note 1.

Roscoe, Real Actions, 131; 2 Bl. Com. 185; Co. Litt. 175a; Baring
 V. Nash, 1 Ves. & B. 555; Miller v. Warmington, 1 Jacob & W. 493;
 Coleman v. Coleman, 19 Pa. (7 Harr.) 100, 57 Am. Dec. 641.

tance.3 Where the tenure was copyhold, partition might be had in the lord's court by a plaint in the nature of a writ of partition. This plaint and writ were abolished by statute<sup>4</sup> and there was no remedy, even in equity,<sup>5</sup> for the partition of copyhold estates until jurisdiction was conferred upon the chancery courts by statute.6 "The operation of the common-law remedy, even after its extension to joint tenancies and tenancies in common, was imperfect and narrow. The writ of partition lay only against the tenant in possession, and was incompetent to reach the remainder-man or the reversioner. As the judgment at law proceeded according to the titles proved, it was necessary for the plaintiff to show the title of the defendant as well as his own. And as partition at law was made by the sheriff by actual division, it might happen that, where the undivided interests were incapable of exact apportionment, the judgment of the court would be powerless to compensate the inequalities." Moreover, a court of law was unable to adjust the often complicated rights of the parties, as where one co-tenant had laid out large sums for improvements, or had erected valuable buildings, or had been in receipt of all the rents and profits. A court of law could not order a sale, but could only make an actual partition, although this might often work a great hardship or even result in a virtual destruction of the property.8

<sup>3 31</sup> Hen. VIII., c. 1; 32 Hen. VIII., c. 32; Com. Dig., tit. Parcener; 2 Bl. Com. 187; 4 Pom. Eq. Jur., § 1386, note 2.

<sup>4 3 &</sup>amp; 4 Wm. IV., c. 27; 4 Pom. Eq. Jur., § 1386, note 3.

<sup>5</sup> Scott v. Fawcett, 1 Dick. 299; Horncastle v. Charlesworth, 11 Sim. 315; Jope v. Morshead, 6 Beav. 213; Bolton v. Ward, 4 Hare, 530.

<sup>6 4 &</sup>amp; 5 Vict., c. 35, § 85.

<sup>7</sup> Pom. Eq. Jur., § 1386. The text is quoted in Wagner v. Armstrong, 93 Ohio St. 443, 113 N. E. 397.

<sup>8</sup> The text is quoted in Wagner v. Armstrong, 93 Ohio St. 443, 113 N. E. 397 (in Ohio, partition suits are chancery suits).

§ 2125. (§ 703.) Equitable Jurisdiction.—The origin of the jurisdiction of the courts of chancery in cases of partition, while assumed to be very ancient, has never been satisfactorily accounted for. "As early as the reign of Elizabeth, partition became a matter of equitable cognizance; and now the jurisdiction is established as of right in England and in the United States." The ground of the jurisdiction is sometimes stated as resting upon the principle of convenience, and sometimes as an ordinary case of discovery in aid of

9 1 Fonblanque's Equity, b. 1, c. 1, sec. 3, note f; Speke v. Walrond, Toth. 155; 4 Pom. Eq. Jur., § 1387, note 1.

10 4 Pom. Eq. Jur., § 1387, note 2; Agar v. Fairfax, 17 Ves. 533, 2 Lead. Cas. Eq., 4th Am. ed., 865, 880, 894; Parker v. Gerard, Amb. 236; Baring v. Nash, 1 Ves. & B. 551; McMath v. De Bardelaben, 75 Ala. 68; Mylin v. King, 139 Ala. 319, 35 South. 998; Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139; De Uprey v. De Uprey, 27 Cal. 329, 87 Am. Dec. 81; Tate v. Goff, 89 Ga. 184, 15 S. E. 30; Hill v. Reno, 112 Ill. 154, 54 Am. Rep. 222; Howey v. Goings, 13 Ill. 95, 46 Am. Dec. 427; Milligan v. Poole, 35 Ind. 64; Gregory v. High, 29 Ind. 527; Nash v. Simpson, 78 Me. 142, 3 Atl. 53; Wood v. Little, 35 Me. 107; Reinhardt v. Wendeck, 40 Mo. 577; Larned v. Renshaw, 37 Mo. 458; Waugh v. Blumenthal, 28 Mo. 462; Scott v. Guernsey, 60 Barb. 163, 48 N. Y. 106; Clemens v. Clemens, 37 N. Y. 59; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Tanner v. Niles, 1 Barb. 560; Green v. Putnam, 1 Barb. 500; Van Ardsdale v. Drake, 2 Barb. 599; Burhans v. Burhans, 2 Barb. Ch. 398; Harwood v. Kirby, 1 Paige, 469; Teal v. Woodworth, 3 Paige, 470; Wilkinson v. Parish, 3 Paige, 653; Sebring v. Mersereau, Hopk. Ch. 501, 9 Cow. 344; Wotten v. Copeland, 7 Johns. Ch. 140; Gregory v. Gregory, 69 N. C. 522; Donnell v. Matteer, 7 Ired. Eq. 94; Holmes v. Holmes, 2 Jones Eq. 334; Williams v. Van Tuyl, 2 Ohio St. 336; Tabler v. Wiseman, 2 Ohio St. 207; Julian v. Yeoman, 25 Okl. 448, 138 Am. St. Rep. 929, 27 L. R. A. (N. S.) 618, 106 Pac. 956; Bailey v. Sisson, 1 R. I. 233; Lindsey v. Brewer, 60 Vt. 627; Wiseley v. Findlay, 3 Rand. (Va.) 361, 15 Am. Dec. 712; Daniels v. Benedict, 50 Fed. 347, citing Pom. Eq. Jur., § 1387. In Cartwright v. Pultney, 2 Atk. 380, it is stated that the relief in equity in discretionary. See, also, Danvers v. Dorrity, 14 Abb. Pr. (N. Y.) 206.

11 Calmody v. Calmody, 2 Ves. Jr. 570; Baring v. Nash, 1 Ves. & B. 555.

a legal right.<sup>12</sup> The true ground, however, is found in the inability of courts of law to furnish a plain, complete and adequate remedy, 13 and in the case of personal property and equitable interests, in the absence of any legal remedy at all.14 While the jurisdiction of equity is concurrent, as to legal interests, it has, owing to the advantage possessed over the common-law court in being loose and free from all technical restraints and to the powers it possesses of dealing with and providing for the various interests it may meet with, practically bealmost exclusive. 15 As to personal property and equitable estates its jurisdiction is exclusive. 16 In exercising its concurrent jurisdiction equity follows the analogies of the law.17 All of the states in this country have provided a statutory remedy for partition. These statutes are in substance enact-

- 12 Watson v. Northumberland, 11 Ves. 155; Paddock v. Shields, 57 Miss. 340. For other suggestions as to the ground of equity's jurisdiction, see Kildare v. Eustace, 1 Vern. 421; Mundy v. Mundy, 2 Ves. Jr. 122.
- 13 Agar v. Fairfax, 17 Ves. 551; Watson v. Northumberland, 11 Ves. 155; Strickland v. Strickland, 6 Beav. 77; Mitford, Pl. Eq., by Jeremy, 120; 1 Fonbl. Eq., b. 1, c. 1, § 3, note f, pp. 20, 21.
- 14 McCabe v. Hunter's Heirs, 7 Mo. 356; Hopkins v. Toll's Heirs, 4 Humph. 46; Stryker v. Lynch, 11 N. Y. Leg. Obs. 116; Coale v. Barney, 1 Gill & J. 341; Allnatt on Partition, 48; Tripp v. Riley, 15 Barb. 333; Fobes v. Shattuck, 22 Barb. 568; Tinney v. Stebbins, 28 Barb. 290; Wetmore v. Zabriskie, 29 N. J. Eq. 62; Crapster v. Griffith, 2 Bland, 525; Smith v. Smith, 4 Rand. 95, 102; Kerley v. Clay, 4 Bibb, 241; Marshall v. Crow's Adm'r, 29 Ala. 278; Conover v. Earl, 26 Iowa, 167.
- <sup>15</sup> Bac. Abr., Joint Tenants (I); Beeler's Heirs v. Bullitt's Heirs, 10 Ky. (3 A. K. Marsh.) 280, 13 Am. Dec. 161.
- 16 Godfrey v. White, 60 Mich. 443, 1 Am. St. Rep. 537, 27 N. W. 593; Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679; and cases in note 14, supra.
- 17 Wills v. Slade, 6 Ves. 498; Baring v. Nash, 1 Ves. & B. 555; Evans v. Bagshaw, L. R. 8 Eq. 469; Wilkinson v. Steuart, 74 Ala. 198.

ments of the common law and equitable remedies and partake of the nature of both. Sometimes the jurisdiction is conferred upon courts of law, sometimes upon courts of equity, but more frequently upon courts exercising both legal and equitable jurisdiction. The statutory remedy is generally held to be cumulative and does not supersede the original jurisdiction in equity.<sup>18</sup>

§ 2126. (§ 704.) Property Subject to Partition — In General.—Following the analogies of the law, equity will grant partition only of property held in co-tenancy and in which the parties have a community of interest, either as co-tenants, tenants in common, or co-parceners; and this rule has not been materially affected by the statutory remedy of partition provided in all the states. Several persons may be owners of the same property without being co-tenants, and the severance of their interests may be desirable or even essential to the enjoyment of such property, but this constitutes no ground for equitable interference by way of partition. If the requisite of cotenancy be present, all kinds of property are subject in equity to partition, whether it be corporeal or incorporeal, real or personal, and whether it be held by legal or equitable title.19

18 Wilkinson v. Steuart, 74 Ala. 198; Labadie v. Hewett, 85 Ill. 341; Patton v. Wagner, 19 Ark. 233; Spitts v. Wells, 18 Mo. 471; Whitten v. Whitten, 36 N. H. 332; Hale v. Jaques, 69 N. H. 411, 43 Atl. 121; Rutherford v. Jones, 14 Ga. 521, 60 Am. Dec. 655; Wright v. Marsh, 2 G. Greene (Iowa), 104; Chrisman v. Divinia, 141 Mo. 122, 41 S. W. 920. See, also, Dunbar v. Bourland, 88 Ark. 153, 114 S. W. 467; Wolkau v. Wolkau, 264 Ill. 510, 106 N. E. 461 (statutory remedy, in Illinois, is a substitute for the common-law action; only legal titles can be considered, and equities cannot be adjusted). To the effect that the statutory remedy supersedes the remedy in equity, see Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139; Whiting v. Whiting, 15 Gray, 504.

19 Russell v. Beasley, 72 Ala. 190; Inman v. Prout, 90 Ala. 362, 372, 7 South. 842; Strong v. Harris, 84 Hun, 314, 32 N. Y. Supp. 349;

§ 2127. (§ 705.) Personal Property.—"The rules and proceedings which obtained at common law and by statute on the subject of partition related exclusively to real

Anderson School Tp. v. Milroy Lodge etc., 130 Ind. 108, 30 Am. St. Rep. 206, 29 N. E. 411; Sneed's Heirs v. Atherton, 6 Dana, 276, 32 Am. Dec. 70; Kelly v. Muir, 17 Ky. Law Rep. 167, 30 S. W. 653; City of Baltimore v. City of New Orleans, 45 La. Ann. 526, 12 South. 878; Soutter v. Atwood, 34 Me. 153, 56 Am. Dec. 647; Haines v. Haines, 4 Md. Ch. 133; Metcalfe v. Miller, 96 Mich. 459, 35 Am. St. Rep. 617, 56 N. W. 16; Benedict v. Torrent, 83 Mich. 181, 21 Am. St. Rep. 589, 11 L. R. A. 278, 47 N. W. 129; Foreman v. Hough, 98 N. C. 386, 3 S. E. 912; Harman v. Kelley, 14 Ohio, 502, 45 Am. Dec. 552; Du Pont v. Du Bos, 52 S. C. 244, 29 S. E. 665 (lands held by fee conditional, partible). In Barr v. Lamaster, 48 Neb. 114, 32 L. R. A. 451, 66 N. W. 1110, owners in severalty of adjoining lots, pursuant to agreement, erected buildings thereon, having the stairs, hallways, skylight and heating apparatus in common. Held, the agreement creates only cross-easements and there is nothing owned in common which can be partitioned. See, also, McConnel v. Kibbe, 43 Ill. 12, 92 Am. Dec. 93, and Johnson v. Moser, 72 Iowa, 523, 34 N. W. 314, where the ownership of property was held to be in severalty and not subject to partition. In Truth Lodge No. 213 etc. v. Barton, 119 Iowa, 230, 97 Am. St. Rep. 303, 93 N. W. 106, where the land was owned jointly and the building severally, partition by sale was granted. Partition does not lie to determine the rights among themselves of successive riparian owners, since they are not co-tenants or joint owners, but each has a right of user as the water passes his land; so held in Tracy Development Co. v. Becker (People), 212 N. Y. 488, 106 N. E. 330. See post, § 707.

That, as a general rule, partition may be had in one suit of several parcels, but each parcel must be owned by the same person, see Middlecoff v. Cronise, 155 Cal. 185, 17 Ann. Cas. 1159, and note, 100 Pac. 232.

A base or determinable fee may be partitioned, the quality following the estate after partition: Askins v. Merritt, 254 Ill. 92, 98 N. E. 256.

Immaterial whether title be legal or equitable: Stein v. McGrath, 128 Ala. 175, 30 South. 792; Royston v. Miller, 76 Fed. 50. See, also, Fox v. Fox, 250 Ill. 384, 95 N. E. 498; Martin v. Martin, 250 Mo. 539, 157 S. W. 575. The owner of a life estate cannot have partition against owners of remainder: Love v. Blauw, 61 Kan. 496, 78 Am. St. Rep. 334, 48 L. R. A. 257, 59 Pac. 1059; Smith v. Run-

estate.<sup>20</sup> At common law the co-owner of a chattel could maintain an action respecting the common property against his co-tenant only where a loss, destruction, or sale of the property was provable against the defendant.<sup>21</sup> However expedient the partition of chattels might appear, or however desirable it might be to the co-tenants, the common law furnished no instrumentality by which the partition could be judicially effected. There was not merely an inadequacy of legal remedy, there was an utter absence of it. The situation clearly demanded the intervention of equity. And although the inception of the equitable jurisdiction for the partition of chattels is not traceable with certainty, the jurisdiction itself is unquestioned; and where a literal partition is not practicable, the court will order a sale."<sup>22</sup> The jurisdiction

nels, 97 Iowa, 55, 65 N. W. 1002; Metcalfe v. Miller, 96 Mich. 459, 35 Am. St. Rep. 617, 56 N. W. 16. See, also, Stockwell v. Stockwell, 262 Mo. 671, 172 S. W. 23; McConnell v. Bell, 121 Tenn. 198, 130 Am. St. Rep. 770, 114 S. W. 203.

- 20 Allnatt on Partition, 48; 4 Pom. Eq. Jur., § 1391, note 1.
- 21 Cowles v. Garrett's Adm'rs, 30 Ala. 341; Tinney v. Stebbins, 28 Barb. 290; Gilbert v. Dickerson, 7 Wend. 449, 22 Am. Dec. 592; Hinds v. Terry, Walk. (Miss.) 80; 4 Pom. Eq. Jur., § 1391, note 2.

22 Pom. Eq. Jur., § 1391. Cited in Van Dyck v. Bloede, 128 Md. 330, 97 Atl. 630. This paragraph is cited and followed in Riley v. Whittier, 100 Neb. 107, 158 N. W. 446. See Marshall v. Crow's Adm'r, 29 Ala. 278; Smith v. Dunn, 27 Ala. 315; Conover v. Earl, 26 Iowa, 167; Kerley v. Clay, 4 Bibb, 241; Crapster v. Griffith, 2 Bland (Md.), 5; Godfrey v. White, 60 Mich. 443, 1 Am. St. Rep. 537, 27 N. W. 593; Potter v. Stone, 70 Miss. 291, 12 South. 208; Caldwell v. Wright, 88 Mo. App. 604; Wetmore v. Zabriskie, 29 N. J. Eq. 62; Fobes v. Shattuck, 22 Barb. 568; Tripp v. Riley, 15 Barb. 333; Edwards v. Bennett, 10 Ired. (N. C.) 363; Weeks v. Weeks, 5 Ired. Eq. 111, 47 Am. Dec. 358; Neal v. Suber, 56 S. C. 298, 33 S. E. 463; Smith v. Smith, 4 Rand. (Va.) 95, 102. See Beardsley v. Kansas Natural Gas Co., 78 Kan. 571, 96 Pac. 859 (must be some special circumstances justifying equitable action). To the effect that money judgments cannot be partitioned: Moorer v. Moorer, 84 Ala. 353, 4 South. 234; Spaulding v. Warner, 59 Vt. 646, 11 Atl. 186.

of equity over the partition of chattels is exclusive, and extends even to the settling of disputed titles.<sup>23</sup>

§ 2128. (§ 706.) Future Estates.—The object of the action at law for partition, as it lay among co-parceners and later among tenants in common and joint tenants, was to obtain relief from the inconveniences and embarrassments incident to the joint occupation of land and to gain the advantages of a tenancy in severalty. The remedy had especial reference to present possession. Estates in remainder and in reversion were, therefore, not subject to partition at law. Unless modified by statute, the rule is the same in equity, and a bill will not lie to partition a future estate unconnected with an estate in possession.<sup>24</sup> While a future estate cannot be partitioned in equity at the suit of a co-owner thereof, the owners of future estates may be made parties defendant to a bill by the owner of a particular estate and may be. compelled to execute conveyances for the purpose of carrying out a decree of partition.25 By statute in

23 Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679; Godfrey v. White, 60 Mich. 443, 1 Am. St. Rep. 537, 27 N. W. 593; Pom. Eq. Jur., § 1392; cited in Van Dyck v. Bloede, 128 Md. 330, 97 Atl. 630 (partition sale of electric light franchise as incorporeal personal property).

24 Evans v. Bagshaw, L. R. 5 Ch. App. 340, 39 L. J. Ch. D. 145;
Wilkinson v. Stuart, 74 Ala. 198; Bool v. Mix, 17 Wend. 119, 31
Am. Dec. 285; Stevens v. Enders, 1 Green (13 N. J. L.), 273; Packard v. Packard, 16 Pick. 194; Ziegler v. Grim, 6 Watts, 106; Baldwin v. Aldrich, 34 Vt. 532, 80 Am. Dec. 695; Brown v. Brown, 8 N. H. 94; Norment v. Wilson, 5 Humph. 310; Robertson v. Robertson, 2 Swan, 201; Simmons v. MacAdaras, 6 Mo. App. 297. See, also, Rutherford v. Rutherford, 116 Tenn. 383, 115 Am. St. Rep. 799, 92
S. W. 1112 (contingent remainder-men); Brown v. Brown, 67 W. Va. 251, 21 Ann. Cas. 263, 28 L. R. A. (N. S.) 125, 67 S. E. 596; Fies v. Rosser, 162 Ala. 504, 136 Am. St. Rep. 57, 50 South. 287.

25 The text is quoted and followed in Tolson v. Bryan, 130 Md. 338, 100 Atl. 366 (suit by joint owner against life tenant and remainder-man under will of other joint owner). See Gaskell v.

some of the states, it is provided that partition may be had when two or more persons are interested in real property as joint tenants or tenants in common. This has been held to authorize a partition of an estate in remainder or in reversion.<sup>26</sup>

§ 2129. (§ 707.) Incorporeal and Other Property.—Because of the facility with which courts of equity can deal with the numerous and complicated interests arising from the common ownership of various sorts of property, there is a peculiar fitness in resorting to those courts, where relief is obtainable in many cases in which the parties would be practically remediless at law. Thus, on a bill to partition the use of waters, equity will decree the use thereof for alternate periods by the parties, 27 or will assign to each owner so much water as will

Gaskell, 6 Sim. 643; Martyn v. Perryman, 1 Ch. Rep. 235; Brook v. Hertford, 2 P. Wms. 518; Hobson v. Sherwood, 4 Beav. 184; Wills v. Slade, 6 Ves. 498; Duke v. Hague, 107 Pa. St. 57; Gayle v. Johnston, 80 Ala. 395; Sullivan v. Sullivan, 66 N. Y. 37. See, further, Wheat v. Wheat, 190 Ala. 461, 67 South. 417; but see Lawson v. Bonner, 88 Miss. 235, 40 South. 488, 117 Am. St. Rep. 738 (under statute). See, also, 4 Pom. Eq. Jur., § 1387, note 3.

26 Hilliard v. Scoville, 52 Ill. 449; Drake v. Merkle, 153 Ill. 318, 38 N. E. 654; Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115; Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352; Cook v. Webb, 19 Minn. 167; Smith v. Gaines, 38 N. J. Eq. 65; Howell v. Mills, 56 N. Y. 227; Jenkins v. Fahey, 73 N. Y. 355; Bierce v. James, 87 Tenn. 538, 553, 11 S. W. 788; Phillips v. Johnson, 14 B. Mon. 140; Preston v. Brant, 96 Mo. 552, 10 S. W. 78. See, also, Deadman v. Yantis, 230 Ill. 243, 120 Am. St. Rep. 291, 82 N. E. 592. To the effect that a contingent remainder or an executory devise cannot be partitioned, see Smith v. Smith (Tenn.), 57 S. W. 198; Muldoon v. Trewhitt (Tenn.), 38 S. W. 109; Havey v. Kelleher, 36 App. Div. 201, 56 N. Y. Supp. 889; Aydlett v. Pendleton, 111 N. C. 28, 32 Am. St. Rep. 776 (monographic note), 16 S. E. 8. That an expectancy cannot be partitioned, see Cummings v. Lohr, 246 Ill. 577, 92 N. E. 970.

<sup>27</sup> Smith v. Smith, Hoff. Ch. (N. Y.) 506. Also in Bodicoate v. Steers, 1 Dick. 69, and Buller v. Bishop of Exeter, 1 Ves. Sr. 340,

run through a gate of certain dimensions or through certain channels of the river.<sup>28</sup> Where property is not in its nature severable, the profits may be divided or alternate occupation decreed,<sup>29</sup> or the property sold.<sup>30</sup> Mining rights may be partitioned by sale and a division of the proceeds, if they are so created as to amount to legal estates of freehold, and are not mere licenses to dig on another's land.<sup>31</sup> Co-owners of growing timber or of

on a bill to partition an advowson the court decreed that the parties should present by alternate terms.

<sup>28</sup> Morrill v. Morrill, 5 N. H. 134; Warren v. Westbrook Mfg. Co., 88 Me. 58, 51 Am. St. Rep. 372, 35 L. R. A. 388, 33 Atl. 665. See, also, Roberts v. Claremont R'y & Lighting Co., 74 N. H. 217, 124 Am. St. Rep. 962, 66 Atl. 485. In McGillivray v. Evans, 27 Cal. 92, the court refused to make a mechanical division of the water running through a ditch and ordered a sale; Cooper v. Cedar Rapids Water-Power Co., 42 Iowa, 398.

29 Bishop of Salisbury v. Philips, 1 Salk. 43, Co. Litt. 4, a, 167, a, b; Fitzherbert's Nat. Brev., 62, I; Allnatt on Partition, 51; Hanson v. Willard, 12 Me. 142, 28 Am. Dec. 162; Warner v. Baynes, Amb. 589; Turner v. Morgan, 8 Ves. 143.

·30 In Hall v. Vernon, 47 W. Va. 295, 81 Am. St. Rep. 791, 34 S. E. 764, the court refused to make an actual partition of oil and gas owned by co-owners separate from the surface, because of the nature of the property.

31 Canfield v. Ford, 16 How. Pr. 473, 28 Barb. 336; Merritt v. Judd, 14 Cal. 64; Merced Mining Co. v. Fremont, 7 Cal. 319, 68 Am. Dec. 262; Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263; Ryan v. Egan, 26 Utah, 241, 72 Pac. 933; Hughes v. Devlin, 23 Cal. 504 (license); Smith v. Cooley, 65 Cal. 46, 2 Pac. 880 (license). See, also, Ball v. Clark, 150 Ky. 383, 150 S. W. 359. A mere license to dig on another's land is indivisible because a division would create new rights and thus surcharge the land. For the same reason, estovers, corodies uncertain, piscaries uncertain, and commons sans nombre were not subject to partition: Co. Litt. 165, a; Allnatt on Partition, 8; Livingston v. Ketcham, 1 Barb. 597. See, also, Darbee & Immel Oyster & L. Co. v. Pacific Oyster Co., 150 Cal. 392, 119 Am. St. Rep. 227, 88 Pac. 1090 (right to plant oysters being a mere personal right, is not an estate subject to partition). To the effect that there can be no partition of lands containing mineral deposits if the location, extent and value of such deposits cannot be ascercrops raised jointly may have partition.<sup>32</sup> Real estate held by partners for partnership purposes is not subject to compulsory partition unless it is clear that the other property of the firm is ample to meet the firm obligations.<sup>33</sup> In England, however, the real estate of a partnership is regarded as so essentially converted into personalty that it cannot be judicially partitioned.<sup>34</sup> No partition in equity can be had among co-tenants of property held by entirety until the tenancy has been converted into a tenancy in common by proper judicial proceedings.<sup>35</sup>

§ 2130. (§ 708.) Limitations on the Right to Partition.—Although there are a few cases to the contrary,<sup>36</sup>

tained, see Kemble v. Kemble, 44 N. J. Eq. 454, 11 Atl. 733; Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; Grubb v. Bayard, 2 Wall. Jr. 81, Fed. Cas. No. 5849. See, also, Robertson Consol. Land Co. v. Paull, 63 W. Va. 249, 15 Ann. Cas. 775, and note, 59 S. E. 1085.

32 Steedman v. Weeks, 2 Strob. Eq. 146, 49 Am. Dec. 660; Neal
 v. Suber, 56 S. C. 298, 33 S. E. 463.

33 Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679; Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Craighead v. Pike, 58 N. J. Eq. 15, 43 Atl. 424; Pennybacker v. Leary, 65 Iowa, 220, 21 N. W. 575; Baird v. Baird's Heirs, 1 Dev. & B. Eq. 524, 31 Am. Dec. 399; Flanner v. Moore, 2 Jones, 123; Buchan v. Sumner, 2 Barb. Ch. 204; Roberts v. McCarty, 9 Ind. 18, 68 Am. Dec. 604; Patterson v. Blake, 12 Ind. 436; Jackson v. Deese, 35 Ga. 88; Ingraham v. Mariner, 194 Ill. 269, 62 N. E. 609. But in Hughes v. Devlin, 23 Cal. 507, the court said that the mere fact that real estate is owned by partners for partnership purposes affords no valid objection to a partition.

See, also, on the subject of partnership real estate, post, chapter XLIX.

34 Wilde v. Milne, 26 Beav. 504; Crawshay v. Maule, 1 Swanst. 518; Darby v. Darby, 3 Drew. 501.

35 Green v. King, 2 W. Bl. 121; Dias v. Glover, 1 Hoff. Ch. (N. Y.) 76; Stuckey v. Keefe's Ex., 26 Pa. St. 400; De Godey v. Godey, 39 Cal. 162; Ketchum v. Walsworth, 5 Wis. 95, 68 Am. Dec. 49. See Schulz v. Ziegler, 80 N. J. Eq. 199, 42 L. R. A. (N. S.) 98, 83 Atl. 968 (partition suit by grantee of husband does not affect the commonlaw right of survivorship.)

36 Conant v. Smith, 1 Aik. (Vt.) 67, 15 Am. Dec. 669; Brown v.

the rule is practically universal that a co-tenant is entitled at law to an actual partition as a matter of absolute right, and the fact that the division will result in great hardship and inconvenience or the virtual destruction of the property is no reason for withholding it. A co-tenant need not assign any reason for desiring a partition; it is sufficient if he wishes to enjoy his estate in severalty. Equity followed the law in this regard and decreed an actual partition notwithstanding manifest hardship.37 While equity treats the right to partition as absolute, it is not restricted, as is a court of law, to an actual physical apportionment according to titles proved, but having control of the parties and greater freedom of action. it may mollify the hardships by adjusting the adverse interests and by making such an allotment as will most nearly effect justice and equality among the parties.38

Turner, 1 Aik. 350, 15 Am. Dec. 696; Miller v. Miller, 13 Pick. 237. In the second case, one reason for denying the relief was that the parties had a more adequate remedy in equity.

37 Cates v. Johnson, 109 Ala. 126, 19 South. 416; Land v. Smith, 44 La. Ann. 931, 11 South. 577; Hanson v. Willard, 12 Me. 147, 28 Am. Dec. 162; Smith v. Smith, 10 Paige, 473; Donnell v. Mateer, 7 Ired. Eq. 94; Scovil v. Kennedy, 14 Conn. 360; Bradley v. Harkness, 26 Cal. 77; Lake v. Jarret, 12 Ind. 395; Updike v. Adams, 22 R. I. 432, 48 Atl. 384; O'Brien v. Mahoney, 179 Mass. 200, 88 Am. St. Rep. 371, 60 N. E. 493. In Turner v. Morgan, 8 Ves. 143, the court confirmed a report of a commission which allotted to the plaintiff, in a partition proceeding in equity to divide a house, the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. Also, in Parker v. Gerard, Amb. 236, an actual partition was decreed, although the land in question extended a mile and a half, some parts were rocky and poor, and some parts had water and others none.

38 Warner v. Baynes, Amb. 589; Agar v. Fairfax, 17 Ves. 533; Donnell v. Mateer, 7 Ired. Eq. 94; also cases in notes 27 to 30 under the last section. "The peculiarities of an equitable partition are, that such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without

As is shown elsewhere,<sup>39</sup> a court of equity formerly labored under the same disadvantage in England as a court of law in not being able to order a sale of the property without the consent of all the parties interested. In this country, however, statutes were early passed conferring this power upon equity courts so that in proper cases a sale and a division of the proceeds may be decreed.<sup>40</sup>

While the character of the property affords no bar to a partition, there are many cases in which equity will refuse to decree a division, as where property is charged with some trust or is dedicated to some use which would be defeated by the partition. There can be no partition which will defeat the purpose of a valid trust created by deed or will,<sup>41</sup> nor will equity grant a partition con-

injury to the others; that when the lands are in several parcels, each joint owner is not entitled to a share of each parcel, but only to his equal share in the whole; that where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be paid for owelty or equality of partition by one whose share is too large to others whose shares are too small; and that when one joint owner has put improvements on the property, he shall receive compensation for his improvements, either by having the part on which the improvements are assigned to him at the value of the land without the improvements, or by compensation directed to be made for them": Hall v. Piddock, 21 N. J. Eq. 316.

- 39 See post, "Partition by Sale," § 722.
- 40 See post, "Partition by Sale," § 722.
- 41 Equity will deny a partition which would defeat the purposes of a valid trust created by deed or will: Sicker v. Sicker, 23 Misc. Rep. 737, 53 N. Y. Supp. 106; Pierson v. Van Bergen, 23 Misc. Rep. 547, 52 N. Y. Supp. 890; Young v. Young, 20 Ky. Law Rep. 1741, 49 S. W. 1074; Outcalt v. Appleby, 36 N. J. Eq. 73; Cubbage v. Franklin, 62 Mo. 364; Hill v. Jones, 65 Ala. 214; Gerard v. Buckley, 137 Mass. 475. See, also, Stewart v. Jones, 219 Mo. 614, 131 Am. St. Rep. 595, 118 S. W. 1; Johnson v. Gaul, 228 Pa. St. 75, 77 Atl. 399. Compare Munson v. Bringe, 146 Wis. 393, Ann. Cas. 1912C, 325, and note, 131 N. W. 904 (mere fact that trustees for separate beneficiaries hold as tenants in common is no reason why partition should not be granted); Dodd v. Cattell, [1914] 2 Ch. 1.

trary to the expressed desires of a testator.<sup>42</sup> Where, however, all the beneficiaries under a trust consent to a partition, equity may order the same and terminate the trust, or may order the property held for the beneficiaries in severalty, provided such termination or holding will not defeat the objects of the trust.<sup>43</sup> Where property is devoted to a public use, no partition detrimental to public right or policy will be permitted,<sup>44</sup> and where property is devoted to a religious or charitable use of such a nature that a partition would be especially disastrous, equity will not enforce a division.<sup>45</sup> A homestead is regarded, in most of the states, as appropriated to a use which requires its occupancy as a whole, and a

- 42 Springer v. Savage, 143 Ill. 301, 32 N. E. 520; Blake v. Blake, 118 N. C. 575, 24 S. E. 424; Wells v. Houston (Tex. Civ.), 56 S. W. 233; Cohill v. Cohill, 62 N. J. Eq. 157, 49 Atl. 809; Stevens v. De La Veuex, 166 Mo. 20, 65 S. W. 1003; Striker v. Mott, 2 Paige, 387, 22 Am. Dec. 646; Gulick v. Huntley, 144 Mo. 241, 46 S. W. 154. To the effect that a discretionary power to sell given to executors does not prevent a partition, see Miller v. Miller, 22 Misc. Rep. 582, 49 N. Y. Supp. 407; Wood v. Hubbard, 29 App. Div. 166, 51 N. Y. Supp. 526.
- 43 Briggs v. Peacock, 52 L. J. Ch. D. 1; Taylor v. Grange, 49
   L. J. Ch. D. 794; Morse v. Morse, 85 N. Y. 53; Wetmore v. Zabriskie,
   29 N. J. Eq. 62.
- 44 Railroad Co. v. Railroad Co., 38 Ohio St. 614; Newcomb v. Newcomb, 12 N. Y. 603; Hodges v. Pingree, 10 Gray, 14. Compare Hill v. Woodward, 100 Miss. 879, Ann. Cas. 1914A, 390, 39 L. R. A. (N. S.) 538, 57 South. 294, holding that the fact that one co-tenant is a railroad company using the land as a right of way, having bought it from only one of the co-tenants, is immaterial; no public policy can divest a person of his property except in the way the law provides.
- 45 Latshaw's Appeal, 122 Pa. St. 142, 9 Am. St. Rep. 76, 15 Atl. 676; Rice v. Osgood, 9 Mass. 38. In Brown v. Lutheran Church, 23 Pa. St. 500, the court refused to order a partition of a burying-ground held by two religious societies in common, although a severable part of the land was not occupied by graves. As to partition of a cemetery lot, see Love v. Robinson, 219 Pa. St. 469, 12 Ann. Cas. 974, and note, 68 Atl. 1033.

partition thereof cannot be had among the heirs of the deceased owner.<sup>46</sup> The inchoate right of dower which may exist in favor of the wife of a co-tenant does not prevent a compulsory partition. On a division of the land the dower right attaches to the moiety set apart to her husband.<sup>47</sup> Where, however, the right of dower exists before the co-tenancy arises, partition can only be had subject to such right.<sup>48</sup> Certain interests cannot be partitioned because of the effect on the rights of third persons.<sup>49</sup> Nor will equity entertain a bill for the partition of land which has already been partitioned by agreement of the owners.<sup>50</sup> There is some authority

46 Wells v. Sweeney, 16 S. D. 489, 102 Am. St. Rep. 813, 94 N. W. 394; Rowe v. Rowe, 61 Kan. 862, 60 Pac. 1049; Rhorer v. Brockhage, 13 Mo. App. 397; Trotter v. Trotter, 31 Ark. 145; Nichols v. Purczell, 21 Iowa, 266, 89 Am. Dec. 572; Hardy v. Gregg (Miss.), 2 South. 358. But see Robinson v. Baker, 47 Mich. 619, 11 N. W. 410. In Ferguson v. Reed, 45 Tex. 574, the grantee of a husband and wife of an undivided interest in their homestead was permitted to have partition. See, also, Faircloth v. Carroll, 137 Ala. 243, 34 South. 182.

Where there are infant co-tenants, equity may refuse to grant partition if it appears that the best interests of the minors will not be served thereby: Pitman v. England (Tenn.), 46 S. W. 464; Tomkins v. Miller, (N. J. Eq.), 27 Atl. 484.

47 Wilkinson v. Parisk, 3 Paige, 658; Lee v. Lindell, 22 Mo. 203, 64 Am. Dec. 262; Mosher v. Mosher, 32 Me. 414; Totten v. Stuyvesant, 3 Edw. Ch. 503; Matthews v. Matthews, 1 Edw. Ch. 567.

- 48 Coles v. Coles, 15 Johns. 159, 8 Am. Dec. 231; White v. White, 16 Gratt. 267, 80 Am. Dec. 706; Bradshaw v. Callaghan, 8 Johns. 563; Ward v. Gardner, 112 Mass. 42. As to estates subject to curtesy, see Bierce v. James, 87 Tenn. 553, 11 S. W. 788.
  - 49 Co. Litt. 165a. See cases cited in note 31 to last section.
- 50 Welchel v. Thompson, 39 Ga. 559, 99 Am. Dec. 470; Hardy v. Summers, 10 Gill & J. (Md.) 316, 32 Am. Dec. 167; Coon v. Cronk, 131 Ind. 44, 30 N. E. 882. Compare Vandal v. Casto (W. Va.), 93 S. E. 1044, where partition was made by agreement, but by mistake or fraud a part of the land was omitted.

Where, after a decree of partition of riparian land there were large accretions, a new suit will lie on the ground of mistake as to the existence of the subject-matter: Fowler v. Wood, 73 Kan. 511, 117 Am. St. Rep. 534, 6 L. R. A. (N. S.) 162, 85 Pac. 763.

for the view that an agreement among co-tenants not to partition their common property is invalid, either because it is repugnant to the partible quality which is an essential characteristic of such estates, or because it is a restraint on alienation and contrary to public policy. It would seem that an agreement never to partition might be subject to the latter objection.<sup>51</sup> The prevailing rule, however, is that the right to a compulsory partition is given for the benefit of co-tenants and may be waived by agreement,<sup>52</sup> and where such a stipulation is an incident to the purchase of lands or other property for the carrying out of a common project to the success of which the preservation of the property as a whole is essential, equity will not compel a partition in violation of the contract.<sup>53</sup>

- § 2131. (§ 709.) Who is Entitled to Partition.—Unless modified by statute or subject to exceptions hereafter noted, the general rule in equity, as well as at law, is that a party applying for partition must not only have a present estate in the property, real or personal, as joint tenant or tenant in common, but he must also have an actual or constructive possession of his undivided share
- 51 Mitchell v. Starbuck, 10 Mass. 11; Haeussler v. Missouri Iron Co., 110 Mo. 188, 33 Am. St. Rep. 431, 16 L. R. A. 220, 19 S. W. 75 (annotations); Pick v. Cardwell, 2 Beav. 137.
- 52 Martin v. Martin, 170 Ill. 639, 62 Am. St. Rep. 411, 48 N. E.
  924; Brown v. Coddington, 72 Hun, 147, 25 N. Y. Supp. 649; Coleman v. Coleman, 19 Pa. St. (7 Harr.) 100, 57 Am. Dec. 641; Spaulding v. Woodward, 63 N. H. 573, 16 Am. Rep. 392; Eberts v. Fisher, 54 Mich. 294, 20 N. W. 80; Avery v. Payne, 12 Mich. 549. See, also, Uden v. Patterson, 252 Ill. 335, 96 N. E. 852. Compare Blakeslee v. Blakeslee, 265 Ill. 48, 106 N. E. 470, distinguishing Martin v. Martin, supra.
- 53 Hunt v. Wright, 47 N. H. 399, 93 Am. Dec. 451; Selden v. Vermilya, 2 Sand. (N. Y.) 568; Pick v. Cardwell, 2 Beav. 137. Compare Hunt v. Meeker County Abstract & Loan Co., 128 Minn. 207, Ann. Cas. 1916D, 925, 150 N. W. 798.

or interest therein.<sup>54</sup> But he will be aided by the presumption that possession usually follows the legal title when no adverse possession is shown.<sup>55</sup> In equity, as at law, a pending lease for years to a third party or to a co-tenant is no obstacle to a partition between the owners of the fee.<sup>56</sup> The grantee or assignee of the share of

54 Burhans v. Burhans, 2 Barb. Ch. 398; Brownell v. Brownell, 19 Wend. 367; Stevens v. Enders, 13 N. J. L. 271; Atha v. Jewell, 33 N. J. Eq. 417; Culver v. Culver, 2 Root (Conn.), 278; Damron v. Campion, 24 Misc. Rep. 234, 53 N. Y. Supp. 543; Sullivan v. Sullivan, 66 N. Y. 37; Striker v. Mott, 2 Paige, 387, 22 Am. Dec. 646; Sterling v. Sterling, 43 Or. 200, 72 Pac. 741; Hutson v. Hutson, 139 Mo. 229, 40 S. W. 886; Brock v. Eastman, 28 Vt. 658, 67 Am. Dec. 733; Rich v. Bray, 37 Fed. 273, 2 L. R. A. 225; McMurty v. Keifner, 36 Neb. 522, 54 N. W. 844; Hoyle v. Huson, 1 Dev. 348; Whitten v. Whitten, 36 N. H. 332; Schori v. Stephens, 62 Ind. 441; Nichols v. Nichols, 28 Vt. 230, 67 Am. Dec. 699 (annotated case); Packard v. Packard, 16 Pick. 194; Brown v. Brown, 8 N. H. 94; Norment v. Wilson, 5 Humph. (Tenn.) 310; Robertson v. Robertson, 2 Swan (Tenn.), 201; Evans v. Bagshaw, L. R. 8 Eq. 469, L. R. 5 Ch. 340; Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639; Osborne v. Mull, 91 N. C. 203; Cannon v. Lomax, 29 S. C. 369, 13 Am. St. Rep. 739, 1 L. R. A. 637, 7 S. E. 529; Weeks v. Weeks, 40 N. C. 711, 47 Am. Dec. 358 (personalty); Conter v. Herschel, 24 Nev. 152, 50 Pac. 851 (personalty). See, also, Coquillard v. Coquillard, 62 Ind. App. 489, 113 N. E. 481, citing Pom. Eq. Jur., § 1387, to this effect. Equity may retain the bill until the parties are entitled to possession: Cole v. Creyon, 1 Hill Eq. 311, 26 Am. Dec. 208.

55 Byers v. Danley, 27 Ark. 96; Hill v. Cherokee Construction Co., 99 Ark. 84, 137 S. W. 553; Wommack v. Whitmore, 58 Mo. 448; Beebe v. Griffing, 14 N. Y. 238.

56 Willard v. Willard, 145 U. S. 116, 36 L. Ed. 644, 12 Sup. Ct. 818; Haeussler v. Missouri Iron Co., 110 Mo. 188, 33 Am. St. Rep. 431, 16 L. R. A. 220, 19 S. W. 75; Wilkinson v. Joberns, L. R. 16 Eq. 14; Hunt v. Hazelton, 5 N. H. 216, 20 Am. Dec 575; Woodworth v. Campbell, 5 Paige, 518; Thursfon v. Minke, 32 Md. 571; Cook v. Webb, 19 Minn. 167; Co. Litt. 46, a, 167, a; Com. Dig., "Parcener," C, 6. See, also, Blakeslee v. Blakeslee, 265 Ill. 48, 106 N. E. 470 (lease with option of purchase); Hunt v. Meeker County Abstract & Loan Co., 128 Minn. 207, Ann. Cas. 1916D, 925, 150 N. W. 798 (each co-tenant is lessee of a floor of the building). But see Hen-

a co-tenant acquires all the rights of his grantor to enforce partition.<sup>57</sup> A mortgagor may at any time before foreclosure maintain proceedings for partition, subject to the interests of the mortgagee.<sup>58</sup> A mortgagee, being generally regarded in this country as having only a defeasible title before foreclosure and the expiration of the period of redemption, is not entitled to have partition, but after his interest becomes indefeasible by reason of appropriate proceedings had to cut off the equity of redemption, he may have his interest set aside in severalty.<sup>59</sup> Reversioners and remainder-men, while liable to be made defendants in a suit in equity to enforce partition, cannot bring a proceeding for that purpose. In a few states, however, estates in remainder or reversion may be partitioned at the suit of the co-owners.<sup>60</sup>

derson v. Henderson, 136 Iowa, 564, 114 N. W. 178. Sce Hunnewell v. Taylor, 6 Cush. 472, contra, but since changed by statute. Lessor's heirs cannot have partition of leased premises during pendency of the lease: Cannon v. Lomax, 29 S. C. 369, 13 Am. St. Rep. 739, 1 L. R. A. 637, 7 S. E. 529.

57 Hill v. Jones, 65 Ala. 214; Stewart's Appeal, 56 Pa. St. 242; Collamer v. Hutchins, 27 Vt. 734; King v. Howard, 27 Mo. 21; Ragan's Estate, 7 Watts (Pa.), 442; Welch v. Agar, 84 Ga. 583, 20 Am. St. Rep. 380, 11 S. E. 149 (creditor of co-tenant); Van Arsdale v. Drake, 2 Barb. 600; Newton Bank v. Hull, 10 Allen, 145; Faircloth v. Carroll, 137 Ala. 243, 34 South. 182; Mee v. Benedict, 98 Mich. 260, 39 Am. St. Rep. 543, 22 L. R. A. 641, 57 N. W. 175.

<sup>58</sup> Green v. Arnold, 11 R. I. 364, 23 Am. Rep. 466; Colton v. Smith, 11 Pick. 311, 22 Am. Dec. 375; Wotten v. Copeland, 7 Johns. Ch. 140; Upham v. Bradley, 17 Me. 427; Hall v. Morris, 13 Bush, 322.

59 Phelps v. Townsley, 10 Allen, 554; Ewer v. Hobbs, 5 Met. 6; Fall v. Elkins, 9 Week. Rep. 861. Where mortgage is to co-tenant, no foreclosure: Yglesias v. Dewey, 60 N. J. Eq. 62, 47 Atl. 59; Bradley v. Fuller, 23 Pick. 1. But see Waite v. Bingley, L. R. 21 Ch. D. 674. That a trustee in bankruptcy may not sue for partition was held in Hobbs v. Frazier, 56 Fla. 796, 131 Am. St. Rep. 179, 16 Ann. Cas. 558, 20 L. R. A. (N. S.) 105, 47 South. 929.

60 Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639; Savage v. Savage, 19 Or. 112, 20 Am. St. Rep. 795, 23 Pac. 890; Merritt v. Hughes, 36

A co-tenant for life or for years may, either at law or in equity, enforce partition of the particular estate, and in equity may make the owners of the future estates parties and have such a decree as will fairly adjust all the interests in the estate. 61 While an infant may enforce partition, equity does not, as with an adult, regard the right as absolute, but subject to such limitations as the court may deem essential for the protection of the interests of the petitioner.62 A partition in equity proceeding upon the theory of mutual conveyances, the court, in cases where the interests of infant co-tenants are involved, is obliged, by reason of the incapacity of the infants to execute valid conveyances, to make an allotment and to quiet the possession of the respective parties until the disabilities of infancy were removed, when conveyances would be ordered. 63 In some juris-

W. Va. 356, 15 S. E. 56; Harding v. Craft, 21 App. Div. 139, 47 N. Y. Supp. 450; Hughes v. Hughes, 63 How. Pr. 408; Tabler v. Wiseman, 2 Ohio St. 208; Sullivan v. Sullivan, 66 N. Y. 37. But see Drake v. Merkle, 153 Ill. 318, 38 N. E. 654, permitting the action. See, also, note 26, "Future Estates," ante, § 706.

61 Gaskell v. Gaskell, 6 Sim. 643; Duke v. Hague, 11 Out. (Pa.) 67; Wills v. Slade, 6 Ves. 498; Baring v. Nash, 1 Ves. & B. 551; Ackley v. Dygert, 33 Barb. 189; Mussey v. Sanborn, 15 Mass. 155; Eisner v. Curiel, 20 Misc. Rep. 245, 45 N. Y. Supp. 1010 (joint life use of personalty); Alnatt on Partition, 91. To the same effect, see Fitts v. Craddock, 144 Ala. 437, 113 Am. St. Rep. 53, and note, 39 South. 506; Watkins v. Gilmore, 130 Ga. 797, 62 S. E. 32.

62 Shull v. Kennon, 12 Ind. 35; Postley v. Cain, 4 Sand. Ch. 509; Goudy v. Shank, 8 Ohio, 415; Hartman v. Hartman, 59 Ill. 104. As the partition of property in which infant co-tenants are interested is often subject to statutory regulation, the statutes of the state in question should be consulted.

63 Lord Brook v. Lord Hertford, 2 P. Wms. 519; Croghan v. Livingston, 17 N. Y. 220. Formerly the infant was allowed his day in court after attaining majority, to show cause against the partition, but this was abolished by statute in England (13 & 14 Vict., c. 60, § 30), and the infant is regarded as a trustee of the portions assigned to the other co-tenants: Bowra v. Wright, 4 De Gex & S. 265.

dictions, heirs to whom real estate has descended may, although the same is in the possession of an administrator and still liable to be taken for the debts of the ancestor, enforce a partition.<sup>64</sup> A tenant in dower not being a co-tenant is not entitled to enforce partition, but a tenant by the curtesy of land held in co-tenancy may have a division.<sup>65</sup>

§ 2132. (§ 710.) Effect of Disseizin.—The object of the proceeding in a petition for partition being to turn an estate that is possessed in common into an estate in severalty, and not to furnish a method for settling conflicting titles, a co-tenant who has been disseised and has only a mere right of entry cannot maintain the action. Only those persons who are co-tenants may have partition. If, therefore, one is effectively disseised, whether by his co-tenant or by a stranger, he is no longer holding an estate in co-tenancy. He must first establish by an appropriate action his status as a co-tenant. 66 There

In the United States the decree has usually the effect of vesting title without a conveyance: Griffith v. Phillips, 3 Grant Cas. 381, and see post, § 721, "Mode of Partition," note 130.

64 Kelley v. Kelley, 41 N. H. 502; Page v. Webster, 8 Mich. 263, 77 Am. Dec. 446; Garrett v. Colvin, 77 Miss. 408, 26 South. 963. See, also, Field v. Leiter, 16 Wyo. 1, 125 Am. St. Rep. 997, 90 Pac. 378, 92 Pac. 622. Contra, Hubbard v. Ricart, 3 Vt. 207, 23 Am. Dec. 198; Beecher v. Beecher, 43 Conn. 556; Alexander v. Alexander, 26 Neb. 68, 41 N. W. 1065; Clarity v. Sheridan, 91 Iowa, 304, 59 N. W. 52; Trowbridge v. Caulkins, 17 R. I. 580, 23 Atl. 1102; Moore v. Moore (Tex. Civ.), 31 S. W. 532. That heirs cannot have partition pending the exercise of the widow's paramount right to acquire dower, was held in Hamby v. Hamby, 165 Ala. 171, 138 Am. St. Rep. 23, 51 South. 732.

65 Ullrich v. Ullrich, 123 Wis. 176, 101 N. W. 376; Purdy v. Purdy, 18 App. Div. 310, 46 N. Y. Supp. 215; Wood v. Clute, 1 Sand. Ch. 200; Coles v. Coles, 15 Johns. 320, 8 Am. Dec. 231; Riker v. Darke, 4 Edw. Ch. 668; Otley v. McAlpine's Heirs, 2 Gratt. 343.

66 Criscoe v. Hambrick, 47 Ark. 235, 1 S. W. 150; Sanders v. Devereux, 60 Fed. 311, 8 C. C. A. 629; Frey v. Willoughby, 63 Fed.

must be an actual and total ouster. Mere possession by one co-tenant to the exclusion of the other does not necessarily work a disseizin. Possession usually follows the legal title when no adverse possession is shown, and consequently, when one of several co-tenants is in possession, his possession will, in the absence of an act of ouster on his part, inure to the benefit of all.<sup>67</sup> In some states, it is sufficient if a co-tenant shows a requisite title, notwithstanding he is out of possession and the property is held adversely. The tendency is to adjust all the conflicting rights in one action, and this is often made possible by statutes conferring general and enlarged powers over legal and equitable remedies upon the same court.<sup>68</sup>

§ 2133. (§ 711.) Disseizin — Rule in Equity. — The rule that a plaintiff co-tenant cannot have partition of property held adversely to him is followed in equity, but

865, 27 U. S. App. 417, 11 C. C. A. 463; American Ass'n v. Eastern Ky. Land Co., 68 Fed. 722; Bigelow v. Bigelow, 39 App. Div. 103, 56 N. Y. Supp. 794; Davis v. Settle, 43 W. Va. 17, 26 S. E. 557; Haskell v. Queen, 66 Hun, 634, 21 N. Y. Supp. 357; Hoffman v. Beard, 22 Mich. 66; Drew v. Clemmons, 2 Jones Eq. 314; Thomas v. Garvan, 4 Dev. 223, 25 Am. Dec. 708; Spight v. Waldron, 51 Miss. 356; Matthewson v. Johnson, Hoff. Ch. 560; Harman v. Kelley, 14 Ohio, 502, 45 Am. Dec. 552. To the same effect, see Carlson v. Sullivan, 146 Fed. 476, 77 C. C. A. 32; Armor v. Frey, 253 Mo. 447, 161 S. W. 829.

67 Florence v. Hopkins, 46 N. Y. 186; Beebe v. Griffing, 14 N. Y. 238; Wommack v. Whitmore, 58 Mo. 448.

68 McMath v. De Bardelaben, 75 Ala. 68; Hillens v. Brinsfield, 108 Ala. 605, 18 South. 604; Godfrey v. Godfrey, 17 Ind. 6, 79 Am. Dec. 448; Weston v. Stoddard, 137 N. Y. 119, 33 Am. St. Rep. 697, 20 L. R. A. 624, 33 N. E. 62; Barnard v. Pope, 14 Mass. 434, 7 Am. Dec. 225; Barker v. Jones, 62 N. H. 497, 13 Am. St. Rep. 413; Holloway v. Holloway, 97 Mo. 628, 10 Am. St. Rep. 339, 11 S. W. 233; Call v. Barker, 12 Me. 325; Miller v. Dennett, 6 N. H. 109; Bollo v. Navarro, 33 Cal. 459; Griffin v. Griffin, 33 Ga. 107; Scarborough v. Smith, 18 Kan. 399; Gage v. Reid, 104 Ill. 509; McClaskey v. Barr, 42 Fed. 609. See Dallam v. Sanchez, 56 Fla. 779, 47 South. 871.

with certain qualifications. Where the questions are such as belong to a court of equity, there is no reason, after having assumed jurisdiction, to suspend the proceedings short of complete justice. Thus, a court of equity has exclusive jurisdiction to determine the validity of an equitable title. If, therefore, jurisdiction has been assumed for this purpose, the court may proceed to determine the whole controversy, including the awarding of a partition, notwithstanding the adverse claim of the defendant.69 Equity having acquired jurisdiction to set aside a deed, may go on and determine title and make partition. 70 Where the jurisdiction of equity was invoked to secure the construction of a will, the court, having secured jurisdiction on that ground, gave a decree for an accounting and a partition in the same proceeding.<sup>71</sup> The jurisdiction of equity over the partition of personal property being exclusive, and there being no remedy at law by which a dispossessed co-owner of a chattel may regain possession, "a refusal by a court of equity to pass upon an issue of title would be tantamount to a complete failure of justice. Courts of equity, therefore, when partition of personalty is sought, have of necessity departed from the analogies of the law of real estate, and have assumed jurisdiction to determine as well the issue of title as any other issue pertinent to the case. ''72

<sup>69</sup> Hosford v. Merwin, 5 Barb. 62; Read v. Huff, 40 N. J. Eq. 229; Coxe v. Smith, 4 Johns. Ch. 276; Welch v. Anderson, 28 Mo. 293; Swan v. Swan, 8 Price, 518; Hitchcock v. Skinner, 1 Hoff. Ch. 24; Satterlee v. Kobbe, 173 N. Y. 91, 65 N. E. 952; Waddle v. Frazier, 245 Mo. 391, 151 S. W. 87; 4 Pom. Eq. Jur., § 1388, at note 3.

<sup>70</sup> Vreeland v. Vreeland, 49 N. J. Eq. (4 Dick.) 322, 24 Atl. 551;Carberry v. West Va. & P. R. Co., 44 W. Va. 260, 28 S. E. 694. See, also, Barnard v. Keathley, 230 Mo. 209, 130 S. W. 306.

<sup>71</sup> Scott v. Guernsey, 60 Barb. 178; Rozier v. Griffith, 31 Mo. 171; Dameron v. Jameson, 71 Mo. 90.

<sup>72 4</sup> Pom. Eq. Jur., § 1392; quoted in Laing v. Williams, 135 Wis. 253, 128 Am. St. Rep. 1025, 115 N. W. 821. See Thompson v.

§ 2134. (§ 712.) Disputed Title.—The difficulty under which the complainant labored at law in proving the title, as well of the defendant as of himself is, in equity, obviated by a discovery, and if need be by a reference to a master. The complainant must show title in himself, and such a title as will establish his right, as against the defendant, to a partition.<sup>73</sup> "Where the complainant's legal title is disputed, courts of equity decline the jurisdiction to try this question; but, in analogy to the case of dower, they will retain the bill for a reasonable time, until the issue of title has been determined at law."<sup>74</sup>

Thompson, 107 Ala. 163, 18 South. 247; Smith v. Dunn, 27 Ala. 315; Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679; Weeks v. Weeks, 40 N. C. 111, 47 Am. Dec. 358; Godfrey v. White, 60 Mich. 443, 1 Am. St. Rep. 537, 27 N. W. 593; Edwards v. Bennett, 10 Ired. 363.

73 Agar v. Fairfax, supra; Jope v. Morshead, 6 Beav. 213; Parker
 v. Gerard, Amb. 236; Rich v. Bray, 37 Fed. 273, 2 L. R. A. 225.

74 4 Pom. Eq. Jur., § 1388; Hillens v. Brinsfield, 108 Ala. 605, 18 South. 604; Harrison v. Taylor, 111 Ala. 317, 19 South. 986; Landon v. Morris, 75 Ark. 6, 86 S. W. 672; La Cotts v. Pike, 91 Ark. 26, 134 Am. St. Rep. 48, 120 S. W. 144; Knight v. Knight, 10 Del. Ch. 304, 89 Atl. 595; Howard v. Howard, 21 D. C. 224; Dinwiddie v. Smith, 141 Ind. 318, 40 N. E. 748; Pierce v. Rollins, 83 Me. 172, 22 Atl. 110; Fenton v. Steere, 76 Mich. 405, 43 N. W. 437; Hoffman v. Beard, 22 Mich. 59; Goff v. Cole, 71 Miss. 46, 13 South. 870; Hassam v. Day, 39 Miss. 392, 77 Am. Dec. 684; Seymour v. Ricketts, 21 Neb. 240, 31 N. W. 781; White v. Smith (N. J. Eq.), 60 Atl. 399; Ellis v. Feist, 65 N. J. Eq. 548, 56 Atl. 369; Slockbower v. Kanouse, 50 N. J. Eq. 481, 26 Atl. 333; Country Homes Land Co. v. De Gray, 71 N. J. Eq. 283, 71 Atl. 340; Wilkin v. Wilkin, 1 Johns. Ch. 111, 118; Walker v. Lyon, 6 App. D. C. 484; Side v. Brenneman, 7 App. Div. 273, 40 N. Y. Supp. 3; Simpson v. Wallace, 83 N. C. 477; Nicely v. Boyles, 23 Tenn. (4 Humph.) 177, 40 Am. Dec. 638; Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; Pillow v. Southwest Va. Imp. Co., 92 Va. 144, 53 Am. St. Rep. 804, 23 S. E. 32; Currin v. Spraull. 10 Gratt. (Va.) 145; Morgan v. Mueller, 107 Wis. 241, 83 N. W. 313; Hardy v. Mills, 35 Wis. 141; Bearden v. Benner, 120 Fed. 690 (citing Pom. Eq. Jur., § 1388); Brown v. Cranberry Iron etc. Co., 72 Fed. 96. 18 C. C. A. 444; Sanders v. Devereux, 60 Fed. 311, 8 C. C. A. 629;

"In several states, courts of equity are authorized by statute to determine questions of title arising in partition suits." If the disputed titles are equitable, courts of equity will exercise jurisdiction to settle them, and will then grant final relief by way of partition, un-

Fuller v. Montague, 59 Fed. 212, 8 C. C. A. 100; McCall v. Carpenter, 59 U. S. (18 How.) 297, 15 L. Ed. 389; Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825; Slade v. Barlow, L. R. 7 Eq. 296; Giffard v. Williams, L. R. 5 Ch. 546; Bolton v. Bolton, L. R. 7 Eq. 298, note; Potter v. Waller, 2 De Gex & S. 410. To the effect that a bare denial of complainant's title will not oust a court of equity of its jurisdiction, see Lucas v. King, 2 Stock. Ch. (10 N. J. Eq.) 280, and Overton's Heirs v. Woodfolk, 6 Dana. 374. In the first case, the following language is used: "I do not understand, however, that the bare denial of the complainant's title is any obstacle to the court's proceeding. The defendant must answer the bill, and if he sets up a title adverse to the complainant, or disputes the complainant's title, he must discover his own title, or show wherein the complainant's title is defective. If, when the titles are spread before the court upon the pleadings, the court can see there is no valid legal objection to the complainant's title, there is no reason why the court should not proceed to order the partition."

75 4 Pom. Eq. Jur., § 1388, note 2; Street v. Benner, 20 Fla. 700; English v. English, 53 Kan. 173, 35 Pac. 1107; Gage v. Bissell, 119 Ill. 298, 10 N. E. 238; Claughton v. Claughton, 70 Miss. 384, 12 South. 340; Phillips v. Dorris, 56 Neb. 293, 76 N. W. 555; Hogg v. Berryman, 41 Ohio St. 81, 52 Am. Rep. 71; Bradley v. Zehner, 82 Va. 685; Hill v. Young, 7 Wash. 33, 34 Pac. 144; Crowley v. Byrne, 71 Wash. 444, 129 Pac. 113. In Deery v. McClintock, 31 Wis. 202, the court, in answer to the argument that the blending of legal and equitable remedies under the code had abolished the rule that formerly prevailed that a court of equity could not try title, said: "A court of equity is not now, any more than it formerly was, the proper forum in which to try and decide the question of a mere legal title to land and the jurisdiction must still be refused. . . . Although the distinctions between actions at law and suits in equity, heretofore existing, are abolished, yet this only relates to the forms of actions, and does not touch or affect their inherent qualities and differences, which, for the nature of things, are unchanged and unchangeable." But see Morenhout v. Higuera, 32 Cal. 293.

der the same bill.<sup>76</sup> Where the subject-matter of the suit is an equitable estate,<sup>77</sup> or an incorporeal hereditament,<sup>78</sup> a partition may be had in equity.''

Parties Defendant.—It is of the first (§ 713.) importance to a successful partition that the title to the purparties allotted be free from cloud, and to accomplish this result it is necessary that all persons interested as co-tenants in the estate to be partitioned be made parties. The general rule in equity, as to parties, is that all those must be made parties whose interests in the subject-matter of the suit, and the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. All co-tenants, therefore, of the estate sought to be partitioned must be made parties, as they are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. 79

76 Crosier v. McLaughlin, 1 Nev. 348; Leverton v. Waters, 7 Cold. 20; Ross v. Cobb, 48 Ill. 111; Foust v. Moorman, 2 Ind. 17; Carter v. Taylor, 3 Head, 30; Obert v. Obert, 10 N. J. Eq. 98; Longwell v. Bentley, 23 Pa. St. 99; Read v. Huff, 40 N. J. Eq. 233; Hayes's Appeal, 123 Pa. St. 110, 16 Atl. 600; Lynch v. Lynch, 18 Neb. 586, 26 N. W. 390; 4 Pom. Eq. Jur., § 1388, at note 3; cited to this effect in Woglom v. Kant, 69 N. J. Eq. 489, 61 Atl. 9; see, also, ante, § 711.

77 Hitchcock v. Skinner, Hoff. Ch. 21; Aspen M. & S. Co. v. Rucker, 28 Fed. 220.

78 Bailey v. Sisson, 1 R. I. 233; Clark v. Stewart, 56 Wis. 154, 14 N. W. 54; 4 Pom. Eq. Jur., § 1388, at note 5; see, also, ante, § 707. 79 Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825; Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; Hill v. Den, 54 Cal. 6; Candy v. Stradley, 1 Del. Ch. 113; Milligan v. Poole, 35 Ind. 64; Borah v. Archers, 7 Dana (Ky.), 176; Holman v. Gill, 107 Ill. 467; Kester v. Stark, 19 Ill. 329; Batterton v. Chiles, 12 B. Mon. 354, 54 Am. Dec. 539; Taylor v. King, 32 Mich. 42; Dameron v. Jameson, 71 Mo. 97;

The rule is confined to the co-owners of the particular estate before the court, and does not, in the absence of statutory modifications, extend to persons having other estates in the same property, although they may be made parties. Thus, partition may be had of a particular estate, as for life or for years, although the owners of the remainder or reversion are not parties.80 may be a partition of equitable estates without the presence of those in whom the legal title is vested,81 or of legal estates without bringing before the court the owners of the equitable interests.82 While the co-tenants of the estate sought to be partitioned are the only necessary parties, it is frequently desirable, in order to adjust in one proceeding all the rights involved, to make the owners of other estates parties; and it is the virtue of equity that it can thus effect a partition of various interests.83 As only those who are parties to the suit at

Burhans v. Burhans, 2 Barb. Ch. 407; Lancaster v. Seay, 6 Rich. Eq. 111; Pearson v. Carlton, 18 S. C. 47; Compton v. Matthews, 3 La. 128, 22 Am. Dec. 167; Cornish v. Gest, 2 Cox, 27; Brashear v. Macy, 3 J. J. Marsh. 89; Braker v. Devereaux, 8 Paige, 513; Anonymous, 3 Swanst. 139, note.

- 80 Gaskell v. Gaskell, 6 Sim. 643; Wills v. Slade, 6 Ves. 498; Woodworth v. Campbell, 5 Paige, 518; Canfield v. Ford, 28 Barb. 342; Heaton v. Dearden, 16 Beav. 147. See, also, Collins v. Crawford (Mo.), 103 S. W. 537; Collins v. Crawford, 214 Mo. 167, 127 Am. St. Rep. 661, 112 S. W. 538; Rutherford v. Rutherford, 116 Tenn. 383, 115 Am. St. Rep. 799, 92 S. W. 1112 (life tenants may have partition, although it is not possible to know in whom the remainder will ultimately vest).
- 81 Wotten v. Copeland, 7 Johns. Ch. 140; Selden v. Vermilya, 2 Sand. 577. In Hunter v. Brown, 7 B. Mon. 284, it is suggested that the owners of the legal title should be made parties.
- 82 Sebring v. Mersereau, 9 Cow. 344; Harwood v. Kirby, 1 Paige, 469; Low v. Holmes, 17 N. J. Eq. 148.
- 83 Lord Brook v. Lord Hertford, 2 P. Wms. 518; Hobson v. Sherwood, 4 Beav. 184; Duke v. Hague, 107 Pa. St. 57; Gayle v. Johnston, 80 Ala. 395; Black v. Washington, 65 Miss. 60, 3 South. 140; Hill v. Reno, 112 Ill. 154, 54 Am. Rep. 222; Calland v. Conway, 14 R. I. 9.

the time the decree is made are bound thereby, it is essential, except where survivorship applies, in case of the death of a co-tenant, during the pendency of the proceeding, to bring in his heirs or successors.<sup>84</sup> The grantee or assignee of a co-tenant's share, whether by metes and bounds or as an undivided moiety, is a necessary party.<sup>85</sup> The purchaser of joint property, or of an interest therein, pending a partition need not be brought in as defendant, provided the suit is prosecuted with reasonable diligence.<sup>86</sup>

§ 2136. (§ 714.) Persons Under Disability.—As the jurisdiction of the court in partition suits does not de-

See, also, Chapman v. Chapman, 256 Ill. 593, 100 N. E. 166 (under Illinois statutes, all persons interested in the land are required to be made parties and their rights ascertained).

- 84 Requa v. Holmes, 16 N. Y. 198, 26 N. Y. 347; Pearson v. Carlton, 18 S. C. 47; Whitton v. Whitton, 38 N. H. 127, 75 Am. Dec. 163; Chalon v. Walker, 7 La. Ann. 477; Ewald v. Corbett, 32 Cal. 499; Lyon v. Register, 36 Fla. 273, 18 South. 589.
- 85 Gates v. Salmon, 35 Cal. 588, 95 Am. Dec. 139; Sutter v. San Francisco, 36 Cal. 115; Whitton v. Whitton, 38 N. H. 127, 75 Am. Dec. 163; Holbrook v. Bowman, 62 N. H. 313; Harlan v. Langham, 69 Pa. St. 237; Puckett v. McDaniel, 8 Tex. Civ. App. 630, 28 S. W. 360. Contra, Broughton v. Howe, 6 Vt. 267; Barnes v. Lynch, 151. Mass. 510, 21 Am. St. Rep. 470, 24 N. E. 783; Jackson v. Myers, 14 Johns. 354. See, also, Pellow v. Arctic Iron Co., 164 Mich. 87, Ann. Cas. 1912B, 827, 47 L. R. A. (N. S.) 573, 128 N. W. 918; In re Union Mfg. & Power Co., 81 S. C. 265, 128 Am. St. Rep. 908, 62 S. E. 259 (one to whom co-tenant has granted an easement to overflow a part of the land is a necessary party); Highland Park Mfg. Co. v. Steele, 235 Fed. 465, 149 C. C. A. 11 (where assignment was by metes and bounds, proper to give to the grantee the portion so assigned).
- 86 Partridge v. Luce, 36 Me. 16; Coble v. Clapp, 1 Jones Eq. 173; Hart v. Steedman, 98 Mo. 452, 11 S. W. 993; Edwards v. Dykeman, 95 Ind. 509; Hawes v. Orr, 10 Bush, 431; Bybee v. Summers, 4 Or. 354. As to parties defendant and especially the legislation of the various states on that subject, see Pomeroy, Code Remedies, §§ 373-377.

pend upon the character of the cotenants, but upon the fact that property is held in co-tenancy, the right of coowners to enjoy their estates in severalty is not destroyed because some of their number are under a legal disability. While equity is especially solicitous for the interests of infants, it does not regard the infancy of one of the parties as sufficient reason, in itself, for denying partition. Infant co-owners must, therefore, be made parties, and if they are brought before the court by appropriate process and duly represented, which matters now are extensively regulated by statute, the decree of partition is binding upon them.87 A court of equity will, however, always relieve an infant from the effect of a partition if it appears that his interests have suffered by reason of fraud and collusion.88 The rule requiring all co-tenants to be made parties extends to femes covert, and their interests may be effectually bound by the decree. unless it is clear that they acted through mistake or in ignorance of their rights.89 Lunatics and others suffering from mental incapacity, so long as they are vested with a title to a moiety of the estate sought to be partitioned, are necessary parties.90

# § 2137. (§ 715.) Holders of Particular Estates and Interests.—The holder of an encumbrance or lien, created

- 87 Coker v. Pitts, 37 Ala. 693; Hite v. Thompson, 18 Mo. 461; Richards v. Richards, 17 Ind. 636; Shaw v. Gregoire, 41 Mo. 413. See, further, Riddell v. Wilcox, 151 Ky. 17, 151 S. W. 25; Brown v. Garton, 86 N. J. Eq. 289, 98 Atl. 845. See, also, note 63, "Who is Entitled to Partition."
- 88 Long v. Mulford, 17 Ohio St. 484, 93 Am. Dec. 638; Merritt v. Shaw, 15 Grant Ch. (A. C.) 323.
- 89 Pillsbury v. Dugan's Adm'r, 9 Ohio 120, 34 Am. Dec. 427; Short v. Prettyman, 1 Houst. (Del.) 334; Disbrow v. Folger, 5 Abb. Pr. 54; Crenshaw v. Creek, 52 Mo. 100; Horsfall v. Ford, 5 Bush (Ky.), 644.
- 90 Bryant's Heirs v. Stearns, 16 Ala. 306; Gorham v. Gorham, 3 Barb. Ch. 41; Hollingsworth v. Sidebottom, 8 Sim. 620.

by mortgage, judgment, or otherwise, upon the undivided interest of a co-tenant, is not, in the absence of statutory requirement, a necessary party to a bill for partition. Upon partition, the encumbrance is transferred from the estate in common to the estate in severalty of the tenant against whose moiety the lien was a charge. Even where partition is by sale, encumbrancers are not necessary parties, unless made so by statute. As the power of courts of equity to order sale in partition proceedings is wholly statutory, the statutes conferring such power usually contain provisions for bringing lien-holders before the court, ascertaining the amount of the liens, and preserving the security by attaching the lien to the co-tenant's share in the proceeds. 92

The wife of a tenant in common is not a necessary party to a suit for partition. If an actual partition is made, her right of dower will attach to the share allotted in severalty to her husband. This results as a

- 91 Rochester Loan & Bank Co. v. Morse, 181 Ill. 64, 54 N. E. 628; East Coast Cedar Co. v. People's Bank, 111 Fed. 446; Martin v. Martin, 95 Va. 26, 27 S. E. 810; Sebring v. Mersereau, 9 Cow. 344; Harwood v. Kirby, 1 Paige, 469; Low v. Holmes, 17 N. J. Eq. 148; Speer v. Speer, 14 N. J. Eq. 240; Thurston v. Minke, 32 Md. 571; Stewart v. Allegheny Nat. Bank, 101 Pa. St. 342; Jackson v. Pierce, 10 Johns. 417; Torrey v. Cook, 116 Mass. 163. See, also, Rich v. Smith, 26 Cal. App. 775, 148 Pac. 545. In Colton v. Smith, 11 Pick. 314, 22 Am. Dec. 375, it is stated that a mortgagee is not bound by a partition to which he was not a party. And in Whitton v. Whitton, 38 N. H. 127, 75 Am. Dec. 163, the court said: "It may well be doubted if a mortgagee would be bound by a partition in equity, where he is not made a party, and by the partition his security was destroyed or impaired."
- 92 Arnold v. Butterbaugh, 92 Ind. 403; Westervelt v. Haff, 2 Sand. Ch. 101; Church v. Church, 3 Sand. Ch. 437; Loomis v. Riley, 24 Ill. 310; Treacy v. Ellis, 45 App. Div. 492, 61 N. Y. Supp. 600; Succession of Viard, 106 La. Ann. 73, 30 South. 246; Lancaster v. Wolff, 23 Ky. Law Rep. 233, 62 S. W. 717. See, also, Grogan v. Grogan (Mo.), 177 S. W. 649; Pomeroy, Code Remedies, § 254, and the various state statutes.

matter of course, without any decree or order of the court, and without her being before the court as a party.93 Nor is the widow of a deceased tenant in severalty a necessary party in a partition proceeding among the heirs, since she is not a co-tenant with them.94 Inasmuch as a husband cannot, without the wife's consent, cut off her inchoate right of dower, it is held that in all cases where a sale of the property will probably be necessary, the wife should be made a party, so that the purchaser's interest in the premises will not be charged with her contingent claim of dower.95 On the other hand, it is said that the wife's right of dower subsists in virtue of the seizin of her husband. The liability to be divested by sale in partition is an incident which the law affixes to the seizin of all joint estates, and the inchoate right of the wife is subject to the same incident.96 By statute in many states, the wife may be made a party, and a decree entered ordering a sale and an award to her of a part of the proceeds in lieu of dower. The husband of a co-tenant is a necessary party defendant in a partition proceeding, brought during her

<sup>93</sup> Matthews v. Matthews, 1 Edw. Ch. 567; Wilkinson v. Parish,
3 Paige, 658; Haxsie v. Ellis, 4 R. I. 124; Davis v. Lang, 153 Ill.
175, 38 N. E. 635.

<sup>94</sup> Bradshaw v. Callaghan, 5 Johns. 80; McClintic v. Manns, 4 Munf. (Va.) 328. But see Curtis v. Snead, 12 Gratt. (Va.) 264.

<sup>95</sup> Greiner v. Klein, 28 Mich. 17; Wilkinson v. Parish, 3 Paige, 658; Green v. Putuam, 1 Barb. 506; Matthews v. Matthews, 1 Edw. Ch. 567; Jackson v. Edwards, 7 Paige, 411; Rosenkrans v. White, 7 Lans. 486.

<sup>96</sup> Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262; Warren v. Twilley, 10 Md. 39; Fink's Appeal, 130 Pa. St. 256, 18 Atl. 621; Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355; Haggerty v. Wagner, 148 Ind. 625, 39 L. R. A. 384, 48 N. E. 366. To effect that wife claiming a homestead is necessary party, see De Uprey v. De Uprey, 27 Cal. 332, 87 Am. Dec. 81. See, also, Wheelock v. Overshiner, 110 Mo. 100, 19 S. W. 640.

life or after her death, for the division of lands held by her as co-tenant.97

While an outstanding lease is no obstacle to a partition of the reversion among the co-owners, a lessee of a moiety or of the whole of the estate must be made a party defendant in order to affect his interest.<sup>98</sup>

(§ 716.) Estates of Persons not in Being.— As has already been shown, the jurisdiction of equity in partition suits is not limited to the division of present estates in possession, but extends to the estates of remainder-men and reversioners, and other owners of future and contingent interests. It is also within the established jurisdiction of equity to bind the estates of persons not in being who may become co-owners of property. This is accomplished by means of the principle of virtual representation, by which the tenant for life or of the inheritance, being brought before the court, is regarded as competent to represent both his own interests and the interests of all those who may by their subsequent birth acquire interests in the estate.99 In order to bind such interests the bill should set out specifically the various estates involved, so that the court may in its decree pro-

<sup>97</sup> Pillsbury v. Dugan, 9 Ohio, 120, 34 Am. Dec. 427; Foster v. Duggan, 8 Ohio, 106, 31 Am. Dec. 432; Bogert v. Bogert, 53 Hun, 629, 5 N. Y. Supp. 893. But statutory change should be noted.

<sup>98</sup> Willard v. Willard, 145 U. S. 116, 36 L. Ed. 644, 12 Sup. Ct. 818; Haeussler v. Missouri Iron Co., 110 Mo. 188, 33 Am. St. Rep. 431, 16 L. R. A. 220, 19 S. W. 75; Thurston v. Minke, 32 Md. 575; Pleak v. Chambers, 7 B. Mon. 570; Jordan v. McNulty, 14 Colo. 280, 23 Pac. 460.

<sup>99</sup> Giffard v. Hort, 1 Schoales & L. 407; Hopkins v. Hopkins, 1 Atk. 590; Reinders v. Koppelmann, 68 Mo. 482, 30 Am. Rep. 802; Brevoort v. Brevoort, 70 N. Y. 136; Cheesman v. Thorne, 1 Edw. Ch. 629; Noble v. Cromwell, 26 Barb. 475; Faulkner v. Davis, 18 Gratt. 651, 98 Am. Dec. 698; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Goodess v. Williams, 2 Younge & C. 595. To the effect that only a person having an estate of inheritance is a competent representative, see Downin v. Sprecher, 35 Md. 478.

tect the rights of persons not in being by substituting in place of the land the fund derived from its sale and preserving it to the extent necessary to satisfy such future interests as they arise.<sup>100</sup>

§ 2139. (§ 717.) Incidental Relief in Equity—In General.—It is characteristic of equity in matters of partition that not only does it afford a more advantageous and adequate relief than is obtainable at law, but it also takes into consideration the various and diverse equities of the respective parties growing out of their ownership of property in common, and adjusts and disposes of them upon broad principles of fairness and equality. 101 This incidental relief extends only to such equities as arise out of the relation of the parties to the joint property, but this may include the disposition of matters preliminary to final partition and to the management of the property pending the partition proceedings. 102

100 Barnes v. Luther, 77 Hun, 234, 28 N. Y. Supp. 400; Fox v. Fee, 24 App. Div. 314, 49 N. Y. Supp. 292; Monarque v. Monarque, 80 N. Y. 326. See, also, Coquillard v. Coquillard, 62 Ind. App. 426, 113 N. E. 474.

In most of the states, a method is provided by statute for binding, in partition proceedings, the interests of unknown owners of the property before the court. If the statutory provisions have been strictly followed, the decree of partition will be binding upon all unknown owners. For a discussion of such legislation, see Cook v. Allen, 2 Mass. 467; Nash v. Church, 10 Wis. 311, 78 Am. Dec. 678; Herr v. Herr, 5 Pa. St. 428, 47 Am. Dec. 416; Lenehan v. College of St. Francis Xavier, 51 App. Div. 535, 64 N. Y. Supp. 868.

101 Dall v. The Confidence Silver Min. Co., 3 Nev. 535, 93 Am. Dec. 419; Packard v. King, 3 Colo. 211; Milligan v. Poole, 35 Ind. 64; Miller v. Peters, 25 Ohio St. 270; Storey v. Johnson, 1 Younge & C. 538; Bryan v. Bryan, 61 N. J. Eq. 45, 48 Atl. 341; Dorman v. Dorman, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235; Buchanan v. Buchanan, 38 S. C. 410, 17 S. E. 218; Kalteyer v. Wipff, 92 Tex. 673, 52 S. W. 63. But see Wamesit etc. Co. v. Sterling Mills, 158 Mass. 435, 33 N. E. 503.

102 Stuart's Heirs v. Coalter, 4 Rand. (Va.) 74, 15 Am. Dec. 731; Wolcott v. Robbins, 26 Conn. 236.

Thus, a deed or devise may be construed, 103 or a mortgage reformed and foreclosed and the manner of its payment be prescribed, 104 or deeds may be corrected and conveyances ordered. 105 If the maintenance of the property and the preservation of the rights and interests of the parties require it, the court may appoint a receiver pending partition. 106 When a tenant in possession is making an unusual or improper use of the premises to their detriment and waste, the court may, if such tenant be pecuniarily irresponsible, grant an injunction, either in the suit for partition or in an independent proceeding, to stay waste. 107 Equity will also enjoin the prosecution of a partition at law when such interference becomes necessary to protect some of the co-tenants from fraud or wrong, or to secure them some clear right which a court of law, from the manner of proceeding before it, cannot secure. 108 If it can be done without prejudice, a partial partition may be ordered by setting off to the complainant his moiety and leaving

103 Simmons v. Hendricks, 8 Ired. Eq. (N. C.) 85, 55 Am. Dec. 439; Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Willis v. Henderson, 5 Ill. 13, 38 Am. Dec. 120; Helms v. Austin, 116 N. C. 751, 21 S. E. 556.

104 Conyers v. Mericles, 75 Ind. 443.

105 Rann v. Rann, 95 Ill. 433. Equities growing out of advancements will be settled: Comer v. Shehee, 129 Ala. 588, 87 Am. St. Rep. 78, 30 South. 95; Poulter v. Poulter, 193 Ill. 641, 61 N. E. 1056.

106 Williams v. Jenkins, 11 Ga. 598; Weeks v. Weeks, 106 N. Y. 626, 13 N. E. 96; Weise v. Welsh, 30 N. J. Eq. 431; Low v. Holmes, 17 N. J. Eq. 150; Varnum v. Leek, 65 Iowa, 751, 23 N. W. 151. See volume I, chapter III, as to appointment of such receivers.

107 Hawley v. Clows, 2 Johns. Ch. 122; Obert v. Obert, 5 N. J. Eq. 397; Twort v. Twort, 16 Ves. 128; Kennedy v. Scovill, 12 Conn. 327; Rainey v. H. C. Frick Coke Co., 73 Fed. 389; Bailey v. Hobson, L. R. 5 Ch. 180. Tenant must be pecuniarily irresponsible: Coffin v. Loper, 25 N. J. Eq. 443; Lewis v. Christian, 40 Ga. 188.

108 Hall v. Piddock, 21 N. J. Eq. 312; Gash v. Ledbetter, 6 Ired. Eq. (N. C.) 185; Wilkinson v. Stuart, 74 Ala. 198.

the other co-tenants to continue their ownership in common. 109

§ 2140. (§ 718.) Owelty of Partition.—"In the original jurisdiction of equity the partition was effected by means of mutual conveyances; and where the land was incapable of exact or fair division, the court had power to compensate for the inequality by awarding what was known as 'owelty of partition,' being a pecuniary compensation or charge," upon the more valuable share, by way of rent, servitude, or easement, in favor of the less valuable one. This charge rests upon the land alone and not upon the person of the co-tenant, and may be enforced forthwith by the appropriate proceedings in

109 Abbott v. Berry, 46 N. H. 369; Upham v. Bradley, 17 Me. 427; Page v. Webster, 8 Mich. 263, 77 Am. Dec. 446; Shull v. Kennon, 12 Ind. 35. See, also, Smith v. Hill, 168 Ala. 317, 52 South. 949; Davis v. Palmer, 78 N. J. Eq. 78, 81 Atl. 573. But see Robertson v. Robertson, 2 Swan, 199; Handy v. Leavitt, 3 Edw. Ch. 229; Hobson v. Sherwood, 4 Beav. 184.

110 4 Pom. Eq. Jur., § 1389; cited in Field v. Hudson, 19 N. M. 89, 140 Pac. 1118 (no owelty when both lots equally valuable); Williamson Inv. Co. v. Williamson, 96 Wash. 529, 165 Pac. 385. See Updike v. Adams, 24 R. I. 220, 96 Am. St. Rep. 711, 52 Atl. 991 (citing Pom. Eq. Jur., § 1389); Martin v. Martin, 95 Va. 26, 27 S. E. 810 (citing Pom. Eq. Jur., § 1389); Powell v. Weathington, 124 N. C. 40, 32 S. E. 380; Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384; Ex parte Smith, 134 N. C. 495, 47 S. E. 16; Earl of Clarendon v. Hordby, 1 P. Wms. 446; Turner v. Morgan, 8 Ves. 143; Story v. Johnson, 2 Younge & C. 586; Horncastle v. Charlesworth, 11 Sim. 315; Mole v. Mansfield, 15 Sim. 41; Smith v. Smith, 10 Paige, 470; Larkin v. Mann, 2 Paige, 27; Phelphs v. Green, 3 Johns. Ch. 302; Haywood v. Judson, 4 Barb. 228; Norwood v. Norwood, 4 Har. & J. (Md.) 112; Warfield v. Warfield, 5 Har. & J. 459; Cox v. McMullin, 14 Gratt. 82; Wynne v. Tunstall, 1 Dev. Eq. 23; Graydon v. Graydon, McMull. Eq. 63; Oliver v. Jernigan, 46 Ala. 41; Cheatham v. Crews, 88 N. C. 38; Field v. Leiter, 117 Ill. 341, 7 N. E. 279. As to the power of the court to annex easements to one parcel and impose servitudes on another, see Bornstein v. Doherty, 204 Mass. 280, 90 N. E. 531.

- rem.<sup>111</sup> It constitutes an encumbrance in the nature of a lien upon the moiety against which it is assigned, and follows the land into the hands of third persons, and is prior to other encumbrances existing against such moiety.<sup>112</sup> Unless made so by the decree, the payment of owelty is not a condition precedent to the vesting of the title to the portion upon which it rests.<sup>113</sup> Owelty awarded to a co-tenant whose share is encumbered should be applied to the payment of the encumbrance.<sup>114</sup>
- § 2141. (§ 719.) Improvements.—In making partition, equity will take into consideration the fact that one co-tenant has occupied a portion of the common property and has enhanced its value by making useful improvements thereon, and will, so far as it can do so consistently with an equitable allotment, assign to the tenant making such improvements the land on which they stand, or so much thereof as represents his proportion. In some cases, however, either by reason of the
- 111 Baltimore & O. R. R. Co. v. Trimble, 51 Md. 99; Waring v. Wadsworth, 80 N. C. 345; Turpin v. Kelly, 85 N. C. 399.
- 112 Sutton v. Edwards, 5 Ired. Eq. 425; Dobbin v. Rex, 106 N. C.
  444, 11 S. E. 260; McCandless's Appeal, 13 Pa. St. 432; Davis v. Norris, 8 Pa. St. 125; Lacy v. Gard, 60 Ill. App. 72.
- 113 Archer v. Munday, 17 S. C. 84; Burris v. Gooch, 5 Rich. (S. C.) 1.
  - 114 Green v. Arnold, 11 R. I. 364, 23 Am. Rep. 466.
- 115 Ford v. Knapp, 102 N. Y. 140, 55 Am. Rep. 782, 6 N. E. 283; Kelsey's Appeal, 113 Pa. St. 119, 57 Am. Rep. 444, 5 Atl. 447; Dagan v. Mayor, 70 Md. 1, 16 Atl. 501; Wilkinson v. Stuart, 74 Ala. 198; Elrod v. Keller, 89 Ind. 382; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Robertson v. Robertson, 2 Swan, 199; Handy v. Leavitt, 3 Edw. Ch. 229; Withers v. Thompson, 4 T. B. Mon. (Ky.) 335; Hart v. Hawkins, 3 Bibb (Ky.), 510, 6 Am. Dec. 666; Pope v. Whitehead, 68 N. C. 199; Town v. Needham, 3 Paige, 545, 24 Am. Dec. 246; Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665; Donnor v. Quartermas, 90 Ala. 164, 24 Am. St. Rep. 778, 8 South. 715; 4 Pom. Eq. Jur., § 1389, note 3, and cases cited. See, also, the recent cases: Noble v. Tipton, 219

nature of the property or the location of the improvements, it will be impossible to apportion the land in such a way as to give a co-tenant the benefit of his improvements. In such a contingency the general rule seems to be, that a co-tenant, acting in good faith and for the purpose of honestly bettering the property, and not for the purpose of embarrassing his co-tenants, or encumbering the estate, or hindering partition, will be entitled to compensation to the extent that his substantial and useful improvements have added to the value of the common property. 116 It does not appear to be necessary to

Ill. 182, 3 L. R. A. (N. S.) 645, 76 N. E. 151; Manternach v. Studt, 240 Ill. 464, 130 Am. St. Rep. 282, 88 N. E. 1000; Ratterman v. Apperson, 141 Ky. 821, 133 S. W. 1005; Hunt v. Meeker County Abstract & Loan Co., 135 Minn. 134, 160 N. W. 496; Whitmire v. Powell, 103 Tex. 232, 125 S. W. 889; Solesberry v. Virginian R'y Co., 73 W. Va. 642, 81 S. E. 985. No compensation for improvements pending partition: Mayer v. Haggerty, 138 Ind. 628, 38 N. E. 42.

116 The text is quoted in Helmken v. Meyer, 138 Ga. 457, 45 L. R. A. (N. S.) 738, 75 S. E. 586 (claim for betterments is an equitable charge merely). See Hall v. Piddock, 21 N. J. Eq. 314; Swan v. Swan, 8 Price, 518; Green v. Putnam, 1 Barb. 500; Conklin v. Conklin, 3 Sand. Ch. 64; St. Felix v. Rankin, 3 Edw. Ch. 323; Brookfield v. Williams, 2 N. J. Eq. 341; Obert v. Obert, 5 N. J. Eq. 397; Sneed's Heirs v. Atherton, 6 Dana, 276, 32 Am. Dec. 70; Borah v. Archers, 7 Dana, 176; Respass v. Breckenridge's Heirs, 2 A. K. Marsh. 581; Dean v. O'Meara, 47 Ill. 120; Martindale v. Alexander, 26 Ind. 104, 87 Am. Dec. 458; Curtis v. Poland, 66 Tex. 511, 2 S. W. 39; Scantlin v. Allison, 32 Kan. 376, 4 Pac. 618; Buck v. Martin, 21 S. C. 590, 53 Am. Rep. 702. See, also, Ventre v. Tiscornia, 23 Cal. App. 598, 138 Pac. 954; Noble v. Tipton, 219 Ill. 182, 3 L. R. A. (N. S.) 645, 76 N. E. 151; Manternach v. Studt, 240 III. 464, 130 Am. St. Rep. 282, 88 N. E. 1000; Whitmire v. Powell, 103 Tex. 232, 125 S. W. 889. Compensation depends upon increased value of premises: Williman v. Holmes, 4 Rich. Eq. (S. C.) 476; Moore v. Williamson, 10 Rich. Eq. 328, 73 Am. Dec. 93; Dean v. O'Meara, 47 Ill. 120; Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665; Bayley v. Nichols, 263 Ill. 116, 104 N. E. 1054 (no allowance when improvement has been burned). Improvements must be useful: Hitchcock v. Skinner, Hoff, Ch. 21. For suggested limitations on right to

show the assent of his co-tenants to such improvements, or a promise on their part to pay their portion of the cost, nor a previous request by him and a refusal by them to join in the work.<sup>117</sup> Against the award for improvements may be set off such sums for use and occupation as may, on an accounting, be found chargeable to the tenant making the improvements.<sup>118</sup>

§ 2142. (§ 720.) Accounting. — There is hardly any question arising out of the relation of the parties to the common property which a court of equity may not determine incidentally in a suit for partition, for the purpose of doing complete justice and preventing multiplicity of litigation. A bill for partition may include a prayer for an accounting against the defendants and the defendants may by cross-bill have an accounting against the complainant.<sup>119</sup> Thus, if one of the joint owners or

compensation, see Scott v. Guernsey, 48 N. Y. 123; Ormond v. Martin, 37 Ala. 606; Jones v. Johnson, 28 Ark. 211; Elrod v. Keller, 89 Ind. 382; Ward v. Ward, 40 W. Va. 611, 52 Am. St. Rep. 911, 29 L. R. A. 449, 21 N. E. 746 (annotated case); also, Maciejewska v. Jarzombek, 243 Ill. 136, 90 N. E. 231; Geisendorff v. Cobbs, 47 Ind. App. 573, 94 N. E. 236 (no allowance); Shelangowski v. Schrack, 162 Iowa, 176, 143 N. W. 1081 (no allowance); Sagen & Nelson v. Gudmansen, 164 Iowa, 440, 145 N. W. 954 (allowance only in exceptional circumstances).

117 Green v. Putnam, 1 Barb. 507. To the effect that right to compensation depends upon consent of co-tenants: Rowan v. Reed, 19 Ill. 21; Baird v. Jackson, 98 Ill. 78; Lewis v. Sellick, 69 Tex. 379, 7 S. W. 673; Jones v. Johnson, 28 Ark. 211; Husband v. Aldrich, 135 Mass. 317; Allen v. Hall, 50 Me. 253; Calhoun v. Stark, 13 Tex. Civ. App. 60, 35 S. W. 410.

118 Sutton v. Sutton, 26 S. C. 33, 1 S. E. 19; Pickering v. Pickering, 63 N. H. 468, 3 Atl. 744; Luck v. Luck, 113 Pa. St. 256, 6 Atl. 142; Teasdale v. Sanderson, 33 Beav. 534. See, also, Porter v. Mooney (Ind. App.), 116 N. E. 60; Vaughan v. Langford, 81 S. C. 282, 128 Am. St. Rep. 912, 16 Ann. Cas. 91, 62 S. E. 316.

119 Backler v. Farrow, 2 Hill Eq. 111; Wills v. Slade, 6 Ves. 498; Obert v. Obert, 10 N. J. Eq. 98; Tuckerfield v. Buller, 1 Dick. 241. V-302

owners in common has received more than his share of the rents and profits, or has occupied the common property to the exclusion of the other co-tenants, the court will direct an accounting for the purpose of decreeing a reimbursement or the payment of rent for use and occupation. Where there are encumbrances resting upon the property, the court will ascertain their extent and validity and apportion them according to the rights of the parties, 121 or in case a co-tenant has paid a common encumbrance he may, in a suit for partition, enforce contribution from his co-tenants. If one tenant has committed waste upon the common property, the court may assign to him the wasted portion or decree compensation to be made for such waste. Reimburse-

See Barnett v. Thomas, 36 Ind. App. 441, 114 Am. St. Rep. 385, 75 N. E. 868 (in partition among heirs, advancements to them and debts from them should be taken into account).

120 Lorimer v. Lorimer, 5 Madd. 363; Hill v. Fulbrook, Jacob, 574; Story v. Johnson, 2 Younge & C. 586; Leach v. Beattie, 33 Vt. 195; Hitchcock v. Skinner, Hoff. Ch. 21; Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Carter's Ex. v. Carter, 5 Munf. 108; Rozier v. Griffith, 31 Mo. 171; Fry v. Payne, 82 Va. 759, 1 S. E. 197; Arnett v. Munnerlyn, 71 Ga. 14; Lowe v. Burke, 79 Ga. 164, 3 S. E. 449; · Nash v. Simpson, 78 Me. 142, 3 Atl. 53; Annely v. De Saussure, 26 S. C. 497, 4 Am. St. Rep. 725, 2 S. E. 490; Bridgeford v. Barbour, 80 Ky. 529; Davidson v. Thompson, 22 N. J. Eq. 84; Scantlin v. Allison, 32 Kan. 379, 4 Pac. 618; 4 Pom. Eq. Jur., § 1389, at note 2. See, further, Coleman v. Connolly, 242 Ill. 574, 134 Am. St. Rep. 347, 90 N. E. 278; Barnett v. Thomas, 36 Ind. App. 441, 114 Am. St. Rep. 385, 75 N. E. 868; Porter v. Mooney (Ind. App.), 116 N. E. 60; Reed v. Bachman, 61 W. Va. 452, 123 Am. St. Rep. 996, 57 S. E. 769; but see Sagen & Nelson v. Gudmanson, 164 Iowa, 440, 145 N. W. 954.

121 Kingsbury v. Buckner, 70 Ill. 514; Townshend v. Townshend, 1 Abb. N. C. (N. Y.) 81.

122 Titsworth v. Stout, 49 Ill. 78, 95 Am. Dec. 577; Illinois etc. Co. v. Bonner, 75 Ill. 315. See, also, Easly v. Easly, 78 Wash. 505, 139 Pac. 200.

123 Polhemus v. Emson, 30 N. J. Eq. 405; Backler v. Farrow, 2 Hill Eq. 111; Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502,

ment may be had for expenses incurred in recovering or preserving the joint property. 124

- § 2143. (§ 721.) Mode of Partition.—The method of making partition is now generally prescribed by statute. While varying in the different states, it is in substance the procedure originally followed in equity. The court first decides whether the parties are co-tenants and are entitled to partition. If so, the moiety of each co-tenant is ascertained by the court with the aid of a An interlocutory decree is then entered  $master.^{125}$ directing a commission to issue to certain persons to make the partition in the manner prescribed in the decree, and directing the parties to execute the necessary conveyances. After being duly sworn, the commissioners examine the premises, give notice to all parties interested of the time and place of making the partition, and then proceed to set off the shares in the proportion stated in the decree. A full report of all their doings is certified to the court.126 Unless it appears that the commissioners have acted on wholly erroneous principles or have made a grossly unequal and unjust division, 127 a final decree is entered confirming the report. Under modern procedure, if the commissioners find an actual partition impracticable, they may so report and
- 74 N. W. 384 (no allowance for insurance). See, also, Dangerfield v. Caldwell, 151 Fed. 554, 81 C. C. A. 400 (oil wells as waste).
- 124 McMeekin v. Brummet, 2 Hill Eq. 643; McDearman v. McClure, 31 Ark. 559.
- 125 Calmady v. Calmady, 2 Ves. Jr. 568; Agar v. Fairfax, 17 Ves. 542; Phelps v. Green, 3 Johns. Ch. 304; Ham v. Ham, 39 Me. 218 (commission cannot ascertain moieties).
  - 126 Daniell's Ch. Pr., pp. \*1150-1164.
- 127 Hay v. Estell, 19 N. J. Eq. 135; Story v. Johnson, 1 Younge & C. 538; Morrill v. Morrill, 5 N. H. 329; Haulenbeck v. Cronkright, 26 N. J. Eq. 159; Livingston v. Clarkson, 4 Edw. Ch. 597; Lister v. Lister, 3 Younge & C. Ch. 544; Doubleday v. Newton, 9 How. Pr. 72.

advise a sale. 128 The decree of partition and the confirmation of the report of the commissioners did not, according to the original equity practice, transfer or convey the title. This could only be done by act of the parties. Formerly, therefore, every partition in equity included a decree that the parties make mutual conveyances to effectually carry out the allotments of the commissioners. 129 In some states the court is authorized to appoint a commissioner to execute conveyances in the names of the parties. At the present time, the general rule, either by statute or judicial decision, is that mutual conveyances are not necessary. The partition is regarded as consummated and the titles vested in severalty to the respective shares by virtue of the final decree. 130

· § 2144. (§ 722.) Partition by Means of Sale.—"On account of the difficulty of making an equable apportionment and division of the land, it might sometimes be expedient for the court to order a sale of the property and a division of the proceeds. By the original equitable jurisdiction, independent of any statute, if all the parties sui juris were willing, the court had power to decree a sale; and this, even though infants might be among the parties interested.<sup>131</sup> But where one of the

128 Tucker v. Tucker, 19 Wend. 226; Steedman v. Weeks, 2 Strob. Eq. 148, 49 Am. Dec. 660; Lake v. Jarrett, 12 Ind. 395.

129 Gay v. Parpart, 106 U. S. 689, 27 L. Ed. 256, 1 Sup. Ct. 456; Smith v. Moore, 6 Dana, 417; Whaley v. Dawson, 2 Schooles & L. 367; Attorney-General v. Hamilton, 1 Madd. 214; Cartwright v. Pultney, 2 Atk. 380.

130 Young v. Cooper, 3 Johns. Ch. 295; Dixon v. Warters, 8 Jones, 451; Swett v. Swett, 49 N. H. 264; Wright v. Marsh, 2 G. Greene (Iowa), 110; Young v. Frost, 1 Md. 403; Street v. McConnell, 16 Ill. 126; Van Orman v. Phelps, 9 Barb. 503. As to effect of decrees in equity under modern statutes, see ante, volume I, chapter I.

131 Davis v. Turvey, 32 Beav. 554; Hubbard v. Hubbard, 2 Hem. & M. 38; Thackeray v. Parker, 1 N. R. 567.

parties sui juris refused his consent, the court had no option but to proceed with the ordinary mode of partition. This restriction has in England been removed by a modern statute. It is the United States an unqualified power of sale has been conferred on the courts in very many of the states, the power to be exercised whenever it shall appear to the court, independently of the consent of the parties, that a sale would be more beneficial, or less injurious, than an actual division. As between a sale and a partition, however, the courts will favor a partition, as not disturbing the existing form of the inheritance. It is a party who desires a sale must assume the burden of showing that a good

132 Griffies v. Griffies, 11 Week. Rep. 943; Wood v. Little, 35 Me.
107; Codman v. Tinkham, 15 Pick. 364; Lyon v. Powell, 78 Ala. 351.
133 31 & 32 Vict., c. 40.

134 This portion of Pom. Eq. Jur., § 1390, is quoted in Williamson Inv. Co. v. Williamson, 96 Wash. 529, 165 Pac. 385; and cited in Finch v. Smith, 146 Ala. 644, 9 Ann. Cas. 1026, 41 South. 819; Shorter v. Lesser, 98 Miss. 706, 54 South. 155. See, also, Croston v. Male, 56 W. Va. 205, 107 Am. St. Rep. 918, 49 S. E. 136; Thompson v. Hardman, 6 Johns. Ch. 436; McCall's Appeal, 56 Pa. St. 363; Matter of Skinner's Heirs, 2 Dev. & B. Eq. 63; Steedman v. Weeks, 2 Strob. Eq. 145, 49 Am. Dec. 660; Royston v. Royston, 13 Ga. 425; Wilson v. Duncan, 44 Miss. 642; Higginbottom v. Short, 25 Miss. 160, 57 Am. Dec. 198; Graham v. Graham, 8 Bush, 334; Welsh v. Freeman, 21 Ohio St. 402; Wilson v. Green, 63 Md. 547; Marshall v. Marshall, 86 Ala. 383, 5 South, 475. See, also, Contaldi v. Evischetti, 79 Conn. 276, 64 Atl. 219 (not necessary that actual division be impossible or impracticable). To effect that power to order sale does not depend upon statute, see Moore v. Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465; Holley v. Glover, 36 S. C. 404, 31 Am. St. Rep. 883, 16 L. R. A. 776, 15 S. E. 605.

135 4 Pom. Eq. Jur., § 1390; cited in Idema v. Comstock, 131 Wis. 16, 120 Am. St. Rep. 1027, 110 N. W. 786. See Davidson v. Thompson, 22 N. J. Eq. 83; Thurston v. Minke, 32 Md. 571; Graham v. Graham, 8 Bush, 334; Walker v. Lyon, 6 App. D. C. 484; Smith v. Trustees etc. of Brookhaven, 55 N. Y. Supp. 370, 36 App. Div. 386; Stapler v. Hollister, 82 N. J. Eq. 7, 87 Atl. 335 (sale only where division a great prejudice to parties).

cause exists therefor, and when the grounds for a sale, which are usually prescribed by statute, are duly established, it, like an actual partition, may be demanded as of right. 136 The court may order an actual partition of a part of the premises and a sale of the remainder. 137 The sale is usually conducted by a referee or commissioner appointed by the court, who makes a certified report of all his doings. The court may vacate or confirm the sale, a confirmation of the sale being essential to its validity. 138 A bidder at a sale, being regarded merely as an offeror, cannot complain if the court refuses confirmation and orders a resale. 139 The grounds on which a resale will be ordered are various and are no different from those on which other judicial sales may be avoided. 140 After confirmation, the proceeds are distributed according to the various rights and interests before the court.141

136 Windley v. Barrow, 2 Jones Eq. 66; Davis v. Davis, 2 Ired. Eq. 607; Gregory v. Gregory, 69 N. C. 522; Johnson v. Olmstead, 49 Conn. 517; Reeves v. Reeves, 11 Heisk. 669; Bentley v. Long Dock Co., 1 McCartner, 489; Hartman v. Hartman, 59 Ill. 103. See, also, Moore v. Willey, 77 Ark. 317, 113 Am. St. Rep. 151, 91 S. W. 184 (showing insufficient to support sale).

137 Conner v. Cox, 15 Ky. Law Rep. 140, 22 S. W. 605. See, also, Lucy v. Kelly, 117 Va. 318, 84 S. E. 661 (where two tracts, court

may give one tract to one party and order the other sold).

138 Hutton v. Williams, 35 Ala. 503, 76 Am. Dec. 297; Lloyd v. Lloyd, 61 Iowa, 243, 16 N. W. 117; Schwaman v. Truax, 179 N. Y. 35, 103 Am. St. Rep. 832, 71 N. E. 464. That the court may order and confirm a private sale, see Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

139 Ex parte Bost, 3 Jones Eq. 483; Lefevre v. Laraway, 22 Barb. 173; Goode v. Crow, 51 Mo. 214.

140 Ex parte White, 82 N. C. 377.

141 Gillespie v. Allison, 117 N. C. 512, 23 S. E. 438; Lythgoe v. Smith, 140 N. Y. 442, 35 N. E. 646; Jackson v. Bradhurst, 16 Misc. Rep. 149, 37 N. Y. Supp. 1068; Kelly v. Deegan, 111 Ala. 152, 20 South. 378.

#### CHAPTER XXXV. BILLS OF PEACE.

ANALYSIS.

§ 723. Bills of peace—Bills quia timet—Quieting title.

§ 2145. (§ 723.) Bills of Peace—Bills Quia Timet— Quieting Title.—"The origin, grounds, growth, and extent of the jurisdiction of equity to entertain bills of peace have been fully discussed in the section which treats of the jurisdiction to prevent a multiplicity of suits. 1 It was shown that there were two distinct kinds of bills of peace,—the one brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests, and the other for the purpose of quieting a complainant's title to land against a single adverse claimant.<sup>2</sup> In the first class, the original jurisdiction to maintain 'bills of peace' or 'bills quia timet,' properly so called, will only be exercised where the claims of the numerous individuals have some community of interest in the subject-matter, or arise from a common title; but the jurisdiction has been enlarged so as to entertain analogous suits, where the community of interest is in respect merely to the questions involved or to the kind of relief demanded.3 In the second class, the suit can be

<sup>1</sup> See 1 Pom. Eq. Jur., Part First, Chapter Second, Section IV, §§ 243-275.

<sup>2 1</sup> Pom. Eq. Jur., §§ 246–248.

<sup>3</sup> For the discussion of the growth and development and present status of the jurisdiction which has developed from these bills of peace,—"classes third and fourth" of the analysis in the chapter referred to, see Pom. Eq. Jur., §§ 255-261, 264-270, 273, 274, and notes.

maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title

It may be convenient, in this place, to summarize the chief results of the great mass of cases decided within the last twenty-five years, and embodied in the present author's notes to the chapter just cited. Professor Pomeroy's conclusion, that the jurisdiction may be exercised when there is a community of interest in respect merely to the questions involved, but none in the subject-matter, has been adopted in an overwhelming majority of the cases; see, for recent cases upholding the jurisdiction, in the "third class," where the plaintiffs are numerous, Pom. Eq. Jur., § 255, note (b); § 257, note (b); § 260, notes (b), (d); § 261, note (b); denying the jurisdiction, § 265, note, (a); § 267, note (a); upholding the jurisdiction in the "fourth class," § 256, note (c); § 261, note (b); denying the jurisdiction, § 264, note (b). This is hardly, therefore, a matter of dispute at the present day; the question on which the recent cases chiefly separate is, Will the exercise of the equity jurisdiction, in a given case, be effectual to avoid a multiplicity of suits in fact, as well as in form? There must be "some common relation, some common interest, or some common question" among the parties; if, after the numerous parties are joined, there still remain, in the one comprehensive equity proceeding, separate issues to be tried between each of them and the single plaintiff or defendant, nothing will be gained by the court of equity's assuming jurisdiction. See Pom. Eq. Jur., 4th ed., § 2511/2, and notes, where this limitation on the exercise of the jurisdiction is fully illustrated and explained by numerous quotations from recent cases. Other limitations are, that equity jurisdiction will not be assumed where the numerous parties may be joined equally as well in an action at law; or (in the author's "second" and "fourth" classes), where there is merely a possibility, and not a probability, of vexatious litigation: See Pom. Eq. Jur., 4th ed., § 2513/4.

It often happens that litigation with numerous parties may be avoided by an injunction directed against a person who is not one of their number: See Pom. Eq. Jur., 4th ed., § 250, note (e), § 274, note (d).

On the question of the right of a single person to sue, or the right to sue a single person, as representative of a numerous class, see Pom. Eq. Jur., 4th ed., § 256, note (e), § 251½, end of note (e).

The jurisdiction which has developed from the ancient bills of peace should be carefully distinguished from that for apportionment, where numerous plaintiffs claim to share ratably in a fund of a lim-

by repeated actions of ejectment. It is here necessary that the title of the complainant should be established

ited amount; in the latter case, of course, there need be no community of interests among the different plaintiffs, no single question to be settled by the one suit in equity: See Pom. Eq. Jur., 4th ed., note to § 261, at p. 462.

The following references to the recent cases affirming, denying or limiting the jurisdiction, in "Classes Third and Fourth," are arranged according as the principle relating to multiplicity of suits is invoked for jurisdictional purposes, or merely for purposes of joinder of parties; and according to the form of the equitable remedy in each case.

Class Third. I. Where each of the complainants, suing or defending singly, would have had a cause of action or defense at law, but not in equity: Pp. 458, 459, enjoining actions at law against the numerous complainants (contra, § 267, note (a); jurisdiction limited, § 251½, note (e)). Pp. 449-455, enjoining taxation and local assessments (contra, § 265, note (a), p. 433; jurisdiction limited, § 251½, note (d)). P. 460, enjoining enforcement of invalid municipal ordinance. P. 460, enjoining trespass, etc. (for cases where each plaintiff has an equitable cause of action, see § 257). P. 461, enjoining breach of contract affecting numerous complainants. P. 461, cancellation in favor of numerous complainants. Pp. 461, 462, pecuniary relief to numerous complainants (but in this class of cases the issues as to each plaintiff are usually distinct, and the jurisdiction is declined for that reason; see § 251½, note (c)).

II. Joinder of numerous complainants, each of whom has an equitable cause of action: Pp. 441-445, 462, 463; jurisdiction limited, where distinct issue as to each complainant, p. 415, note.

Class Fourth. I. Where the complainant, suing or defending against each defendant, would have had a cause of action or defense at law, but not in equity: Pp. 464-466, enjoining numerous actions at law (contra, § 264, note (b); jurisdiction limited, where no common question in these actions, § 251½, notes (h), (i); where no danger of vexatious litigation, § 251¾, note (c)). Pp. 466, 467, enjoining tax proceedings which would involve the plaintiff in litigation with numerous persons (contra, § 266, note (a)). P. 467, enjoining numerous attachments or executions on property claimed adversely by complainant (contra, § 264, note (b); jurisdiction limited where garnishment suits may be consolidated at law, § 251¾, note (b)). Pp. 467, 468, enjoining numerous trespassers (for

by at least one successful trial at law before equity will entertain jurisdiction.''4

joinder where there is an equitable cause of action against each, see p. 473). Pp. 468, 469, cancellation against numerous defendants (jurisdiction limited, because separate issues with each defendant, § 251½, note (g); because no real danger of litigation, § 251¾, note (c)). Pp. 469, 470, quieting title and settling disputed boundaries against numerous defendants. Pp. 470–472, recovery of specific chattels from numerous defendants (jurisdiction limited, where separate issues with each defendant, § 251½, note (j)). Pp. 472, 473, pecuniary relief against numerous defendants (jurisdiction limited, because separate issues with each defendant, § 251½, note (f)).

II. Joinder of numerous defendants against each of whom the complainant has an equitable cause of action: Pp. 473-475.

4 1 Pom. Eq. Jur., §§ 253, 272. "This class is practically obsolete in many states, owing to the effect given to judgments, by statute, in the action of ejectment": 4 Pom. Eq. Jur., § 1394, and note 4. The text, above, is cited in Whitehouse v. Jones, 60 W. Va. 680, 12 L. R. A. (N. S.) 49, 55 S. E. 730.

#### CHAPTER XXXVI.

# SUIT TO PREVENT OR REMOVE CLOUD ON TITLE—STATUTORY SUIT TO QUIET TITLE.

#### ANALYSIS.

- §§ 724-734. Cloud on title.
  - § 724. Definition.
  - § 725. Distinction between bill to quiet title and bill to remove cloud.
  - § 726. Prevention of threatened cloud.
  - § 727. Instrument constituting cloud.
  - § 728. Adequacy of remedy at law.
  - § 729. Does the jurisdiction extend to personal property?
  - § 730. Plaintiff's title.
  - § 731. Possession of plaintiff.
  - § 732. Sufficiency of possession.
  - § 733. Instrument invalid on its face; no relief.
  - § 734. Same; limitations on, and denial of this doctrine.
- §§ 735-743. Statutory suit to quiet title.
  - § 735. In general.
  - § 736. Remedy, whether equitable or legal.
  - § 737. Possession of plaintiff.
  - § 738. Title of plaintiff.
  - § 739. Nature of the adverse claim.
  - § 740. Service of process by publication.
  - § 741. Pleading on the part of plaintiff.
  - § 742. Defendant's pleadings.
  - § 743. Judgment or decree.
- § 2146. (§ 724.) Definition of Cloud on Title. The authorities refer to the indefiniteness of the term "cloud." In general, a cloud upon one's title is something which constitutes an apparent encumbrance upon it, or an apparent defect in it.<sup>2</sup> It is something which is
- 1 Apperson v. Ford, 23 Ark. 746, 758; Ward v. Dewey, 16 N. Y. 519, 529; Mayor etc. of Brooklyn v. Meserole, 26 Wend. 137.
- <sup>2</sup> This paragraph is cited in Whitehouse v. Jones, 60 W. Va. 680, 12 L. R. A. (N. S.) 49, 55 S. E. 730. See Detroit v. Martin, 34 Mich.

apparently valid but which is in fact invalid.<sup>3</sup> Such clouds upon title as may be removed by courts of equity are instruments or other proceedings in writing, which may appear upon the records and thereby cast doubt upon the validity of the record title. A mere verbal claim or oral assertion of ownership in property is not a cloud which equity will remove.<sup>4</sup>

### § 2147. (§ 725.) Distinction Between Bill to Quiet Title and Bill to Remove Cloud.—Suits in chancery to

170, 173, 22 Am. Rep. 512; Frost v. Leatherman, 55 Mich. 33, 37, 20 N. W. 705. "A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of the kind that has a tendency, even in a slight degree to cast a doubt upon the owner's title and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title, which he may remove'': Whitney v. Port Huron, 88 Mich. 269, 24 Am. St. Rep. 291, 50 N. W. 316. "A cloud upon one's title is something which shows prima facie some right of a third person to it": Waterbury Savings Bank v. Lawler, 46 Conn. 243. "A cloud may be said to be the semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded, or which it would be inequitable to enforce": Rigdon v. Shirk, 127 Ill. 412, 19 N. E. 698; Shults v. Shults, 159 Ill. 654, 50 Am. St. Rep. 188, 43 N. E. 800. In general, see Parker v. Shannon, 121 Ill. 452, 13 N. E. 155.

3 The text is cited in Lennig v. Harrisonburg Land & Imp. Co., 107 Va. 458, 59 S. E. 400 (validity of the adverse claim must be denied). See Bissell v. Kellogg, 60 Barb. (N. Y.) 629; Teal v. Collins, 9 Or. 89.

4 Parker v. Shannon, 121 Ill. 452, 13 N. E. 155. See, also, Devine v. City of Los Angeles, 202 U. S. 313, 50 L. Ed. 1046, 26 Sup. Ct. 652; Welles v. Rhodes, 59 Conn. 498, 22 Atl. 286; Waters v. Lewis, 106 Ga. 758, 32 S. E. 854. To the effect that laches cannot be imputed to a plaintiff in possession suing to remove a cloud on title, see Beck Lumber Co. v. Rupp, 188 Ill. 562, 80 Am. St. Rep. 190, 59 N. E. 429. See, also, ante, volume I, chapter I. To the effect that plaintiff must do equity, see Emerson v. Shannon, 23 Colo. 274, 58 Am. St. Rep. 232, 47 Pac. 302.

quiet title, in the nature of bills of peace, have been defined in the last chapter. The distinction between these and suits to remove a cloud is not always observed.<sup>5</sup> The equitable relief to remove a cloud from title is "granted on the principle quia timet; that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title."

5 See ante; § 723. "A bill of peace against an individual reiterating an unsuccessful claim to real property would formerly lie only where plaintiff was in possession and his right had been successfully maintained. The equity of plaintiff in such cases arose from protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action being founded upon a fictitious demise between fictitious parties, a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession though successful in every instance might be harassed and vexed if not ruined by litigation constantly renewed. To put an end to such litigation and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the complainant to relief in such cases the concurrence of three particulars was essential. He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the complainant against any further litigation from the same source. It was only in this way that adequate relief could be afforded against yexatious litigation and the irreparable injury which it entailed": Holland v. Challen, 110 U. S. 19, 28 L. Ed. 52, 3 Sup. Ct. 495.

6 4 Pom. Eq. Jur., § 1398; quoted in Sloane v. Kramer Bros. & Co., 230 Fed. 727; Provident Mutual Bldg.-Loan Ass'n v. Schwertner, 15 Ariz. 517, 140 Pac. 495; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533, and cited in Consolidated Plaster Co. v. Wild, 42 Colo. 202, 94 Pac. 285; Lennig v. Harrisonburg Land & Imp. Co., 107 Va. 458, 59 S. E. 400. See, also, Shell v. Martin, 19 Ark. 139, 141; Hager v. Shindler, 29 Cal. 55. "A bill quia timet or to remove a cloud from the title of real estate differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation

§ 2148. (§ 726.) Prevention of Threatened Cloud.—As a court of chancery may undoubtedly entertain a suit to remove an existing cloud upon title, so also it may, in a proper case, interpose its authority to prevent, by injunction, a threatened act from which such a cloud must necessarily arise. In such cases, however, "the danger must be imminent and not merely speculative or potential."

respecting the property, as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests. To maintain a suit of that character it was generally necessary that the plaintiff should be in possession, and except where the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long continued possession'': Holland v. Challen, 110 U. S. 20, 28 L. Ed. 52, 3 Sup. Ct. 495.

7 4 Pom. Eq. Jur., § 1398, note 1; Union Pac. R. Co. v. Cheyenne, 113 U. S. 516, 28 L. Ed. 1098, 5 Sup. Ct. 601; McConnaughy v. Pennoyer, 43 Fed. 342 (citing Pom. Eq. Jur., §§ 1345, 1398, 1399); Eufaula Bank v. Pruett, 128 Ala. 478, 30 South. 731; Shattuck v. Carson, 2 Cal. 588; Roth v. Insley, 86 Cal. 134, 24 Pac. 853; Young v. Hatch, 30 Colo. 422, 70 Pac. 693; Groves v. Webber, 72 Ill. 606; Bishop v. Moorman, 98 Ind. 1, 49 Am. Rep. 731; Allen v. New Dominion Oil & Gas Co., 24 Ky. Law Rep. 2169, 73 S. W. 747; O'Hare v. Downing, 130 Mass. 16; Gardner v. Terry, 99 Mo. 523, 7 L. Ed. 67, 12 S. W. 888; Benecke v. Welsh, 168 Mo. 267, 67 S. W. 604; Pettit v. Shepherd, 5 Paige, 493, 28 Am. Dec. 437; Oakley v. Trustees etc., 6 Paige, 262; Mann v. City of Utica, 44 How. Pr. 334; Sanders v. Village of Yonkers, 63 N. Y. 489; De Witt v. Van Schoyk, 110 N. Y. 7, 6 Am. St. Rep. 342, 17 N. E. 425; Alvord v. Syracuse, 163 N. Y. 158, 57 N. E. 310; Norton v. Beaver, 5 Ohio, 178; Bank of United States v. Schultz, 2 Ohio, 471; Sperry v. City of Albina, 17 Or. 481, 21 Pac. 453; Hughes v. Linn Co., 37 Or. 111, 60 Pac. 843; Merriman v. Polk, 5 Heisk. 717. "The jurisdiction of the court to enjoin a sale of real estate is co-extensive with its jurisdiction to set aside and order to be canceled a deed of such property": Pixley v. Huggins, 15 Cal. 127.

- § 2149. (§ 727.) Instrument Constituting Cloud.—
  "It is impossible to lay down rules which will cover all
  the cases in which a court of equity will interpose its
  jurisdiction to remove a cloud upon the title to real
  estate. This jurisdiction does not rest upon any arbitrary rules, but depends upon the facts of each case."

  Instruments and proceedings of every conceivable
  nature have been removed as clouds on title. A few of
  the cases are given in the note.9
  - 8 Fonda v. Sage, 48 N. Y. 179.
- 9 Deeds.—Bunce v. Gallagher, 5 Blatchf. 487, Fed. Cas. No. 2133; Peirsoll v. Elliott, 6 Pet. 95, 8 L. Ed. 332; Greenfield v. United States Mtg. Co., 133 Fed. 784; Lyon v. Hunt, 11 Ala. 295, 46 Am. Dec. 216; Hunt v. Acre, 28 Ala. 580; Barclay v. Henderson, 44 Ala. 269; Daniel v. Stewart, 55 Ala. 278; Lockett v. Hurt, 57 Ala. 198; Posey v. Conaway, 10 Ala. 811; Florence v. Paschall, 50 Ala. 28; Plant v. Barclay, 56 Ala. 561; Jones v. De Graffenreid, 60 Ala. 145; Arnett v. Bailey, 60 Ala. 435; Tyson v. Brown, 64 Ala. 244; Baines v. Barnes, 64 Ala. 375; Smith's Ex'r v. Cockrell, 66 Ala. 64; Grigg v. Swindall, 67 Ala. 187; Shell v. Martin, 19 Ark. 139; Walker v. Peay, 22 Ark. 103; Miller v. Neiman, 27 Ark. 233; Crane v. Randolph, 30 Ark. 579; Castle v. Hillman, 70 Ark, 157, 66 S. W. 648; Riley v. Pehl, 23 Cal. 70; Hager v. Shindler, 29 Cal. 47; Thompson v. Lynch, 29 Cal. 189; Lick v. Ray, 43 Cal. 83; Cohen v. Sharp, 44 Cal. 29; Alden v. Trubee, 44 Conn. 455; Munson v. Munson, 28 Conn. 582, 78 Am. Dec. 693; Stout v. Cook, 37 Ill. 283; Reed v. Tyler, 56 Ill. 288; Gage v. Billings, 56 Ill. 268; Reed v. Reber, 62 Ill. 240; Kennedy v. Northrup, 15 Ill. 149; Redmond v. Packenham, 66 Ill. 434; Brooks v. Kearns, 86 Ill. 547; Burton v. Gleason, 56 Ill. 25; Glos v. Furman, 164 Ill. 585, 45 N. E. 1019; Peek v. Sexton, 41 Iowa, 566; Gerry v. Stimson, 60 Me. 186; Polk v. Rose, 35 Md. 153, 89 Am. Dec. 773; Polk v. Reynolds, 31 Md. 106; Polk v. Pendleton, 31 Md. 118; Briggs v. Johnson, 71 Me. 235; Martin v. Graves, 5 Allen, 601; Burns v. Lynde, 6 Allen, 305; Sullivan v. Finnegan, 101 Mass. 447; Russell v. Deshon, 124 Mass. 342; Davis v. City of Boston, 129 Mass. 377; Holt v. Weld, 140 Mass. 578, 5 N. E. 506; Smith v. Smith, 150 Mass. 73, 22 N. E. 437; Tobin v. Gillespie, 152 Mass. 219, 25 N. E. 88; Barnes v. Barnes, 161 Mass. 381, 37 N. E. 379; Loring v. Hildreth, 170 Mass. 328, 64 Am. St. Rep. 301, 49 N. E. 652; Merchants' Bank v. Evans, 51 Mo. 335; Clark v. Covenant Ins. Co., 52 Mo. 272; Harrington v. Utterback, 57 Mo. 519; Keane v. Kyne, 66 Mo. 216; Haythorn v. Margerem, 3 Halst. Ch.

§ 2150. (§ 728.) Adequacy of Remedy at Law.— "Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at

(7 N. J. Eq.) 324; Downing v. Wherrin, 19 N. H. 91, 49 Am. Dec. 139; Hall v. Fisher, 9 Barb. 17; Buffalo etc. R. R. v. Lampson, 47 Barb. 533; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; Cox v. Clift, 2 N. Y. 118; Bockes v. Lansing, 74 N. Y. 437; Hotchkiss v. Elting, 36 Barb. 38; Levy v. Hart, 54 Barb. 248; Busbee v. Macy, 85 N. C. 329; Lance v. Tainter, 137 N. C. 249, 49 S. E. 211; Busbee v. Lewis, 85 N. C. 332; Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540; Slegel v. Lanier, 148 Pa. St. 236, 23 Atl. 996; Kittles v. Williams, 64 S. C. 229, 41 S. E. 975; Jones's Heirs v. Perry, 10 Yerg. 59, 30 Am. Dec. 430; Johnson v. Cooper, 2 Yerg. 524, 24 Am. Dec. 502; Almony v. Hicks, 3 Head, 39; Carter v. Taylor, 3 Head, 30; Butler v. Rutledge, 2 Cold. 4; Willock v. Grisham, 3 Sneed, 237; Williams v. Williams 7 Baxt. 116; Corinth v. Locke, 62 Vt. 411, 11 L. R. A. 207, 20 Atl. 809; Huffman v. Huffman, 1 Lea, 491; Jones v. Neale, 2 P. & H. 339; Carroll v. Brown, 28 Gratt. 791; Steinman v. Vicars, 99 Va. 595, 39 S. E. 227; Willis v. Sweet, 49 Wis. 505, 5 N. W. 895.

Restrictive covenants in deeds, creating equitable easements, when these covenants have become unenforceable in a court of equity: Mc-Arthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162; Rector etc. of St. Stephens P. E. Church v. Rector etc. of Church of the Transfiguration, 201 N. Y. 1, Ann. Cas. 1912A, 760, 94 N. E. 191.

Mortgages and foreclosure proceedings.—Reynolds v. Kirk, 105 Ala. 446, 17 South. 95; Kelly v. Martin, 107 Ala. 479, 18 South. 132; Stevens v. Reeves, 138 Cal. 678, 72 Pac. 346; Head v. Fordyce, 17 Cal. 149; Ramsdell v. Fuller, 28 Cal. 37, 87 Am. Dec. 103; Hartford v. Chipman, 21 Conn. 488; Sherman v. Fitch, 98 Mass. 59 (chattel); Clouston v. Shearer, 99 Mass. 209; Commissioners v. Smith, 10 Allen, 448, 87 Am. Dec. 672; Vogler v. Montgomery, 54 Mo. 577; Ward v. Dewey, 16 N. Y. 519; Eldridge v. Smith, 34 Vt. 484; Watkins v. Brunt, 53 Ind. 208; Hodgen v. Guttery, 58 Ill. 431; Standish v. Dow, 21 Iowa, 363; New England Mut. L. Ins. Co. v. Capehart, 63 Minn. 120, 65 N. W. 258.

Judgments and executions.—Chapman v. Brewer, 114 U. S. 158, 29 L. Ed. 83, 5 Sup. Ct. 799; Burt v. Cassety, 12 Ala. 734; Alabama etc. Co. v. Pettway, 24 Ala. 544; Rea v. Longstreet, 54 Ala. 291; Pixley v. Huggins, 15 Cal. 127; England v. Lewis, 25 Cal. 337; Shattuck v. Carson, 2 Cal. 588; Louisville v. Gray, 1 Litt. 146; Barton v. Drake, 21 Minn. 299; Uhl v. May, 5 Neb. 157; Corey v. Schuster, 44

law are inadequate where the estate or interest is legal,—a party being left to his legal remedy where his estate or interest is legal in its nature, and full and complete justice can thereby be done."<sup>10</sup>

Neb. 269, 62 N. W. 470; Title Trust Co. v. Aylesworth, 40 Or. 20, 66 Pac. 276 (sheriff's certificate).

Attachment proceedings.—Marr v. Washburn, 167 Mass. 35, 44 N. E. 1062; Edgell v. Clark, 76 Miss. 66, 23 South. 358.

Leases.—Big Six Development Co. v. Mitchell, 138 Fed. 279, 1 L. R. A. (N. S.) 332, 70 C. C. A. 569; Mayor etc. v. North Shore etc. Co., 9 Hun, 620; Spofford v. Bangor etc. R. R., 66 Me. 51; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533 (citing Pom. Eq. Jur., § 1399).

Land contract.—Sea v. Morehouse, 79 Ill. 216; Larmon v. Jordan, 56 Ill. 204; Boyd v. Schlesinger, 59 N. Y. 301; Washburn v. Burnham, 63 N. Y. 132.

Claim of dower.-Wood v. Seeley, 32 N. Y. 105.

Tax assessments.-Minturn v. Smith, 3 Sawy. 142, Fed. Cas. No. 9647; Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881 (special assessment); De Witt v. Hays, 2 Cal. 463; Waterbury Sav. Bank v. Lawler, 46 Conn. 243; Gage v. Rohrbach, 56 Ill. 262; Gage v. Chapman, 56 Ill. 311; Barnett v. Cline, 60 Ill. 205; Holland v. Mayor etc., 11 Md. 186, 69 Am. Dec. 195; Scofield v. Lansing, 17 Mich. 437; Henry v. Gregory, 29 Mich. 68; Curtis v. East Saginaw, 35 Mich. 508; Lockwood v. St. Louis, 24 Mo. 20; Fowler v. St. Joseph, 37 Mo. 228; McPike v. Pen, 51 Mo. 63; Johnson v. Hahn, 4 Neb. 139; Morris Canal etc. Co. v. Jersey City, 12 N. J. Eq. 227; Longley v. City of Hudson, 4 T. & C. 353; Newell v. Wheeler, 48 N. Y. 486; Dederer v. Voorhies, 81 N. Y. 153; Wells v. Buffalo, 80 N. Y. 253; Townsend v. Mayor etc., 77 N. Y. 542; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Sanders v. Yonkers, 63 N. Y. 489; Guest v. Brooklyn, 69 N. Y. 506; Marsh v. Brooklyn, 59 N. Y. 280; Heywood v. Buffalo, 14 N. Y. 534; Tilden v. Mayor etc., 56 Barb. 340; Cong. Shaarai Tephila v. May etc., 53 How. Pr. 213; Hebrew etc. Ass'n v. Mayor etc., 4 Hun, 446; Howell v. Buffalo, 2 Abb. App. Dec. 412; Burnet v. Cincinnati, 3 Ohio, 73, 17 Am. Dec. 582; Culbertson v. Cincinnati, 16 Ohio, 574; Shepardson v. Milwaukee County, 28 Wis. 593; Milwaukee Iron Co. v. Hubbard, 29 Wis. 51; Hamilton v. Fond du Lac, 25 Wis. 490; Head v. James, 13 Wis. 641. See, also, cases cited in note, 7, ante.

10 Pom. Eq. Jur., § 1399; as where the plaintiff, having a legal title, is out of possession and the defendant is in possession: See

§ 2151. (§ 729.) Does the Jurisdiction Extend to Personal Property?—It has been held that a cloud upon the title to personal property, even by matter appearing of record, cannot be removed; 11 but there seems no good reason for thus restricting the jurisdiction, and the instances are not infrequent where it has been exercised, in cases of void recorded chattel mortgages, spurious issues of shares of stock, etc. 12

post, § 731. Pom. Eq. Jur., § 1399, is cited, generally, in Sloane v. Kramer Bros. & Co., 230 Fed. 727; Wilson v. Miller, 143 Ala. 264, 111 Am. St. Rep. 42, 5 Ann. Cas. 724, 39 South. 178; Bank of Henry y. Elkins, 165 Ala. 628, 51 South. 821; Smith v. City of Opelika, 165 Ala. 630, 51 South. 821; King Lumber Co. v. Spragner, 176 Ala. 564, 58 South. 920; Swan v. Talbot, 152 Cal. 142, 17 L. R. A. (N. S.) 1066, 94 Pac. 238; Commissioners Court of Floyd County v. Nichols (Tex. Civ. App.), 142 S. W. 37. In general, see Davidson v. Calkins, 92 Fed. 230; Teague v. Martin, 87 Ala. 500, 13 Am. St. Rep. 63, 6 South. 362; Grigg v. Swindall, 67 Ala. 187; Smith v. Cockrell, 66 Ala. 64; Jones v. De Graffenreid, 60 Ala. 145; Plant v. Barclay, 56 Ala. 561; Daniel v. Stewart, 55 Ala. 278; Crane v. Randolph, 30 Ark. 579; Miller v. Neiman, 27 Ark. 233; Munson v. Munson, 28 Conn. 582, 73 Am. Dec. 693; Budd v. Long, 13 Fla. 288; Gage v. Rohrbach, 56 Ill. 262; Kennedy v. Northrup, 15 Ill. 148; Helden v. Hellen, 80 Md. 620, 31 Atl. 506; Commonwealth v. Smith, 10 Allen (Mass.), 448, 87 Am. Dec. 672; Hall v. Whiston, 5 Allen (Mass.), 126; Rhode v. Hassler, 113 Mich. 56, 71 N. W. 461; Moran v. Palmer, 13 Mich. 367; King v. Carpenter, 37 Mich. 363; Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 328, 16 S. W. 497; Lockwood v. St. Louis, 24 Mo. 20.

11 Loggie v. Chandler, 95 Me. 220, 49 Atl. 1059 (chattel mortgage)

12 The text is cited and followed in Thompson v. Emmett Irr. Dist., 227 Fed. 560, 142 C. C. A. 192. See Sherman v. Fitch, 98 Mass. 59 (chattel mortgage); Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114; Magnuson v. Clithero, 101 Wis. 551, 77 N. W. 882. Spurious stock certificates, issued by officer having apparent authority to do so, undistinguishable upon their face from the certificates of genuine stock and outstanding in the hands of numerous holders as evidence of interests in the property of the corporation, are clouds upon the title of the genuine stockholders, which equity will remove: New York & New Haven R. R. Co. v. Schuyler, 17

§ 2152. (§ 730.) Plaintiff's Title.—A bill to remove a cloud from title cannot be brought by a stranger to the title. Since the plaintiff must recover solely on the strength of his own title and not on the weakness of that of his adversary, it follows that he must have some title.<sup>13</sup> It is not necessary that the claimant should have a prima facie record title, which the real owner must call in extrinsic evidence to overthrow, <sup>14</sup> but it is sufficient prima facie if the complainant makes out a title apparently good. <sup>15</sup>

As to whether this title must be legal or may be equitable the cases are not uniform. The better opinion appears to be that the proposition that only the owner of

N. Y. 592. The issue of capital stock contrary to law creates a cloud upon the rights of the stockholders; the right to have such cloud removed may be asserted by stockholders at any time during the existence of the cloud, although the corporation treats the holder of such stock as a bona fide stockholder: Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048. One who, as attaching creditor, has acquired a lien upon personal property may maintain suit to remove a cloud upon it which would affect its sale in the proceeding: Voss v. Murray, 50 Ohio St. 28, 32 N. E. 1112.

13 Kennedy v. Elliott, 85 Fed. 832; Hall v. Melvin, 62 Ark. 439, 54 Am. St. Rep. 301, 35 S. W. 1109; Cook v. Ziff Colored Masonic Lodge, 80 Ark. 31, 96 S. W. 618 (mere possession is not sufficient); Levy v. Ladd, 35 Fla. 391, 17 South. 635; Houston v. McKinney, 54 Fla. 600, 45 South. 480; Whipple v. Gibson, 158 Ill. 339, 41 N. E. 1017; Wilkinson v. Hiller, 71 Miss. 678, 14 South. 442; Ricks v. Bassett, 68 Miss. 250, 8 South. 514; Purdy v. Collyer, 26 N. Y. App. Div. 338, 49 N. Y. Supp. 665; Logan v. Ward, 58 W. Va. 366, 5 L. R. A. (N. S.) 156, 52 S. E. 398; Iguano Land & M. Co. v. Jones, 65 W. Va. 59, 64 S. E. 640. "The complainant in a bill to remove a cloud is not bound to show a perfect title from the government. or as against all the world, but he must show title in himself superior to the alleged cloud": South Chicago Brewing Co. v. Taylor, 205 Ill. 132, 68 N. E. 732; citing Rucker v. Dooley, 49 Ill. 377, 99 Am. Dec. 614; Wing v. Sherrer, 77 Ill. 200; Glos v. Randolph, 138 Ill. 268, 27 N. E. 941.

<sup>14</sup> Fonda v. Sage, 48 N. Y. 173.

<sup>15</sup> Rayner v. Lee, 20 Mich. 384; Hall v. Kellogg, 16 Mich. 135.

the legal title can remove a cloud "is not only not sustainable upon authority but is not supported by the reason which lies at the basis of such actions. That reason is that the party has no adequate remedy at law, and that to require him to await the action of the party claiming under the instrument or other matter constituting the cloud, until perhaps his evidence and ability to defend against it is lost by lapse of time, would, in many cases, be to deny him any remedy. The reason is as forcible in the case of one holding an equitable estate or merely a lien, as in that of the legal owner." A party

16 Redin v. Branhan, 43 Minn. 283, 45 N. W. 445, per Gilfillan, C. J. The text is quoted in Swick v. Rease, 62 W. Va. 557, 59 S. E. 510; and cited in Casstevens v. Casstevens, 227 Ill. 547, 118 Am. St. Rep. 291, 81 N. E. 709. For cases holding that a legal title is necessary, see Frost v. Spitley, 121 U. S. 552, 30 L. Ed. 1010, 7 Sup. Ct. 1129; Dewing v. Woods, 111 Fed. 575, 49 C. C. A. 443; Guarantee Trust etc. Co. v. Delta etc. Co., 104 Fed. 5, 43 C. C. A. 396; Crook v. Brown, 11 Md. 158; Glenn v. West, 103 Va. 521, 49 S. E. 671. See, also, Carswell v. Swindell, 102 Md. 636, 62 Atl. 956. That an equitable title is sufficient, see Armstrong v. Connor, 86 Ala. 350, 5 South. 451; Echols v. Hubbard, 90 Ala. 309, 7 South. 817 (citing Pom. Eq. Jur., § 1399, note); Sloan v. Sloan, 25 Fla. 53, 5 South. 603. See, also, Coel v. Glos, 232 Ill. 142, 15 L. R. A. (N. S.) 413, 83 N. E. 529 (bill by vendee against third party). And see cases cited, post, next section, note 21. In Peninsular Naval Stores Co. v. Cox, 57 Fla. 505, 49 South. 191, however, it is held that a mortgagee, having a mere lien, cannot bring the suit. It has frequently been held that one who has conveyed with covenants of warranty, or under an agreement to clear the title for the benefit of his grantee, has a standing in a court of equity to remove a cloud, especially where he has a grantor's lien for part of the purchase-money: Remer v. Mackay, 35 Fed. 86 (one who is only a warrantor in the chain of title may have a cloud removed); Sutliff v. Smith, 58 Kan. 559, 50 Pac. 455 (part of purchase-money unpaid; grantor has sufficient interest to give him a standing in a court of equity to have the title cleared); Begole v. Hershey, 86 Mich. 130, 48 N. W. 790 (same); Styer v. Sprague, 63 Minn. 414, 65 N. W. 659 (same); Pier v. Fond du Lac, 53 Wis. 421, 10 N. W. 686 (same); Ely v. Wilcox, 26 Wis. 91; Jackson Milling Co. v. Scott, 130 Wis. 267, 110 N. W. 184. That who has been in adverse possession for a period of time, which, under the statute of limitations, vests him with a title against all the world, can bring his suit against a party claiming under a record title, to have the claim determined and adjudged null and void as against him. "The statute of limitations as against a party claiming under a written title would have performed but half its mission, as a statute of repose, if the party relying upon it must wait till he is attacked before he can reduce the evidence of his title to the form of a permanent record." 17

§ 2153. (§ 731.) Possession of Plaintiff.—"As to whether possession by a plaintiff is necessary before he can resort to equity to remove a cloud, there appears to be some conflict of opinion, arising from loose and careless statements of judges, and an overlooking of the

the wife's inchoate dower is a sufficient interest, see Huntzicker v. Crocker, 135 Wis. 38, 15 Ann. Cas. 444, 115 N. W. 340. "It is possible that one who holds land under grant from the United States who has done everything in his power to entitle him to a patent (which he cannot compel the United States to issue to him), and is deemed the legal owner so far as to render the land taxable to him by the state in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his right and possession": Frost v. Spitley, 121 U. S. 506, 30 L. Ed. 1012, 7 Sup. Ct. 1129; citing Carroll v. Safford, 3 How. 463, 11 L. Ed. 681; Van Brocklin v. Tennessee, 117 U. S. 169, 29 L. Ed. 851, 6 Sup. Ct. 670; Van Wyck v. Knevals, 106 U. S. 370, 27 L. Ed. 204, 1 Sup. Ct. 336; Southern Pacific R. R. Co. v. Stanley, 49 Fed. 263.

17 Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722, per Sawyer, J.; Clemmons v. Cox, 116 Ala. 567, 23 South. 79; Torrent Fire Engine Co. v. Mobile, 101 Ala. 559, 14 South. 557; Normant v. Eureka Co., 98 Ala. 181, 39 Am. St. Rep. 45, 12 South. 454; Parker v. Miller-Brent Lumber Co., 157 Ala. 282, 47 South. 580; Van Etten v. Daugherty, 83 Ark. 534, 103 S. W. 737; Baker v. Clark, 128 Cal. 181, 60 Pac. 677; Tracy v. Newton, 57 Iowa, 210, 10 N. W. 636; Vier v. Detroit, 111 Mich. 646, 70 N. W. 139; McRee v. Gardner, 131 Mo. 599, 33 S. W. 166; Parker v. Metzger, 12 Or. 407, 7 Pac. 518; contra, McCoy v. Johnson, 70 Md. 490, 17 Atl. 387.

principles of equity in regard to the exercise of its jurisdiction. When the estate or interest to be protected is equitable, the jurisdiction should be exercised whether the plaintiff is in or out of possession, for under these circumstances legal remedies are not possible; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment, under ordinary circumstances. But where he is in possession, and thus unable to obtain any adequate legal relief, he may resort to equity.

18 This part of Pom. Eq. Jur., § 1399, note 1, is quoted in Consolidated Plaster Co. v. Wild, 42 Colo. 202, 94 Pac. 285.

19 Whitehead v. Shattuck, 138 U. S. 146, 34 L. Ed. 873, 11 Sup. Ct. 276; Johnston v. Corson Gold Min. Co., 157 Fed. 145, 15 L. R. A. (N. S.) 1078, 84 C. C. A. 593; Plant v. Barclay, 56 Ala. 561; Jones v. De Graffenreid, 60 Ala. 145; Smith's Ex'r v. Cockrell, 66 Ala. 64; Gregg v. Swindall, 67 Ala. 187; Treadwell v. Torbert, 133 Ala. 504, 32 South. 126; Tarwater v. Going, 140 Ala. 273, 37 South. 330; Lawrence v. Zimpleman, 37 Ark. 643; Branch v. Mitchell, 24 Ark. 439; Crane v. Randolph, 30 Ark. 579; Munson v. Munson, 28 Conn. 582, 73 Am. Dec. 693; Clem v. Meserole, 44 Fla. 191, 32 South. 783; Simmons v. Carlton, 44 Fla. 719, 33 South. 408; Ropes v. Jenerson, 45 Fla. 556, 110 Am. St. Rep. 79, 34 South. 955 (by purchaser at execution to set aside deed by judgment debtor in fraud of judgment creditor; contra, see Hager v. Shindler, 29 Cal. 47); Burton v. Gleason, 56 Ill. 25; Glos v. Kemp, 192 Ill. 72, 61 N. E. 473; Polk v. Pendleton, 31 Md. 118; King v. Carpenter, 37 Mich. 363; Moran v. Palmer, 13 Mich. 370; Gambrill Lumber Co. v. Saratoga Lumber Co., 87 Miss. 773, 40 South. 485; Essex County Nat. Bank v. Harrison, 57 N. J. Eq. 91, 40 Atl. 209; Odle v. Odle, 73 Mo. 289; Smith v. Thomas, 99 Va. 86, 37 S. E. 784. If land is held adversely by another under color of title, complainant must first recover possession by an action at law: Daniel v. Stewart, 55 Ala. 278.

The text of Pom. Eq. Jur., § 1399, is cited at this point in Patterson v. Simpson, 147 Ala. 550, 41 South. 842; Pollitzer v. Beinkempen, 76 S. C. 517, 57 S. E. 475; Guerard v. Jenkins, 80 S. C. 223, 61 S. E. 258.

20 Allen v. Hanks, 136 U. S. 311, 34 L. Ed. 418, 10 Sup. Ct. 961; Jones v. De Graffenreid, 60 Ala. 145; Branch v. Mitchell, 24 Ark. Where, on the other hand, a party out of possession has an equitable title, or where he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned.<sup>21</sup> While it cannot

439; Gage v. Rohrback, 56 Ill. 266; Gage v. Billings, 56 Ill. 268; Hinckley v. Greany, 118 Mass. 595; Sullivan v. Finnegan, 101 Mass. 447; Clouston v. Shearer, 99 Mass. 209; Loomis v. Roberts, 57 Mich. 284, 23 N. W. 816; Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540; and see the cases in this chapter, passim, where the relief has been granted.

21 The text is quoted in Hodgkin v. Boswell, 57 Or. 88, 110 Pac. 487; State v. Warner Valley Stock Co., 56 Or. 283, 106 Pac. 780, 108 Pac. 861; quoted, in part, in Sears v. Scranton Trust Co., 228 Pa. St. 126, 20 Ann. Cas. 1145, 77 Atl. 423; cited and followed in Shannon v. Long, 180 Ala. 128, 60 South. 273; Swick v. Rease, 62 W. Va. 557, 59 S. E. 510; Custer v. Hall, 71 W. Va. 119, 76 S. E. 183 (plaintiff being entitled to relief as to greater part of tract, to which his title is equitable, may have cloud removed from portion to which his title is legal). See Shipman v. Furniss, 69 Ala. 555, 563, 44 Am. Rep. 528 (relief granted, when other grounds of jurisdiction, as the cancellation of the deed for undue influence); Armstrong v. Conner, 86 Ala. 350, 5 South. 451, citing Pom. Eq. Jur., § 1399, and note (to cancel deed of wife's statutory separate estate, which divested her of the legal title); Echols v. Hubbard, 90 Ala. 309, 7 South. 817 (citing Pom. Eq. Jur., § 1399, and note); Stock-Growers' Bank v. Newton. 13 Colo. 245, 22 Pac. 444; Mulock v. Wilson, 19 Colo. 296, 35 Pac. 532; Brown v. Wilson, 21 Colo. 309, 52 Am. St. Rep. 228, 40 Pac. 688; Kennedy v. Northup, 15 Ill. 148 (deed obtained by fraud); Redmond v. Packenham, 66 Ill. 434 (same); Booth v. Wiley, 102 Ill. 84, 114 (same); Haworth v. Taylor, 108 Ill. 275 (same); King v. Carpenter, 37 Mich. 363; Bausman v. Kelley, 38 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. 333; Mason v. Black, 87 Mo. 329, 345; Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 297, 38 Am. St. Rep. 656, 670, 22 S. W. 623; Horn v. Garry, 49 Wis. 464, 5 N. W. 897; Suring v. Rollman, 145 Wis. 490, 130 N. W. 485 (deed of defendant in possession procured by fraud). In many of the above cases the relief was granted as incident to a jurisdiction assumed on other grounds, such as fraud in various forms; see, also, Sayers v. Burkhardt, 85 Fed. 246, 29 C. C. A. 137, and cases cited. It is frequently be said that the cases are uniform on the above propositions, still it is believed that the rule stated [in § 728], and the above explanations are founded on principle and are sufficient to reconcile a vast majority of the conflicting, or apparently conflicting, judicial opinions and dicta on this question. In some of the cases the rule is so broadly stated as to require a plaintiff, seeking to have a cloud removed, under all circumstances to be in possession;<sup>22</sup> while, on the other hand, it is as generally stated that possession is never essential.<sup>23</sup> Both of these extreme views are open to criticism, and the cases should always be considered with reference to the facts actually before the court.''<sup>24</sup> Where, however,

granted to remainder-men or reversioners, as they are not able to recover possession: Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 13 Am. St. Rep. 73, 6 South. 197; Worthington v. Miller, 134 Ala. 420, 32 South. 748; Winters v. Powell, 180 Ala. 425, 61 South. 96; Fies v. Rosser, 162 Ala. 504, 136 Am. St. Rep. 57, 50 South, 287; Steuart v. Meyer, 54 Md. 454, 467; Oppenheimer v. Levi, 96 Md. 296, 60 L. R. A. 729, 54 Atl. 74 (reviewing Maryland cases on the subject of plaintiff not in possession); Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 328, 16 S. W. 497 (outstanding homestead right); Keyes v. Ketrick, 25 R. I. 468, 56 Atl. 770.

Frost v. Spitley, 121 U. S. 552, 30 L. Ed. 1010, 7 Sup. Ct. 1129;
Harland v. B. & M. T. Co., 32 Fed. 305; Smith's Ex'r v. Cockrell,
66 Ala. 64; Baines v. Baines, 64 Ala. 375; Tyson v. Brown, 64 Ala.
244; Arnett v. Bailey, 60 Ala. 435; Daniel v. Stewart, 55 Ala. 278;
Miller v. Neiman, 27 Ark. 233; Simmons v. Carlton, 44 Fla. 719, 33
South. 408; Keane v. Kyne, 66 Mo. 216; Clark v. Covenant etc. Ins.
Co., 52 Mo. 272; Haythorn v. Margarem, 7 N. J. Eq. 324; Busbee
v. Lewis, 85 N. C. 332; Herrington v. Williams, 31 Tex. 448; Glenn
v. West, 103 Va. 521, 49 S. E. 671.

For the attitude of the federal courts to this question, see 1 Pom. Eq. Jur., 4th ed., § 293, note (a). See, also, Willitt v. Baker, 133 Fed. 937.

<sup>23</sup> Hager v. Shindler, 29 Cal. 47; Thompson v. Lynch, 29 Cal. 189; Almony v. Hicks, 3 Head, 39; Bunce v. Gallagher, 5 Blatchf. 481, Fed. Cas. No. 2133; Jones v. Smith, 22 Mich. 360; Post v. Campbell, 110 Wis. 378, 85 N. W. 1032.

24 4 Pom. Eq. Jur., § 1399, note 1.

neither party is in possession or where the lands are wild and unoccupied, it has been generally admitted that the remedy at law is inadequate and that equity has jurisdiction to remove or prevent a cloud.<sup>25</sup>

- § 2154. (§ 732.) Sufficiency of Possession.—Actual possession with a claim of ownership in fee establishes a presumptive title and is sufficient to maintain a bill to remove a cloud upon title.<sup>26</sup> The possession must be bona fide and fairly gained.<sup>27</sup> It must have been acquired in a lawful way. If it has been obtained by . violence or by the use of any unfair or corrupt means or by fraud, equity will not lend its aid.<sup>28</sup> Aside from the general rule as above stated, what is a sufficient possession to sustain the jurisdiction of equity depends on the particular facts of each case.<sup>29</sup>
  - 25 For the numerous cases in the United States courts, applying the statutory "suit to quiet title" or to determine adverse claims, to this state of circumstances, see 1 Pom. Eq. Jur., 4th ed., p. 564, note. In general, see Chancellor v. Banks, 92 Ark. 497, 123 S. W. 650; Simmons v. Carlton, 44 Fla. 719, 33 South. 408; Clem v. Meserole, 44 Fla. 191, 32 South. 783; Glos v. Kemp, 192 Ill. 72, 61 N. E. 473; Glos v. Beckman, 183 Ill. 158, 55 N. E. 636; Glos v. Goodrich, 175 Ill. 20, 51 N. E. 643; Glos v. Archer, 214 Ill. 74, 73 N. E. 382; O'Brien v. Creitz, 10 Kan. 202; Lejenne v. Harmon, 29 Neb. 268, 45 N. W. 630; Low v. Staples, 2 Nev. 209; McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491; Heppenstall v. Leng, 217 Pa. St. 491, 12 L. R. A. (N. S.) 652, 66 Atl. 991 (suit by vendor who has placed vendee in possession, against adverse claimant); Pier v. Fond du Lac, 38 Wis. 470; Davenport v. Stephens, 95 Wis. 456, 70 N. W. 661; Kimball v. Baker Land & Title Co., 152 Wis. 441, 140 N. W. 47.
  - <sup>26</sup> See cases cited under preceding pa:agraph; Towle v. Quante, 246 Ill. 568, 92 N. E. 967.
    - 27 Watson v. Lion Brewing Co., 61 Mich. 595, 28 N. W. 726.
  - 28 Gage v. Hampton, 127 Ill. 87, 2 L. R. A. 512, 20 N. E. 12; Herman v. Lambert, 76 W. Va. 370, 85 S. E. 660 (fraud). But mere fact that plaintiff went into possession at night does not defeat his right; Perry v. McDonald, 69 W. Va. 619, 72 S. E. 745.
  - 29 Actual possession of a part of a tract coupled with constructive possession of the balance is sufficient possession to maintain suit to

§ 2155. (§ 733.) Instrument Invalid on Its Face; No Relief.—"While a court of equity will set aside a deed, agreement, or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, because such instrument or proceeding may be used for annoying and injurious purposes at a time when the evidence to contest or resist it may not be as effectual as if used at once,<sup>30</sup> still, if the defect appears upon its face, and a resort to extrinsic evidence [on the part of the complainant] is unnecessary, the reason for equitable interference does not exist, for it cannot be said that any cloud whatever is cast upon the title." As a part of.

remove a cloud from the whole tract: Fitzhugh v. Barnard, 12 Mich. 104; Sullivan v. Finnegan, 101 Mass. 447; actual possession by a tenant or agent is sufficient possession by the landlord or principal: Sloan v. Sloan, 25 Fla. 53, 5 South. 603; Stewart v. May, 111 Md. 162, 18 Ann. Cas. 856, and note, 73 Atl. 460. In general, see Towle v. Quante, 246 Ill. 568, 92 N. E. 967 (sufficient if possession is calculated to give notice to the community that the land is occupied and who the occupant is). This paragraph of the text is cited in Jordan v. McClure Lumber Co., 170 Ala. 289, 54 South. 415.

30 See cases cited, 4 Pom. Eq. Jur., § 1399, note 2; and cases passim, in this chapter.

31 Simpson v. Lord Howden, 3 Mylne & C. 97, 102, 103, 108, and cases cited; Piersol v. Elliott, 6 Pet. 95, 8 L. Ed. 332; Phelps v. Harris, 101 U. S. 375, 25 L. Ed. 857; Minturn v. Smith, 3 Sawy. 142, Fed. Cas. No. 9647; Posey v. Conaway, 10 Ala. 811; Curry v. Peebles, 83 Ala. 225, 83 South. 622; Parker v. Boutwell, 119 Ala. 297, 24 South. 860; Prestwood v. Horn, 195 Ala. 450, 70 South. 134; Beardsley v. Hill; 85 Ark. 4, 106 S. W. 1169; Cohen v. Sharp, 44 Cal. 29; Russ v. Crichton, 117 Cal. 695, 49 Pac. 1043; Miles v. Strong, 62 Conn. 95, 25 Atl. 459; Mayse v. Gaddis, 2 App. D. C. 20; Reyes v. Middleton, 36 Fla. 99, 51 Am. St. Rep. 17, 29 L. R. A. 66, 17 South. 937; Benner v. Kendall, 21 Fla. 584; Briggs v. Johnson, 71 Me. 235; Curtis v. City of East Saginaw, 35 Mich. 508; Mogan v. Carter, 48 Minn. 501, 51 N. W. 614; Gilman v. Van Brunt, 29 Minn. 271, 13 N. W. 125; Hannibal v. Nortoni, 154 Mo. 142, 55 S. W. 220; Merchants' Bank v. Evans, 51 Mo. 335, 345; Thompson v. Pinnell, 237 Mo. 545, 141 S. W. 605, citing Pom. Eq. Jur., §§ 1396-1399; Pooley 'v. Buffalo, 124 N. Y. 206, 24 N. E. 624; Moores v. Townshend, 102 N. Y. 387.

the same doctrine, the further rule is generally established, that "where the instrument or proceeding is not thus void upon its face, but the party claiming under it, in order to enforce it, must necessarily offer evidence which will inevitably show its invalidity and destroy its efficacy,—in each of these cases the court will not exercise its jurisdiction either to restrain or remove a cloud, for the assumed reason that there is no cloud."32

7 N. E. 401; Clark v. Davenport, 95 N. Y. 477; Cox v. Clift, 2 N. Y. 118; Van Doren v. Mayor etc., 9 Paige, 388; Heywood v. City of Buffalo, 14 N. Y. 534; Overing v. Foote, 43 N. Y. 290; Marsh v. City of Brooklyn, 59 N. Y. 280; Levy v. Hart, 54 Barb. 248; Tilden v. Mayor etc., 56 Barb. 340; Mulligan v. Baring, 3 Daly, 75; Howell v. City of Buffalo, 2 Abb. App. 412; Farnham v. Campbell, 34 N. Y. 480; Dederer v. Voorhies, 81 N. Y. 153; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Townsend v. Mayor etc., 77 N. Y. 542; Wells v. City of Buffalo, 80 N. Y. 253; Busbee v. Macy, 85 N. C. 329; Browning v Lavender, 104 N. C. 73, 10 S. E. 77; Kirk v. Duren, 45 S. C. 597, 23 S. E. 954; Brown v. Cohn, 88 Wis. 627, 60 N. W. 826; Cornish v. Frees, 74 Wis. 490, 43 N. W. 507; Head v. James, 13 Wis. 641; Shepardson v. Supervisors, 28 Wis. 593. "If, however, the claim is based upon a written instrument which is void upon its face, or which does not in its terms apply to the property it is claimed to affect, there seems to be no reason for entertaining a litigation respecting it, before it is attempted to be enforced; for the party apprehending danger has his defense always at hand. In such a case this court has determined that no action at the suit of the party apprehending injury will lie. The same reason applies to cases where the claim requires the existence of a series of facts or the performance of succession of legal acts and there is a defect as to one or more links. The party must in general wait until the pretended title is asserted. This principle is also well settled by authority. In both these classes of cases the party whose estate is questioned may naturally wish to have the matter speedily determined, as he may in the meantime suffer inconveniences and even actual damage on account of the discredit attaching to his title by reason of the unfounded claim. But unless the circumstances are such as to sustain an action for slander of title, the law regards the injury too speculative to warrant its interference": Scott v. Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106.

32 Pom. Eq. Jur., § 1399; cited in Blanchard v. Barre, 77 Vt. 420, 60 Atl. 970 (assessment void on its face). See City of Birmingham

(§ 734.) Same: Limitations on and Denial of This Doctrine.—The second rule, as stated in the last section, is subject to a number of limitations, some of which have given rise to a sharp conflict of authority. "In many states, deeds, certificates, and other instruments given on sales for taxes are made prima facie evidence by statute of the regularity of proceedings connected with the assessments and sales, and it is well settled that courts of equity will set aside such instruments for defects, although such defects are apparent" on the face of the proceedings leading up to the execution of the instrument; or, in a proper case, the execution of such an instrument, prima facie valid on its face, will be enjoined.<sup>33</sup> It is also a rule in many jurisdictions that where the title of both complainant and defendant are derived from a common source, but defendant's title appears by the records to have originated subsequently to the complainant's title, so that by an inspection of the whole record it appears that the

v. McCormack, 145 Ala. 685, 40 South. 111 (title of defendant depended on invalid ordinances); Scott v. Onderdonk, 14 N. Y. 147, 67 Am. Dec. 106; Marsh v. Brooklyn, 59 N. Y. 280; Washburn v. Burnham, 63 N. Y. 132 (extreme application of principle; in suit by defendant he must, by extrinsic proof, show power of attorney to execute the instrument, and relief therefore denied to complainant); Bucknell v. Story, 36 Cal. 67 (injunction against tax sale refused where invalidity would appear in proceedings to enforce the sale). For further cases, see notes 35 and 36 to next section.

33 Pom. Eq. Jur., § 1399, note 3. The text is quoted in Lindgren v. Doughty, 32 R. I. 524, 80 Atl. 125. See Rich v. Braxton, 158 U. S. 407, 39 L. Ed. 1033, 15 Sup. Ct. 1006; Huntington v. Central Pacific R. R., 2 Sawy. 503, Fed. Cas. No. 6911; Chase v. City of Los Angeles, 122 Cal. 540, 55 Pac. 414, and cases cited; Palmer v. Rich, 12 Mich. 414; Marquette etc. R. R. v. Marquette, 35 Mich. 504; Weller v. St. Paul, 5 Minn. 95; Stewart v. Crysler, 100 N. Y. 378, 3 N. E. 471; Allen v. Buffalo, 39 N. Y. 386; Crooke v. Andrews, 40 N. Y. 547; Hatch v. Buffalo, 38 N. Y. 276; Scott v. Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106; Alvord v. City of Syracuse, 163 N. Y. 158, 57 N. E. 310.

defendant's title is *prima facie* inferior to that of the complainant, the complainant is still entitled to equitable relief, since he would be required, in an action by the defendant, to offer evidence of his own prior title in order to defeat a recovery.<sup>34</sup> In New York, however, and a few other jurisdictions, the contrary is the rule; if it appears by the whole record that the complainant's title is paramount, there is no cloud to be removed.<sup>35</sup>

In pursuance of the general doctrine it is usually held that if the defendant's title is derived from a complete stranger to the complainant's title, from one who never had any connection with the property, it does not constitute a cloud; as, where an execution is levied upon lands owned by complainant, issued upon a judgment, in an action to which he was not a party, against one who never had any interest in the lands.<sup>36</sup> But in sev-

- 34 "Every deed from the same source through which the plaintiff derives his real property must, if valid on its face, necessarily have the effect of casting such cloud upon the title. . . . The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed": Pixley v. Huggins, 15 Cal. 127, by Field, C. J. (a leading case on the whole subject); Key City Gas Light Co. v. Munsell, 19 Iowa, 305; Gerry v. Stimson, 60 Me. 186; Linnell v. Battey, 17 R. I. 241, 21 Atl. 606.
- 35 Bockes v. Lansing, 74 N. Y. 437 (complainant's title was derived from an assignee for benefit of creditors of G. W., and defendants, through a sale by receiver of G. W.'s property, subsequently appointed. "Those claiming under the receiver's sale could not establish any title, without first overthrowing the plaintiff's title by showing by extrinsic evidence that the assignment made by G. W. was fraudulent and void"; Maisch v. Hoffman, 42 N. J. Eq. 116, 7 Atl. 349.
- 36 Lytle v. Sandefeer, 93 Ala. 396, 9 South. 260 (deed by widow of intestate not a cloud on title of his heirs); Thompson v. Etowah Iron Co., 91 Ga. 538, 17 S. E. 663, per Lumpkin, J., and cases cited

eral states such levy may be enjoined, on the general theory obtaining in such states that a void act under color of judicial process is subject to injunction.<sup>37</sup>

Finally, the doctrine itself has been condemned as wholly impractical and unreasonable, and in a few states, has been rejected. "While this doctrine may be settled by the weight of authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily in the courts, of defendants urging that the instruments under which they claim are void, and therefore that they ought to be permitted to stand unmolested, and of judges deciding that the court cannot interfere, because the deed or other instrument is void, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency."38

(an instructive opinion); Payne v. Daviess County Savings Ass'n, 126 Mo. App. 593, 105 S. W. 15; Scharff v. Kirkwood Lumber Co. (Mo. App.), 184 S. W. 494; Ward v. Dewey, 16 N. Y. 519.

37 Bishop y. Moorman, 98 Ind. 1, 49 Am. Rep. 731. "No reason in law or in morals can be found that will justly support the position of one who resists an injunction where he concedes he is acting under color of authority, but in fact has none, and is using that authority to seize and sell without right or the semblance of justification the land of another. No one, we suppose, doubts that a property owner may quiet his title against an apparent claim, though it be never so empty, and if he may do this, surely he may by injunction prevent that apparent claim from clouding his title, without delaying until it has assumed that shape": Bishop v. Moorman, 98 Ind. 3, 49 Am. Rep. 731.

38 Pom. Eq. Jur., § 1399. This criticism has been adopted, and the doctrine repudiated in Texas: Day Land & Cattle Co. v. State,

§ 2157. (§ 735.) Statutory Suit to Quiet Title—In General.—The equity jurisdiction to quiet title, independent of statute, was intended to protect the legal owner of the title from being harassed by suits in regard to that title. It was invoked only "by a plaintiff in possession, holding the legal title, when successive ac-

68 Tex. 527, 4 S. W. 865; Morton v. Morris, 27 Tex. Civ. App. 262, 66 S. W. 94; and in Washington: Kinsman v. Spokane, 20 Wash. 118, 72 Am. St. Rep. 74, 54 Pac. 934. The text has also been quoted and followed in Spar Consolidated Min. Co. v. Casserleigh, 34 Colo. 454, 83 Pac. 1058; Whitehouse v. Jones, 60 W. Va. 680, 12 L. R. A. (N. S.) 49, 55 S. E. 730; Stearns Coal & Lumber Co. v. Patton, 134 Tenn. 556, 184 S. W. 855; and cited in Ashburn v. Graves, 149 Fed. 968, 77 C. C. A. 478 (but not followed, since the Supreme Court had adopted the general rule). See, also, Mount v. McAulay, 47 Or. 444, 83 Pac. 529. This passage has also been quoted in certain cases enjoining invalid execution sales, enumerated above, notes 34 and 37; Linnell v. Battey, 17 R. I. 241, 20 Atl. 606; Bishop v. Moorman, 98 Ind. 1, 49 Am. Rep. 731; Yount v. Hoover, 95 Kan. 752, Ann. Cas. 1918C, 148, L. R. A. 1915F, 1120, 149 Pac. 408. To the same effect are the early English case, Bromley v. Holland, 7 Ves. 3, 21, 22; dicta of Chancellor Kent in Hamilton v. Cummings, 1 Johns. Ch. 517, and of Chief Justice Marshall in Peirsoll v. Elliott, 6 Pet. 98, 8 L. Ed. 334, to the effect that the question should be one of discretion, not of jurisdiction, where the instrument was void on its face, and cases in Tennessee: Jones v. Perry, 10 Yerg. 58, 83, 30 Am. Dec. 430; Almony v. Hicks, 3 Head, 41. In Missouri the courts have attempted a compromise, and have laid down a rule, peculiar to that state, that if the defect in the deed "is such as to require legal acumen to discover it, whether it appears on the face of the deed or proceedings, or is to be proven aliunde, courts of equity entertain jurisdiction to remove the cloud'': Merchants' Bank v. Evans, 51 Mo. 335; Verdin v. City of St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Hannibal & St. J. R. R. Co. v. Nortoni, 154 Mo. 142, 55 S. W. 220 (relief refused, since recorder showed that grantor in deed alleged to be a cloud had no title); Perkins v. Baer, 95 Mo. App. 70, 68 S. W. 939. See, also, McLaughlin v. McLaughlin, 228 Mo. 635, 137 Am. St. Rep. 680, 129 S. W. 21.

The statutory action to quiet title or determine an adverse claim may, it is often held, be maintained though the adverse claim is invalid upon its face: Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55 (though the decree includes cancellation of the instruments invalid

tions at law, all of which had failed, were brought against him by a single person out of possession, or when many persons asserted equitable titles against a plaintiff in possession holding the legal or an equitable title. The action has been greatly extended by statute, and in many states is the ordinary mode of trying disputed titles." Very frequently, proceedings under

on their face; citing Pom. Eq. Jur., § 1399); Palmer v. Yorks, 77 Minn. 20, 79 N. W. 587; Rumbo v. Gay Mfg. Co., 129 N. C. 9, 39 S. E. 581; Moores v. Clackamas County, 40 Or. 538, 67 Pac. 662; Kinsman v. Spokane, 20 Wash. 118, 72 Am. St. Rep. 24, 50 Pac. 934; Fox v. Williams, 92 Wis. 320, 66 N. W. 357 (decree includes canceling of instrument invalid on its face); Broderick v. Cary, 98 Wis. 419, 74 N. W. 95. See, post, § 739.

39 Pom. Eq. Jur., § 1396. Perhaps it may be said, however, that the statutory remedy has more in common with the suit to remove a cloud from title, and was probably designed to avoid the artificial and unpractical restrictions by which that suit was, and is, encumbered. "The general principles of equity jurisprudence, as administered in this country and in England permit a bill to quiet title to be filed only by a party in possession against a defendant who has been ineffectually seeking to establish his title by repeated actions of ejectment, and as a prerequisite to such bill it was necessary that the title of the plaintiff should have been established by at least one successful trial at law. At common law a party might by successive fictitious demises bring as many actions of ejectment as he chose, and a bill to quiet title was only permitted for the purpose of preventing the party in possession being annoyed by repeated and vexatious actions. The jurisdiction was, in fact, only another exercise of the familiar power of a court of equity to prevent a multiplicity of suits by bills of peace. . . . This method of adjusting titles by bill in equity proved so convenient that in many of the states statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases": Wehrman v. Conklin, 155 U. S. 314, 39 L. Ed. 167, 15 Sup. Ct. 129.

such statutes are not designated as proceedings to quiet title but are known as proceedings for the determination of adverse claims.<sup>40</sup>

The statutory action to determine an adverse claim is an improvement upon the old bill of peace.<sup>41</sup> The stat-

40 See the following statutes: Alabama, Acts 1892-93, p. 42; Alaska, Code, § 475 (31 Stats. 410, § 786); Civ. Code, § 809; Rev. Stats. 1887, par. 3132; Arizona, Code Civ. Proc. § 256; Arkansas, Sand. & H. Dig., § 6120; California, Code Civ. Proc., § 738; Colorado, Code Civ. Proc., § 237; Idaho, Code Civ. Proc., § 3379; Rev. Stats. 1887, § 4538; Illinois, Rev. Stats., c. 22, § 50; Indiana, Burns' Rev. Stats., § 1082; Iowa Code, § 3273; Kansas, Gen. Stats. 1901, § 5081; Civ. Code, § 594; Kentucky, 1 St. Law, 294; Louisiana, Rev. Code Pr., p. 46, arts. 46, 49, 50, 52; Michigan, Comp. Laws, § 448; Minnesota, Gen. Stats. 1894, c. 75, § 2; Mississippi, Rev. Code, § 1833; Montana, Code Civ. Proc., § 1310; Nebraska, Comp. Stats., c. 73, § 57; Nevada, Civ. Pr. Act, § 25; Gen. Stats., § 3278; New Jersey, Gen. Stats., p. 3486; New York, Code Civ. Proc., § 1638; North Carolina, Laws 1893, c. 6; North Dakota, Rev. Code, § 5904; Ohio, Code Civ. Proc., § 557; Oregon, B. & C. Comp., § 506; South Dakota, Code Civ. Proc., § 676; Utah, Code Civ. Proc., § 620; Washington, 2 Bal. Ann. Codes & Sts., § 5521; Wisconsin, Rev. Stats., c. 141, § 29. The statutes of Maine, Massachusetts, Missouri and Pennsylvania contain provisions concerning preliminary actions which may be brought against holders of adverse claims to show cause why they should not institute actions to try their titles. The proceedings under these statutes are not of such a distinctively equitable nature as to call for description in this work.

41 "The statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings not merely in cases where a bill of peace would lie, that is to establish the title of the plaintiff against numerous parties insisting upon the same right or to obtain repose against the repeated litigation of an unsuccessful claim by the same party; but also to prevent future litigation respecting the property by removing existing causes of controversy as to its title, and so embraces cases where a bill quia timet to remove a cloud upon the title would lie": Holland v. Challen, 110 U. S. 15, 28 L. Ed. 52, 3 Sup. Ct. 495. That the statute is an enabling act, see Pom. Eq. Jur., § 1397, cited in Armor v. Frey, 253 Mo. 447, 161 S. W. 829.

ute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should first establish his right by an action at law. He can immediately, upon knowledge of such claim, require the nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted.<sup>42</sup>

42 The text is quoted in Coleman v. Jaggers, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894. See Stark v. Starrs, 6 Wall, 409, 18 L. Ed. 926; Curtis v. Sutter, 15 Cal. 263; Castro v. Barry, 79 Cal. 446, 21 Pac. 946; American Dock etc. Co. v. School Trustees, 37 N. J. Eq. 266; Bogert v. City of Elizabeth, 27 N. J. Eq. 568; King v. Carpenter, 37 Mich. 363. "The statute is remedial and highly beneficial. It should, therefore, be construed liberally. It is a statute of repose. It deprives the defendant of no right. His claim may be tried at law, if he desires it. It compels him to a speedy trial of the question'": Holmes v. Chester, 26 N. J. Eq. 81; Bogert v. City of Elizabeth, 27 N. J. Eq. 568. "The purpose of the act was to relieve, not persons who had the power to test the hostile claim by a direct proceeding in the usual mode, but to aid those persons whose situation afforded them no such opportunity. The inequity that was designed to be remedied grew out of the situation of a person in the possession of land as owner, in which land another person claimed an interest which he would not enforce; and the hardship was that the person so in possession could not force his adversary to sue, and thus put the claim to test. The title to the act indicates that this was the purpose, for it is 'an act to compel the determination of claims to real estate' '': Jersey City v. Lembeck, 31 N. J. Eq. 255. See, also, Albro v. Dayton, 50 N. J. Eq. 574, 25 Atl. 937; Adler v. Sullivan, 115 Ala. 582, 22 South. 87. Justice Field, in Holland v. Challen, 110 U. S., at page 21, 28 L. Ed. 52, 3 Sup. Ct. 495, construing the Nebraska statute, said: "It is certainly for the interest of the state that this jurisdiction of the court should be maintained. and that causes of apprehended litigation respecting real property, necessarily affecting its use and enjoyment, should be removed; for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of every-day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others

§ 2158. (§ 736.) Remedy, Whether Equitable or Legal.—It has been held, in every state but one, and in the United States courts, that the remedy created by these statutes is an equitable remedy, in the instances where the defendant is not in possession of the land; and that neither party is of right entitled to a jury trial.<sup>43</sup>

are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case to quiet the title to which the present suit is brought, is described in the bill as wild and uncultivated land. Few persons would be willing to take possession of such land, inclose, cultivate and improve it, in the face of a disputed claim to its ownership. The cost of such improvements would probably exceed the value of the property. An action for ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled so that it may be subjected to use and improvement. To meet cases of this character statutes like the one in Nebraska have been passed by several states, and they accomplish a most useful purpose."

43 The text is cited in Tracy v. Wheeler, 15 N. D. 248, 6 L. R. A. (N. S.) 516, 107 N. W. 68 (the action is governed by equitable principles). For numerous cases where these statutes have been applied on the equity side of the United States courts, see 1 Pom. Eq. Jur., 4th ed., § 293, note (a), pp. 564-567; United States Min. Co. v. Lawson, 134 Fed. 769. When the complainant is in possession, the fact that the answer contains a counterclaim in ejectment does not entitle the defendant to a jury trial: Angus v. Craven, 132 Cal. 691, 696. 64 Pac. 1091; Johnson v. Peterson, 90 Minn. 506, 97 N. W. 384. But see Donahue v. Meister, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096, where the defendant was ousted of possession by the complainant immediately before the commencement of the action. Since the action is an equitable one, relief is subject to the maxim, he who seeks equity must do equity: Benson v. Shotwell, 87 Cal. 49, 60, 25 Pac. 249. See, also, Larson v. Peppard, 38 Mont. 128, 129 Am. St. Rep. 630, 16 Ann. Cas. 800, 99 Pac. 136; Maurer v. Reifschneider, 89 Neb. 673, Ann. Cas. 1912C, 643, 132 N. W. 197.

Where, however, the defendant is in possession, it is held, in most jurisdictions, that he is entitled to a jury trial, at least when the complainant seeks restitution of possession as part of his relief.<sup>44</sup>

In Indiana, however, under Rev. Stats., § 409, the action is triable by jury, since it is a statutory action, and not one that "prior to the 18th of June, 1852, was of exclusive equitable jurisdiction": Puterbaugh v. Puterbaugh, 131 Ind. 288, 15 L. R. A. 431, 30 N. E. 519; Jennings v. Moon, 135 Ind. 168, 34 N. E. 996; Johnson v. Taylor, 106 Ind. 89, 5 N. E. 732.

44 In such case, therefore, the equity courts of the United States will not take jurisdiction: See 1 Pom. Eq. Jur., 4th ed., § 293, note (a), pp. 564-566; Whiteside v. Norton, 205 Fed. 5, 45 L. R. A. (N. S.) 112, 123 C. C. A. 313. But compare Pacific Coal & Transp. Co. v. Pioneer Miń. Co., 205 Fed. 577, 123 C. C. A. 593.

In general, see Donahue v. Meister, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096 (where defendant was ousted by plaintiff shortly before commencement of the action); Newman v. Duane, 89 Cal. 597, 27 Pac. 66; Gillespie v. Gouly, 120 Cal. 515, 52 Pac. 816; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271 (but where defendants counterclaim for specific performance, no right to jury trial); Angus v. Crewen, 132 Cal. 691, 696, 64 Pac. 1091 (but if defendant is out of possession, he cannot, by a counterclaim in ejectment, oust the jurisdiction of the court to try the action as an equitable one); Hughes v. Hannah, 35 Fla. 365, 22 South. 613; Trustees v. Gleason, 39 Fla. 771, 23 South. 539; Butts v. Butts, 84 Kan. 475, 114 Pac. 1048; Vancev. Gray, 142 Ky. 267, 134 S. W. 181 (but if defendant counterclaims to quiet his title, equity has jurisdiction); Cumberland Co. v. Kelly, 156 Ky. 397, 160 S. W. 1077; Tahor v. Cook, 15 Mich. 322; Chandler v. Graham, 123 Mich. 327, 82 N. W. 814; Snowden v. Tyler, 21 Neb. 215, 31 N. W. 661; Lyon v. Gombert, 63 Neb. 630, 88 N. W. 774 (but right to jury trial may be waived); Burleigh v. Hecht, 22 S. D. 301, 117 N. W. 367.

In other states, the action is held to be equitable, and the defendant in possession not entitled to a jury trial: Lewis v. Soule, 52 Iowa, 11, 2 N. W. 400; Lees v. Wetmore, 58 Iowa, 170, 12 N. W. 238; Wofford v. Bailey, 57 Miss. 239 (but in this state the jurisdiction of equity is exhausted when the hostile claim is canceled; complainant must resort to law to recover possession). The question was left undecided in Love v. Bryson, 57 Ark. 589, 22 S. W. 341.

§ 2159. (§ 737.) Possession of Plaintiff.—"The states adopting such statutes may be separated into two classes, the first and most numerous class requiring the plaintiff to be in possession, 45 and the second allowing the action to be brought by a plaintiff either in or out of possession." Under both classes of statutes the right of an owner in possession of lands to maintain a bill to quiet title is undoubted, for he has no adequate remedy at law. 47

"In regard to the nature of the possession requisite to maintain the action, there is some conflict. It has been held on the one side that possession must be lawful,—must be accompanied by a claim of right, legal or equitable." Such cases hold that equity will not assume jurisdiction where the possession was acquired by trespass or by unfair means merely for the purpose of filing the bill. 48 On the other hand, it is held that it is

- 45 These states and territories are, Alaska, Arkansas, Colorado, Kansas, Kentucky, Illinois, Louisiana, Michigan, Minnesota, Nevada, New Jersey, New York, Ohio, Oregon, Utah, Washington and Wisconsin.
- 46 Pom. Eq. Jur., § 1396; quoted in McGrath v. Norcross, 71 N. J. Eq. 763, 65 Atl. 998; Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213. These states and territories are, Arizona, California, Idaho, Indiana, Iowa, Montana, Mississippi, Nebraska, North Dakota, and South Dakota.
- 47 Wehrman v. Conklin, 155 U. S. 324, 39 L. Ed. 173, 15 Sup. Ct. 129; Curtis v. Sutter, 15 Cal. 259; Standish v. Dow, 21 Iowa, 363; Miller v. Davidson, 31 Iowa, 435; Giltenan v. Lemert, 13 Kan. 476. As to the rule under the Michigan statute, see Tinker v. Piper, 149 Mich. 335, 112 N. W. 913; Dolph v. Norton, 158 Mich. 417, 123 N. W. 13; Donnelly v. Lyons, 173 Mich. 515, 139 N. W. 246.
- 48 Adler v. Sullivan, 115 Ala. 582, 22 South. 87; Cartwright v. McFadden, 24 Kan. 662; Deuchatill v. Robinson, 24 La. Ann. 176; Rubert v. Brayton, 82 Mich. 632, 46 N. W. 935; Oberon Land Co. v. Dunn, 56 N. J. Eq. 749, 40 Atl. 121; Tichenor v. Knapp, 6 Or. 205; Pom. Eq. Jur., § 1396, note. See, also, Steelman v. Blackman, 72 N. J. Eq. 330, 65 Atl. 715 (what is not peaceable possession). The statute authorizing a person in possession to file a bill to quiet title

immaterial how possession was acquired,—by fraud, collusion or otherwise, so long as it exists.<sup>49</sup> In certain of those states in which possession is required, the possession must be actual as distinguished from a constructive possession presumptively arising from the legal title. In other words, it must be a possession in fact as distinguished from a mere legal or civil possession.<sup>50</sup>

was not intended to reach a case where a party by sharp practice acquires possession twenty-four hours before filing his bill, and where previous thereto he had a remedy by ejectment: Stetson v. Cook, 39 Mich. 750. Where the possession is acquired by buying off the tenant of another and entering into possession, the court will not take jurisdiction: Hardin v. Jones, 86 Ill. 313; nor where the entry is obtained by fraud: Wakefield v. Sunday Lake Min. Co., 85 Mich. 605, 39 N. W. 135. The following cases hold that a trespasser cannot maintain the action: Gould v. Sternburg, 105 Ill. 488 (dictum); Hardin v. Jones, 86 Ill. 313; Wood v. Missouri etc. R. R. Co., 11 Kan. 323; Rubert v. Brayton, 82 Mich. 632, 46 N. W. 935; Dyer v. Baumeister, 87 Mo. 134; contra, see Sayre v. Sage, 47 Colo. 559, 108 Pac.. 160.

49 Calderwood v. Brooks, 45 Cal. 519; Reed v. Calderwood, 32 Cal. 109; Phillippi v. Leet, 19 Colo. 246, 35 Pac. 540; Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370; Pom. Eq. Jur., § 1396, note. See, also, Kraus v. Congdon, 161 Fed. 18, 88 C. C. A. 182 (possession may be taken for purpose of bringing the suit, if not tortious); Davis v. Crump, 162 Cal. 513, 123 Pac. 294 (same); Sayre v. Sage, 47 Colo. 559, 108 Pac. 160 (possession obtained by trespass).

50 Searles v. Costillo, 12 La. Ann. 203; Douglass v. Nuzum, 16 Kan. 515; Conklin v. Hinds, 16 Minn. (Gil. 411) 457; Shepherd v. Nixon, 43 N. J. Eq. 627, 13 Atl. 617. See, also, Randle v. Daughdrill, 142 Ala. 490, 39 South. 162 (mere constructive possession of wild lands); Crabtree v. Alabama Land Co., 155 Ala. 513, 46 South. 450 (disputed possession insufficient); Vandegrift v. Southern Mineral Land Co., 166 Ala. 312, 51 South. 983 (same); Nugent v. Mallory, 145 Ky. 824, 141 S. W. 850; Cumberland Co. v. Kelly, 156 Ky. 397, 160 S. W. 1077; but see Rucker v. Tennessee Coal, Iron & R. Co., 176 Ala. 456, 58 South. 465. As to what acts are sufficient possession of submerged land, see Le Sourd v. Edwards, 236 Ill. 169, 127 Am. St. Rep. 287, 86 N. E. 212. In New York, a plaintiff must have been in possession for three years, claiming an estate in fee, for life, or for a term of years not less than ten: Ford v. Belmont, 69

Some of the statutes expressly provide that the possession of the tenant shall be equivalent to actual possession by the landlord. In the states where there is no such express provision, the courts nevertheless have held that actual possession by the tenant is sufficient to support the landlord's suit.<sup>51</sup>

§ 2160. (§ 738.) Title of Plaintiff. — As a general rule, the suit may be brought by anyone claiming some right or interest in the land.<sup>52</sup> In most of the states the

N. Y. 567; Austin v. Goodrich, 49 N. Y. 266; Diefendorf v. Diefendorf, 132 N. Y. 100, 30 N. E. 375; Pom. Eq. Jur., § 1397, note. The actual possession need be of part only of a tract, where no one is in actual possession of the remainder; see Yard v. Ocean Beach Ass'n, 49 N. J. Eq. 306, 24 Atl. 729.

In other states, the constructive possession which the law presumes from the legal title is sufficient: See Flood v. Templeton, 152 Cal. 148, 13 L. R. A. (N. S.) 579, 92 Pac. 78 (though a third person is in actual possession); Mitchell v. Titus, 33 Colo. 385, 80 Pac. 1042 (property vacant); Vanderpan v. Pelton, 22 Colo. App. 357, 123 Pac. 960 (same).

51 Fulkerson v. Chisna M. & I. Co., 122 Fed. 782; Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Or. 366, 30 Pac. 30 (quoting statute). Possession by a tenant is insufficient when the action is brought by the landlord against the tenant in possession setting up a claim adverse to his landlord: Van Winkle v. Hinckle, 21 Cal. 342.

52 The text of Pom. Eq. Jur., § 1397, is quoted to this effect in Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213. In Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114, the court says: "It will be observed that a party, to be entitled to maintain an action under this section, is not required to have any specific interest in or lien upon the property, real or personal, but that it is sufficient to maintain the action that there is reasonable apprehension that if the instrument sought to be canceled is left outstanding, it may cause serious injury to him and that as to him it is void or voidable." The owner of an estate or interest in land less than an estate in fee may sue: Pierce v. Felter, 53 Cal. 18; Stoddart v. Burge, 53 Cal. 394. See, also, Gulf Coal & Coke Co. v. Alabama Coal & Coke Co., 145 Ala. 228, 7 L. R. A. (N. S.) 712, 40 South. 397 (owner of coal and minerals in the land); German-American Sav. Bank v. Gollmer, 155 Cal. 683, 24 L. R. A.

owner of an equitable interest as well as the holder of the legal title may maintain the suit to determine adverse claims.<sup>53</sup>

(N. S.) 1066, 102 Pac. 932 (estate for years, suit by lessee against lessor); Wannamaker v. Pendleton, 21 Colo. App. 174, 121 Pac. 108 (water rights); Hipes v. Doherty, 176 Ind. 379, 96 N. E. 152 (easement). A grantor who has executed a conveyance with the usual covenants of warranty: See ante, n. 17; Hounchin v. Salyards, 155 Iowa, 608, 133 N. W. 48. A remainder-man: First Nat. Bank of Perry v. Pilger, 78 Neb. 168, 126 Am. St. Rep. 592, 110 N. W. 704; Hobson v. Huxtable, 79 Neb. 340, 116 N. W. 278. A possessory title in or upon public lands is sufficient: Pralus v. Pacific etc. Min. Co., 35 Cal. 30; see, also, Wilson v. Madison, 55 Cal. 5; Merced Min. Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262; Mt. Rosa Min. etc. Co. v. Palmer, 26 Colo. 56, 77 Am. St. Rep. 245, 50 L. R. A. 289, 56 Pac. 176. In Knight v. Alexander, 38 Minn. 384, 8 Am. St. Rep. 675, 38 N. W. 796, it was held that one in possession may maintain the action without further proof of his interest. To the same effect, Kendrick v. Colyar, 143 Ala. 597, 42 South. 110; Bond v. Aickley, 168 Cal. 161, 141 Pac. 1188; Cramer v. McCann, 83 Kan. 719, 37 L. R. A. (N. S.) 108, 112 Pac. 832; contra, Clark v. Huff, 49 Colo. 197, 112 Pac. 542. A title by adverse possession is sufficient: Work v. United Globe Mines, 12 Ariz. 339, 100 Pac. 813; Le Moyne v. Hays, 145 Ky. 415, 140 S. W. 552; Nash v. Northwest Land Co., 15 N. D. 566, 108 N. W. 792.

That the plaintiff must rely on the strength of his own title is held in Meyer v. Snell, 89 Ark. 298, 116 S. W. 208; McMillan v. Morgan, 90 Ark. 190, 118 S. W. 407; Brown v. Comonow, 17 N. D. 84, 114 N. W. 728. That the burden of proof lies on plaintiff to establish his title, see Heaton v. Grant Lodge, 55 Ind. App. 100, 103 N. E. 488. That defendant in possession may, without proving title in himself, defeat the action by showing that plaintiff has no title, see Van Patten v. O'Brien, 88 Neb. 382, 129 N. W. 540.

53 The text is quoted in Coleman v. Jaggers, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894; and cited in Fowler v. Alabama Iron & Steel Co., 154 Ala. 497, 45 South. 635 (dissenting opinion). See Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295; Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806; Brown v. Wilson, 21 Colo. 309, 52 Am. St. Rep. 228, 40 Pac. 688; Stanley v. Holliday, 130 Ind. 464, 30 N. E. 634; Vier v. Detroit, 111 Mich. 646, 70 N. W. 139; Eayrs v. Nason, 54 Neb. 143, 74 N. W. 408. See, also, Wilson v. Bombeck, 38 Okl. 498, 134 Pac. 382; Mitchell v. Black

§ 2161. (§ 739.) Nature of the Adverse Claim. — In general, it may be said that the action may be brought against any person claiming an adverse interest, of whatever kind.<sup>54</sup> The words "claim an estate or inter-

Eagle Min. Co., 26 S. D. 260, Ann. Cas. 1913B, 85, 128 N. W. 159; but see Le Moyne v. Hays, 145 Ky. 415, 140 S. W. 552. "Undoubtedly where a party holding a legal title seeks to enforce it as against a person in possession claiming under an invalid title or one which the party complaining claims to be such, the only proper remedy is ejectment, and that remedy is proper. But where a party has an equitable cause of action against another, arising within any recognized rule of equity jurisdiction, such right can be enforced in equity, whether the complainant is in possession or not": King v. Carpenter, 37 Mich. 363 (in a state of the first class). That the statutes do not deprive a person out of possession of any equitable relief to which he would otherwise be entitled, see this case, and Pom. Eq. Jur., § 1397, note 1.

The suit may be maintained by the grantee of a devisee before distribution of the estate against anyone but the executor or administrator: Jordan v. Fry, 98 Cal. 264, 33 Pac. 95. Title to a homestead interest may be quieted: McKinnie v. Shaffer, 74 Cal. 614, 16 Pac. 509. An administrator has a title which may be quieted: Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398; but see Gulf Coal & Coke Co. v. Appling, 157 Ala. 325, 47 South. 730. The equitable owner of swamp lands, who has paid the state in full, so that the state is merely a naked trustee of the legal title, has an interest which may be quieted against a subsequent patentee from the state: Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295. So, a holder of an equitable title, under a valid location made prior to a patent to a railroad: Van Ness v. Rooney, 160 Cal. 131, 116 Pac. 392.

In California it is held that the action cannot be brought by the holder of an equitable title against the holder of the legal title; the proper form of action in such a case is one to enforce the trust by obtaining a conveyance of the legal title: See Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806; Shanahan v. Crampton, 92 Cal. 9, 28 Pac. 50; Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319; Harrigan v. Mowry, 84 Cal. 456, 22 Pac. 658, 24 Pac. 48. See, also, Los Angeles County v. Hannon, 159 Cal. 37, Ann Cas. 1912B, 1065, 112 Pac. 878.

54 Landregan v. Peppin, 94 Cal. 465, 467, 29 Pac. 771; Fry v.
 Summers, 4 Idaho, 424, 39 Pac. 1118; Clark v. Darlington, 7 S. D.

est," which are the usual words of the statutes, are used in a broad sense and are not technical in their meaning.<sup>55</sup> Though the defendant's claim is worthless, and void upon its face, yet if it be hostile to the plaintiff and cloud his title so as to depreciate the market value in the estimation of business men, the action can be maintained.<sup>56</sup> It is also immaterial whether or not the

148, 58 Am. St. Rep. 835, 63 N. W. 771. See, also, Bousher v. Andrews, 48 Ind. App. 664, 96 N. E. 483 (against claim of easement of passage); Klemmens v. First Nat. Bank of Cassopolis, 22 N. D. 304, 133 N. W. 1044 (by homestead claimant against judgment creditor): McGuinness v. Hargiss, 56 Wash. 162, 21 Ann. Cas. 220, 105 Pac. 233 (against recorded notice of contract of sale). Relief was granted in the following cases: Against purchasers on execution: Lovelady v. Burgess, 32 Or. 418, 52 Pac. 25; Maxon v. Ayers, 28 Wis. 612; against the holder of a tax certificate: Dean v. City of Madison, 9 Wis. 402; Clark v. Darlington, 7 S. D. 148, 58 Am. St. Rep. 835, 63 N. W. 771; against claimant of an invalid mortgage lien: Withers v. Jack, 79 Cal. 297, 12 Am. St. Rep. 143, 21 Pac. 824. "Nor is it necessary that the adverse claim should be of any particular character, . . . the statute does not confine the remedy to the case of an adverse claimant setting up a legal title or even an equitable one; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title (Head v. Fordvce, 17 Cal. 151; Horn v. Jones, 28 Cal. 204; Joyce v. McAvoy, 31 Cal. 273, 89 Am. Dec. 172); and the rule may be even more broadly stated, viz.: that the action may be maintained by the owner of property to determine any adverse claim whatever'': Castro v. Barry, 79 Cal. 446, 21 Pac. 946.

 $^{55}$  Goldberg v. Taylor, 2 Utah, 486; see, also, cases cited in preceding note.

56 Campbell v. Disney, 93 Ky. 41, 18 S. W. 1027; Bogert v. City of Elizabeth, 27 N. J. Eq. 568; Murphy v. Sears, 11 Or. 127, 4 Pac. 471. It is immaterial that the adverse claim is invalid upon its face: Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55; Empire Ranch & Cattle Co. v. Wilson, 24 Colo. App. 83, 131 Pac. 779; Palmer v. Yorks, 77 Minn. 20, 79 N. W. 587; McLaughlin v. McLaughlin, 228 Mo. 635, 137 Am. St. Rep. 680, 129 S. W. 21; Bogert v. City of Elizabeth, 27 N. J. Eq. 568; Rumbo v. Gay Mfg. Co., 129 N. C. 9, 39 S. E.

defendant claims under the same or a different and independent source of title from the plaintiff's.<sup>57</sup> Neither is it material whether or not the defendant has actually asserted such claim before the commencement of the action, as it is one of the essential features of this action, wherein it differs from the original equitable suit to quiet title, that the plaintiff need not wait until proceedings are brought against him.<sup>58</sup>

There is some diversity of opinion as to whether the action will lie against a mere lien claimant. Under those statutes permitting the action to be brought against anyone asserting a "claim" it seems that the action lies against the assertion of a lien, but where the statute permits the action only against one claiming "title" or an "estate," it cannot be brought against one who asserts a mere lien.<sup>59</sup>

§ 2162. (§ 740.) Service of Process by Publication. The action is a clear instance of those suits *quasi in rem*, in which substituted service or service by publication

581; Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949; Moores v. Clackamas County, 40 Or. 536, 67 Pac. 662; Kinsman v. Spokane, 20 Wash. 118, 72 Am. St. Rep. 24, 54 Pac. 934; Pacific Coast Pipe Co. v. Hedican, 61 Wash. 576, Ann. Cas. 1912C, 833, 112 Pac. 655; Bird Timber Co. v. Snohomish County, 88 Wash. 90, 152 Pac. 689; Fox v. Williams, 92 Wis. 320, 66 N. W. 357; Broderick v. Cary, 98 Wis. 419, 74 N. W. 95.

57 Walton v. Perkins, 33 Minn. 357, 23 N. W. 527.

58 Bulwer Con. Min. Co. v. Standard Con. Min. Co., 83 Cal. 589, 23 Pac 1102; Curtis v. Sutter, 15 Cal. 289. The text is cited, to the effect that the plaintiff may be relieved from assertion of the claim in future, in Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 101 Pac. 825, 104 Pac. 281.

59 To the effect that the action is maintainable, see Kittle v. Bellegarde, 86 Cal. 564, 25 Pac. 55; Alt v. Graff, 65 Minn. 191, 68 N. W. 9; Wilson v. Hooser, 76 Wis. 387, 45 N. W. 316. Contra, Fejervary v. Langer, 9 Iowa, 159; Jersey City v. Lembeck, 31 N. J. Eq. 255; Power v. Bowdle, 3 N. D. 107, 44 Am. St. Rep. 511, 21 L. R. A. 328, 54 N. W. 404.

may be authorized on defendants not found within the jurisdiction; and such service is expressly authorized in this action by the statutes of many of the states.<sup>60</sup>

§ 2163. (§ 741.) Pleading—On the Part of Plaintiff. In accordance with the general rule relating to statutory proceedings, it is sufficient if the bill or complaint embodies the essential averments of the statute.<sup>61</sup> It is sufficient to allege the title or interest of the plaintiff in the land, and that he has the possession thereof (where the statute requires the plaintiff to be in possession). Under those statutes where possession in the plaintiff is sufficient, ownership in the plaintiff need not be alleged.<sup>62</sup> It is not generally necessary to allege the

60 Arndt v. Griggs, 134 U. S. 316, 33 L. Ed. 918, 10 Sup. Ct. 557; Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; Essig v. Lower, 120 Ind. 239, 21 N. E. 1090; Wood v. Nicolson, 43 Kan. 461, 23 Pac. 587; Scarborough v. Myrick, 47 Neb. 795, 66 N. W. 867. As sustaining the validity of such service by publication, see, also, ante, volume I, chapter I.

61 Paton v. Lancaster, 38 Iowa, 494. See, also, Gray v. Walker, 157 Cal. 381, 108 Pac. 278, and cases in the following notes.

62 To the effect that allegations of title and possession are sufficient, see Adler v. Sullivan, 115 Ala. 582, 22 South. 87. To the effect that allegations of title and that plaintiff is entitled to possession are sufficient, see Stanley v. Holliday, 130 Ind. 464, 30 N. E. 634. To the effect that an allegation of ownership is sufficient, see Ely v. New Mexico & A. R. Co., 129 U. S. 291, 32 L. Ed. 688, 9 Sup. Ct. 293; Davis v. Crump, 162 Cal. 513, 123 Pac. 294; Oliver v. Enriquez, 17 N. M. 206, 124 Pac. 798. To the effect that allegations of title and that land is unoccupied are sufficient, see Wakefield v. Day, 41 Minn. 344, 43 N. W. 71. In an action to quiet title, if the plaintiff is not entitled to possession, the complaint must show the nature of his interest or title, and that it is consistent with the right of possession in the other: Pittsburgh etc. R. R. Co. v. O'Brien, 142 Ind. 218, 41 N. E. 528. The complaint under the adverse claim statute need only aver that the plaintiff claims an interest in the land, and that the defendant asserts a claim of title adverse to the claim of the plaintiff. An allegation of the ownership of the fee is unnecessary: Stoddart v. Burge, 53 Cal. 394. In general, see the following recent nature or extent of the defendant's claim, nor is it necessary to point out the defects therein. It is sufficient to aver that the defendant claims an estate or interest in the property hostile to that of plaintiff and that he has none.<sup>63</sup>

§ 2164. (§ 742.) Defendant's Pleadings.—If the defendant does not claim any adverse estate or interest he should file his disclaimer.<sup>64</sup>

cases: Vaughan v. Palmore, 176 Ala. 72, 57 South. 488 (not necessary to allege ownership in terms; allegation of peaceable possession under claim of right, sufficient); Skelton v. Horrell, 232 Mo. 358, 134 S. W. 988, 137 S. W. 264 (must allege what title or interest plaintiff has); Fittichauer v. Metropolitan Fireproofing Co., 70 N. J. Eq. 429, 61 Atl. 746 (need not set forth the title).

63 This entire paragraph is quoted in Ziska v. Avey, 36 Okl. 405, 122 Pac. 722; and cited in Bennett v. Quinlan, 47 Mont. 247, 131 Pac. 1067. See Ely v. New Mexico etc. R. R. Co., 129 U. S. 291, 32 L. Ed. 688, 9 Sup. Ct. 293; Adler v. Sullivan, 115 Ala. 582, 22 South. 87; Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Amter v. Conlan, 22 Colo. 150, 43 Pac. 1002; Tolleston Club of Chicago v. Clough, 146 Ind. 93, 43 N. E. 647; Entreken v. Howard, 16 Kan. 551; Parker v. Conrad, 74 Kan. 111, 85 Pac. 810; Campbell v. Disney, 93 Ky. 41, 18 S. W. 1027; Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370; Monighoff v. Sayre, 41 N. J. Eq. 113, 3 Atl. 397; Fittichauer v. Metropolitan Fire Proofing Co., 70 N. J. Eq. 429, 61 Atl. 746; Clark v. Darlington, 7 S. D. 148, 58 Am. St. Rep. 835, 63 N. W. 771; Glassman v. O'Donnell, 6 Utah, 446, 451, 24 Pac. 537. But in the following cases it was held that the nature of the defendant's claim or its invalidity must be shown: McDonald v. Early, 15 Neb. 63, 17 N. W. 257; King v. Higgins, 3 Or. 406; Page v. Kennan, 38 Wis. 320. In an action to quiet title the allegation in the complaint that "defendant claims some interest in the land adverse to plaintiff's, which claim is without right and unfounded, and a cloud on plaintiff's title," is sufficient, even though the land in issue consists of several parcels: Tolleston Club of Chicago v. Clough, 146 Ind. 93, 43 N. E. 647. In an action to quiet title, an allegation in the complaint that plaintiff is seised in fee simple and is in possession of the lands in question, and that defendant asserts an unfounded claim of title in the premises, is a sufficient averment that defendant's claim of title is adverse: Dumont v. Dufore, 27 Ind. 263.

64 Bulwer Con. Min. Co. v. Standard Con. Min. Co., 83 Cal. 589,

Where the defendant does not disclaim but puts in an answer, he must set up therein whatever right, title or interest he may claim in the property. As the basis of the right to require the adverse interest to be adjudicated is the plaintiff's own interest or ownership in the land, where such interest or ownership is controverted by a general denial, a sufficient issue of fact is raised.

23 Pac. 1102; Miller v. Curry, 124 Ind. 48, 24 N. E. 219, 374; Osborn v. Board of Suprs. of Hinds County, 71 Miss. 19, 14 South. 457. See Hurni v. Sioux City Stockyards Co., 138 Iowa, 475, 114 N. W. 1074 (costs taxed against defendant, where disclaimer after evidence was closed).

In the answer of defendant to a bill by the holder of the legal title in possession of land for the release of an adversary claim it is not sufficient to disclaim; there must be an offer to release: Loftus v. Cotes, 1 T. B. Mon. (Ky.) 97. In an action under Gen. Stats. 1866, c. 75, § 1, to determine an adverse claim to land, an answer denying any interest therein other than the lien of a tax sale certificate thereon amounts to a disclaimer: Brackett v. Gilmore, 15 Minn. (Gil. 190) 245.

65 Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771; Weston v. Estey, 22 Colo. 341, 45 Pac. 367. To constitute a defense to an action under the statute to determine adverse claims, the defendant must set up some adverse claim to or interest in the property, and he must show the nature of such claim: Weston v. Estey, 22 Colo. 341, 45 Pac. 367. Peaceable possession in the complainant is a jurisdictional fact in a bill to quiet title. If the defendant in his answer to such bill deny that the complainant is in peaceable possession of the premises in question, the issue thereby raised is preliminary to the main issue in the cause, and the defendant is entitled to have it tried in this court before it shall grant an issue to be sent to a court of law to try the question of title or no title: Beale v. Blake, 45 N. J. Eq. 668, 18 Atl. 300.

That a counterclaim for a mere money demand is not permissible, see Kane v. Borthwick, 50 Wash. 8, 18 L. R. A. (N. S.) 486, 96 Pac. 516.

66 Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398; Toland v. Toland, 123 Cal. 140, 57 Pac. 681; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488. See, also, McLiesh v. Ball, 58 Wash. 690, 137 Am. St. Rep. 1087, 109 Pac. 209. In an action to quiet title by an administrator,

§ 2165. (§ 743.) Judgment or Decree. — While a decree quieting title is not, strictly speaking, in rem, it fixes and settles the title to real estate, and to that extent it partakes of the nature of a judgment in rem.<sup>67</sup> The court may settle finally and adjudge whether the defendant has any right, interest or estate in the lands, and declare what such interest, estate or right may be,<sup>68</sup> or

a general denial puts in issue plaintiff's ownership of the land and the fact that he is administrator, and it is not demurrable on the ground that it does not set up defendant's claim, or disclaim: Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398.

67 Perkins v. Wareham, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51.

68 Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398; Empire Ranch & Cattle Co. v. Herrick, 22 Colo. App. 394, 124 Pac. 748; Satterwhite v. Sherley, 127 Ind. 59, 25 N. E. 1100; Blatchford v. Conner, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354; Randolph v. Ellis, 240 Mo. 216, 144 S. W. 483. A decree that the plaintiff is the owner in fee simple of the land and that one claiming the legal title thereto under a deed absolute in form has no interest therein except that of a mortgagee, "to be determined by proper suit of foreclosure," merely reserves the right to the mortgagee to have his interest determined as such mortgagee, without declaring what that interest is, and does not exclude him from enforcing his rights as such mortgagee, though it is erroneous in undertaking to quiet the title of the mortgagor, and then disturbing it again by declaring the mortgagee's right to foreclose: Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763. The defendant in an action to quiet title may specially plead that the plaintiff has only a lien or any interest less than he claims, and that the defendant has an equitable title or any interest in the land paramount or subordinate to that of the plaintiff; and the decree of the court should declare the rights of the parties in the property accordingly. It is immaterial whether plaintiff's title is a mortgage or a deed of trust held as security, as the defendant would in either case have the right to a judgment declaring just what interests in the property were held by each of the parties: Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398. But where the defendant in his answer prays no relief except that it be adjudged whether he has any interest, etc., in the land, affirmative relief, such as restraining the complainant from asserting any further claim, should not be dethe defendant's claims may be decreed to be invalid, 69 or it may grant an injunction, as ancillary to the principal relief, restraining the assertion of such claims, 70

creed to him: Cheney v. Nathan, 110 Ala. 254, 266, 55 Am. St. Rep. 26, 20 South. 99.

In general, see Peterson v. Gibbs, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121 (where plaintiff fails to prove full title as alleged, and defendant proves some interest, there should be a decree declaring the interests of both parties); Howard v. Brown, 197 Mo. 36, 95 S. W. 191 (court has no authority to order an accounting between the parties); Powell v. Crow, 204 Mo. 481, 102 S. W. 1024 (held that the court can do no more than to determine and adjudge the title, interest and estate of the several parties); Tarnow v. Carmichael, 82 Neb. 1, 116 N. W. 1031 (defendant, on cross-petition, entitled to a decree quieting his title); Brady v. Carteret Realty Co., 82 N. J. Eq. 620, 90 Atl. 257 (court may award possession to defendant if he is entitled to it).

69 People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Windom v. Wolverton, 40 Minn. 439, 42 N. W. 295. It is not necessary to set aside the instrument upon which the adverse claim is based, or to remove the cloud: Empire Ranch & Cattle Co. v. Wilson, 24 Colo. App. 83, 131 Pac. 779. A judgment in an action under Code of Civil Procedure, section 738, that the defendants have no right, title of interest in, or lien upon the land in question is equivalent to a judgment canceling all papers and proceedings upon which the adverse claim is founded, and has the same effect; and defendants who make default, and admit that the adverse claim is void upon its face, cannot be injured by an express cancellation in the judgment of assessments and certificates of sale-upon which their adverse claim is alleged to be founded: Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55.

As to judgment on default, see Sache v. Wallace, 101 Minn. 169, 118 Am. St. Rep. 612, 11 Ann. Cas. 348, 11 L. R. A. (N. S.) 803, 112 N. W. 386.

70 Brooks v. Calderwood, 34 Cal. 563; Green v. Glynn, 71 Ind. 336. Injunction in judgment against executing deeds in pursuance of the certificates of sale upon which the adverse claim is founded is proper in so far as it is ancillary to the principal relief and necessary to make that relief effectual; and if it is unnecessary to enjoin the execution of void deeds, the injunction is superfluous and cannot injure the defendants: Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55.

That, where the complaint contained only the statutory averments, general relief on the ground of resulting trust cannot be granted, or in those states where the statute, by its express terms or by its general language, permits the action to be brought to remove a cloud, deeds and instruments may be ordered to be canceled.<sup>71</sup> When the plaintiff is out of possession, and the action is authorized to be brought by one out of possession, a writ of possession may be granted in the decree, whenever the justice of the case demands it.<sup>72</sup>

was held, by a divided court, in Fowler v. Alabama Iron & Steel Co., 154 Ala. 497, 45 South. 635.

71 Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55; McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566. But in Bonsor v. Madison County, 204 Mo. 84, 102 S. W. 494, it was held that the Missouri statute furnished no authority for an injunction to prevent a cloud being cast on the title by a sheriff's sale.

72 Kitts v. Austin, 83 Cal. 172, 23 Pac. 290; People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Wylaid v. Mendel, 78 Iowa, 739, 37 N. W. 160. In an action to determine an adverse claim when it has been adjudicated that the defendant has no adverse claims or interests in the property in controversy, the subject of litigation is exhausted; and if it appears that the plaintiff is out of possession, the judgment necessarily entitles him to possession. Nor is it essential that the judgment itself should direct the issuance of the writ of possession, but the law is fully satisfied by a supplemental order to that effect: Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771.

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## CHAPTER XXXVII.

## SPECIFIC PERFORMANCE OF CONTRACTS—GROUND AND EXTENT OF THE JURISDICTION.

## ANALYSIS.

- § 744. Ground of the jurisdiction.
- §§ 745-761. Extent of the jurisdiction.
- §§ 745-754. Inadequacy of damages.
  - § 745. Contracts concerning lands.
  - § 746. Contract to make a will of lands.
  - § 747. Specific performance in favor of vendor.
    - § 748. Contracts concerning chattels—Delivery up of unique, etc., chattels.
    - § 749. Same; other grounds for relief.
    - § 750. Things in action.
  - § 751. Patents.
  - § 752. Shares of stock.
  - § 753. Miscellaneous agreements.
  - § 754. Awards.
  - § 755. No relief when decree would be nugatory—Partnership agreements.
  - § 756. No relief when performance depends on consent of a third person.
- §§ 757-761. Specific performance refused when court cannot render or enforce a decree.
  - § 758. Arbitration agreements, etc.
  - § 759. Contracts for personal services.
  - § 760. Contracts for building or construction.
  - § 761. Other contracts requiring continuous acts—Railroad operating agreements.

## § 2166. (§ 744.) Ground of the Jurisdiction.1—"The remedy of the specific performance of contracts is purely

1 This paragraph (Pom. Eq. Jur., § 1401) is cited, generally, in Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767. Section 744 is cited in Carrico v. Stevenson (Tex. Civ.), 135

equitable, given as a substitute for the legal remedy of compensation, whenever the legal remedy is inadequate or impracticable.<sup>2</sup> In the language of Lord Selborne: 'The principle which is material to be considered is, that the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice.'3 The jurisdiction depending upon this broad principle is exercised in two classes of cases: 1. Where the subject-matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representative of that subject-matter in the hands of the party who is entitled to its benefit; or in other words, where the damages are inadequate; 4 2. Where, from some special and practical features or incidents of the contract inhering either in its subject-matter, in its

S. W. 260. Pom. Eq. Jur., sections 1400-1405, cited in Omaha Lumber Co. v. Co-operative Inv. Co., 55 Colo. 271, 133 Pac. 1112.

<sup>&</sup>lt;sup>2</sup> The text is quoted in J. B. Brown & Sons v. Boston & M. R. R., 106 Me. 248, 76 Atl. 692; Burnett v. Mitchell (Tex. Civ. App.), 158 S. W. 800.

<sup>3 &</sup>quot;Wilson v. Northampton etc. R'y, L. R. 9 Ch. App. 279, 284. The foundation and measure of the jurisdiction is the desire to do justice, which the legal remedy would fail to give. This justice is primarily due to the plaintiff, but not exclusively, for the equities of the defendant are also protected. Specific performance is, therefore, a conscious attempt on the part of the court to do complete justice to both the parties with respect to all the judicial relations growing out of the contract between them: See Buxton v. Lister, 3 Atk. 383; Wright v. Bell, 5 Price, 325, 328, 329; Adderley v. Dixon, 1 Sim. & St. 607, 610; Ord v. Johnston, 1 Jur., N. S., 1063, 1064. [This sentence is quoted in Board of Comm'rs v. A. V. Wills & Sons, 236 Fed. 362.] It follows, therefore, that the remedial right, if it exists at all, must be mutual; each party must be able to enforce the remedy against the other": Pom. Eq. Jur., § 1401, note. As to the last statement, see further, §§ 747, 769-776, post.

<sup>4</sup> The text is quoted in Board of Comm'rs v. A. V. Wills & Sons, 236 Fed. 362.

terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law; or in other words, where damages are impracticable."<sup>5</sup>

5 Pom. Eq. Jur., § 1401. "This ground of the jurisdiction includes two classes of cases: 1. Where, from the lack of some legal formality or condition in the contract, no action at law can be maintained; 2. Where, from some peculiar feature of the contract, either in its subject-matter or in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty": Pom. Eq. Jur., § 1403; quoted in Board of Comm'rs v. A. V. Wills & Sons, 236 Fed. "Under this head are included,—1. Contracts in which the plaintiff has not performed, or even cannot perform, all the conditions on his part, so as to maintain an action at law, but which equity still may treat as binding and enforce. In such cases, if the contract is otherwise a proper one, equity will decree a specific performance with such allowances or compensations as are just: Mortlock v. Buller, 10 Ves. 292, 305, 306; Stewart v. Alliston, 1 Mer. 26, 32 [see post, chapter XLI]. Even where the partial failure or inability results from the plaintiff's own fault: Davis v. Hone, 2 Schoales & L. 341, 347; Voorhees v. De Meyer, 2 Barb. 37; Coale v. Barney, 1 Gill & J. 324; McCorkle v. Brown, 9 Smedes & M. 167. [See Day v. Hunt, 112 N. Y. 191, 19 N. E. 414; post, chapter XLI.] 2. Contracts not valid at all at law, but which equity treats as binding on the conscience. By far the most important are verbal contracts concerning land which are invalid by the statute of frauds, but which, if part performed, equity will enforce: Kirk v. Bromley Union, 2 Phill. Ch. 640; Gough v. Crane, 3 Md. Ch. 119; Crane v. Gough, 4 Md. 316 [see post, chapter XL, where this subject is treated]. Under this head are also included certain agreements void at the old common law, but which equity enforces; e. g., assignments of expectancies; agreements to assign things in action; contracts between a man and woman, who afterwards marry: Cannel v. Buckle, 2 P. Wms. 243; Gould v. Womack, 2 Ala. 83. [See Pom. Eq. Jur., § 1297.] 3. Contracts incomplete in their terms: Buxton v. Lister, 3 Atk. 383; Doloret v. Rothschild, 1 Sim. & St. 590; Phillips v. Thompson, 1 Johns. Ch. 131": Pom. Eq. Jur., § 1403, note.

§ 2167. (§ 745.) Extent of the Jurisdiction — Inadequacy of Damages—Contracts Concerning Lands.6—"The object of the present discussion is to determine the general classes of contracts which come within the jurisdiction, and which may be specifically enforced. Whether any particular contract belonging to one of these classes will actually be thus enforced depends upon other equitable elements, to be described hereafter. Lands: Where land, or any estate therein, is the subjectmatter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established. Whenever a contract concerning

6 This paragraph (Pom. Eq. Jur., § 1402) is cited, generally, in Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767; O. W. Kerr Co. v. Mygren, 114 Minn. 268, Ann. Cas. 1912C, 538, 130 N. W. 1112. Section 745 is cited in Dillon v. Ringleman, 55 Okl. 331, 155 Pac. 563.

7 The remedy of specific performance is sometimes spoken of as one of the most ancient heads of equity jurisdiction. Professor Ames, however (1 Green Bag, 26; 1 Ames, Cas. Eq. Jur., 37), is of the opinion that the cases relied on to support this belief were instances of other kinds of relief, and that with one exception, dating from 1458, no clear instance of specific performance is to be found earlier than the middle of the sixteenth century. Soon after that, however, the remedy became common, as applied to contracts concerning land. The origin and early grounds of the jurisdiction concerning land contracts are thus conjectural. The accepted explanation of the rule that specific performance of such contracts is enforced may be found in the following passages: Adderley v. Dixon, 1 Sim. & St. 607: "Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus, a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value." Cud v. Rutter, 1 P. Wms. 570: "One parcel of land may vary from, and be more commodious, pleasant, or convenient than another parcel of land." It should be carefully observed, however, real property is in its nature and incidents entirely unobjectionable,—when it possesses none of those features which, in ordinary language, influence the discretion of the court,—it is as much a matter of course for a court of equity to decree its specific performance as it is for a court of law to give damages for its breach." Among other contracts thus enforced are agreements to give or renew a lease, ocntracts for mortgages, 10 family settle-

that the remedy in equity is not refused because, in the individual case, these reasons may not hold good and damages in an action at law may be adequate relief: See 1 Pom. Eq. Jur., § 221. Compare with this usual theory of the jurisdiction, the explanation given in Kitchen v. Herring, 42 N. C. 190; and see 3 Pom. Eq. Jur., § 1250.

- 8 Pom. Eq. Jur., § 1402. See note to this section for a collection of various instances of contracts concerning land specifically enforced. The text is quoted in Cummings v. Nielson, 42 Utah, 157, 129 Pac. 619; Gove v. Gove's Adm'r (Armstrong), 88 Vt. 115, 92 Atl. 10; and cited in Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929; Hunholz v. Helz, 141 Wis. 222, 124 N. W. 257. See, also, Wilhite v. Skelton, 149 Fed. 67, 78 C. C. A. 635; Clark v. Cagle, 141 Ga. 703, L. R. A. 1915A, 317, 82 S. E. 21; Cumberledge v. Brooks, 235 Ill. 249, 85 N. E. 197; Brin v. Michalski, 188 Mich. 400, 154 N. W. 110; Fred Gorder & Son v. Pankonin, 83 Neb. 204, 131 Am. St. Rep. 629, 119 N. W. 449; Rodman v. Robinson, 134 N. C. 503, 101 Am. St. Rep. 877, 65 L. R. A. 682, 47 S. E. 19; Rudisill v. Whitener, 146 N. C. 403, 15 L. R. A. (N. S.) 81, 59 S. E. 995.
- 9 Furnival v. Crew, 3 Atk. 83, 87; Tritton v. Foote, 2 Brown Ch. 636; Burke v. Smyth, 3 Jones & L. 193; Moss v. Barton, L. R. 1 Eq. 474; Buckland v. Papillon, L. R. 2 Ch. App. 67; Clark v. Clark, 49 Cal. 586; Myers v. Silljacks, 58 Md. 319; Switzer v. Gardner, 41 Mich. 164, 2 N. W. 191; Wallace v. Scoggins, 17 Or. 476, 21 Pac. 558.
- 10 Ashton v. Corrigan, L. R. 13 Eq. 76; Hermann v. Hodges, L. R. 16 Eq. 18; De Pierres v. Thorn, 4 Bosw. 266; McClintock v. Laing, 22 Mich. 212 (oral agreement to give a mortgage; terms of the agreement not sufficiently clear and specific); Dean v. Anderson, 34 N. J. Eq. 496, and cases collected in reporter's note (parol agreement); Hicks v. Turck, 72 Mich. 311, 40 N. W. 339; Irvine v. Armstrong, 31 Minn. 216, 17 N. W. 343. See, also, § 753, post.

ments,<sup>11</sup> bonds to convey land,<sup>12</sup> judicial sales,<sup>13</sup> and other contracts concerning land.<sup>14</sup> The enforcement of contracts concerning land in another country or state is described in a previous section.<sup>15</sup>

§ 2168. (§ 746.) Contract to Make a Will of Lands.— A contract to devise land, though looked upon with some disfavor as a non-testamentary<sup>16</sup> method of dis-

11 Wistar's Appeal, 80 Pa. St. 484; Stratton v. Stratton, 58 N. H. 473, 42 Am. Rep. 604 (ante-nuptial agreement for husband's use of wife's property).

12 Ewins v. Gordon, 49 N. H. 444; St. Paul Division etc. v. Brown, 11 Minn. 356. See, also, Jordan v. Johnson, 50 Ind. App. 213, 98 N. E. 143; Handy v. Rice, 98 Me. 504, 57 Atl. 847.

13 Henry v. McKerlie, 78 Mo. 416; Gregory v. Tingley, 18 Neb. 319, 25 N. W. 88; Wakefield v. Wakefield, 256 Ill. 296, Ann. Cas. 1913E, 414, 100 N. E. 275 (holding purchaser to his bid by contempt process). It has been held, however, that although a purchase at a foreclosure sale is a contract, it cannot be enforced in the usual way by specific performance. (Citing Miller v. Collyer, 36 Barb. 250.) Plaintiff's remedy is by a motion to compel the purchaser to complete his contract: Burton v. Linn, 47 N. Y. Supp. 835, 21 App. Div. 609.

14 Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753; Hermann v. Babcock, 103 Ind. 461, 3 N. E. 142. See, also, Whitney v. Dewey, 158 Fed. 385, 86 C. C. A. 21 (partnership agreement); Tombler v. Sumpter, 97 Ark. 480, 134 S. W. 967 (to compel delivery of deed held in escrow); Omaha Lumber Co. v. Co-operative Investment Co., 55 Colo. 271, 133 Pac. 1112 (contract for the sale of standing timber); Western Securities Co. v. Atlee, 168 Iowa, 650, 151 N. W. 56, citing Pom. Eq. Jur., §§ 1401, 1402, 1403 (contract relating to partnership land); Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681 (equitable interest); Hardy v. Summers, 10 Gill & J. (Md.) 316, 32 Am. Dec. 167 (partition agreement); St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967 (sale of timber); Tidewater R. Co. v. Hurt, 109 Va. 204, 63 S. E. 421 (right of way).

15 See volume I, chapter I.

16 In re Parkin, [1892] 3 Ch. D. 510, 517 (the court here refused to extend the rule, and would not give specific performance of a contract to devise on the part of one who was merely donee of a testamentary power of appointment); Winne v. Winne, 166 N. Y.

position of property at death, and consequently not subject to the statute of wills, will yet be in effect enforced by equity when the contract is clear, definite, and without doubt.<sup>17</sup> It is obvious that equity cannot compel-

263, 82 Am. St. Rep. 647, 59 N. E. 832 (here the court observes that a contract to devise lands is not a testamentary disposition of property and not subject to the statute of wills).

17 The text is quoted in Ryan v. Lofton (Tex. Civ. App.), 190 S. W. 752. See Cassey v. Fitton (1679), 2 Hargrave, Juridical Arguments, 296; Laird v. Vila, 93 Minn. 45, 106 Am. St. Rep. 420, 100 N. W. 656; Austin v. Kuehn, 211 Ill. 113, 71 N. E. 841; Price v. Price, 133 N. C. 494, 45 S. E. 855; Johnson v. Hubbell, 10 N. J. Eq. 332, 64 Am. Dec. 773; Van Dyne v. Vreeland, 11 N. J. Eq. 370; Davison v. Davison, 13 N. J. Eq. 246; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; Jones v. Martin, 5 Ves. 266; Whiton v. Whiton, 179 Ill. 32, 54, 53 N. E. 722; Manning v. Pippen, 86 Ala. 357, 363, 11 Am. St. Rep. 46, 5 South. 572; Bolman v. Overall, 80 Ala. 451, 60 Am. Rep. 107, 2 South. 624; Logan v. Weinholt, 7 Bligh, 57, 59; Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573; McCullom v. Mackrell, 13 S. D. 262, 83 N. W. 255; Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57; Walton v. Walton, 7 Johns. Ch. 258; Knollys v. Alcock, 5 Ves. 649. See, also, the following recent cases: Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929; Monsen v. Monsen, 174 Cal. 97, 162 Pac. 90; Gordon v. Spellman, 145 Ga. 682, Ann. Cas. 1918A, 852, 89 S. E. 749; Oswald v. Nehls, 233 Ill. 438, 84 N. E. 619; Klussman v. Wessling, 238 Ill. 568, 87 N. E. 544; Chehak v. Battles, 133 Iowa, 107, 12 Ann. Cas. 140, 8 L. R. A. (N. S.) 1130, 110 N. W. 330 (informal adoption agreement); Bless v. Blizzard, 86 Kan. 230, 120 Pac. 351; Dillon v. Gray, 87 Kan. 129, 123 Pac. 878; Anderson v. Anderson, 75 Kan. 117, 9 L. R. A. (N. S.) 229, 88 Pac. 743 (informal adoption agreement); White v. Winchester, 124 Md. 518, Ann. Cas. 1916D, 1156, 92 Atl. 1057 (contract to leave a will unchanged); Peterson v. Bauer's Estate (In re Peterson), 76 Neb. 652, 107 N. W. 993, 111 N. W. 361; Crinkley v. Rogers, 100 Neb. 647, 160 N. W. 974; Deseumeur v. Rondel, 76 N. J. Eq. 394, 74 Atl. 703; Lawrence v. Prosser, 88 N. J. Eq. 43, 101 Atl. 1040; Phalen v. United States Trust Co., 186 N. Y. 178, 9 Ann. Cas. 595, 7 L. R. A. (N. S.) 734, 78 N. E. 943 (agreement to make no distinction among children); Dickinson v. Seaman, 193 N. Y. 18, 20 L. R. A. (N. S.) 1154, 85 N. E. 818 (contract to will all property does not prevent gift of insurance policy of reasonable value); Kelley v. Devin, 65 Or. 211, 132 Pac. 535; In re McGinley's Estate, 257 Pa. direct specific performance of the contract to devise land by ordering the promisor to make the devise before his death, as performance is not due until the time of death.<sup>18</sup> But equity will do what is equivalent to giving specific performance, by fastening a trust upon the land, in the heir or devisee, and enforcing conveyance by the representative holding the legal title in favor of the purchaser under the contract to devise.<sup>19</sup> Before the

St. 478, 101 Atl. 807 (will itself is a memorandum under the statute of frauds); Kerr v. Kennedy, 105 S. C. 496, 90 S. E. 177; Starnes v. Hatcher, 121 Tenn. 330, 117 S. W. 219 (contract to adopt and leave property); Milton v. Kite, 114 Va. 256, 76 S. E. 313. See, also, Phillips v. Bishop, 92 Kan. 313, 140 Pac. 834 (personal property); Jones v. Abbott, 228 Ill. 34, 119 Am. St. Rep. 412, 81 N. E. 791 (contract not to make a will may be specifically enforced). The law is thus stated in Bolman v. Overall, 80 Ala. 451, 60 Am. Rep. 107, 2 South. 624: "There is nothing in this contract which is repugnant to public policy. All the authorities agree that one may, for a valuable consideration, renounce the absolute power to dispose of his estate at pleasure, and bind himself by contract to dispose of his property by will to a particular person, and that such contract may be enforced in the courts after his decease, either by an action against the personal representative, or, in a proper case, by bill in the nature of specific performance against his heirs, devisees or personal representatives. . . . The theory on which the courts proceed is to construe such agreement . . . to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisee, and to enforce such trust against the heirs, and personal representatives of the deceased, or others holding under them charged with notice of the trust."

18 See Burdine v. Burdine's Ex'r, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992.

19 The text is quoted in Ryan v. Lofton (Tex. Civ. App.), 190 S. W. 752, and cited in Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929 (the statute of limitations is that applicable to trusts, not to contracts). See Allen v. Bromberg, 147 Ala. 317, 41 South. 771 (will made in violation of the contract should be probated); Phalen v. United States Trust Co., 186 N. Y. 178, 9 Ann. Cas. 595, 7 L. R. A. (N. S.) 734, 78 N. E. 943 (claimant need not object to probate of will); Oles v. Wilson, 57 Colo. 246, 141 Pac. 489; Teske v. Dittberner, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 181; Price v. Price, 133 N. C. 494, 45 S. E. 855.

death of the promisor, equity will enjoin any attempted conveyance of the land to a third party, as a fraud upon the promise of the contract to devise;<sup>20</sup> or if it has been conveyed to a grantee with notice or without consideration, equity will compel the land either to be held in trust for the devisee-purchaser, or to be reconveyed to the grantor.<sup>21</sup> Equity will construe the contract to devise strictly against the complainant, so as not to interfere with freedom of testamentary disposition. It is said, referring to a parol contract to devise, "In cases of this sort it will not satisfy the requirements of the law to show that there was an understanding of an indefinite character, leaving its terms more or less to inference."<sup>22</sup>

20 The text is quoted in Ryan v. Lofton (Tex. Civ. App.), 190 S. W. 752. See Whiton v. Whiton, 179 Ill. 32, 55, 73 N. E. 722; Logan v. Weinholt, 7 Bligh, 57; Newman v. French, 138 Iowa, 482, 128 Am. St. Rep. 212, 18 L. R. A. (N. S.) 218, 116 N. W. 468; Holland v. Holland, 89 Kan. 730, 132 Pac. 989; Van Horn v. Demarest, 77 N. J. Eq. 264, 77 Atl. 354. See, also, Jones v. Martin, 5 Ves. 266; Johnson v. Hubbell, 10 N. J. Eq. 332, 64 Am. Dec. 773; Van Dyne v. Vreeland, 11 N. J. Eq. 370; Davison v. Davison, 13 N. J. Eq. 246. See, further, Chantland v. Sherman, 148 Iowa, 352, 125 N. W. 871.

21 The text is quoted in Ryan v. Lofton (Tex. Civ. App.), 190
S. W. 752. See Teske v. Dittberner, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 181; Johnson v. Hubbell, 10 N. J. Eq. 332, 64 Am. Dec. 773; Synge v. Synge, [1894] 1 Q. B. 486.

22 Grantham v. Gossett, 182 Mo. 651, 81 S. W. 899; cited with approval in Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 200. The latter case also cited Kinney v. Murray, 170 Mo. 674, 71 S. W. 197, where it is stated: "The proof of such a contract must be so cogent, clear, and forcible as to leave no reasonable doubt in the mind of the chancellor as to its terms or character." As to enforcement of parol contracts to devise, part performed, see post, \$\\$ 826, 828.

A contract controlling the exercise of a power of appointment by will is unenforceable in equity; since to permit the donee of the power to bargain it away would be, in effect, to create a different power: Farmers' Loan & Trust Co. v. Mortimer, 219 N. Y. 290, 114 N. E. 389; Vinton v. Pratt, 228 Mass. 468, 117 N. E. 919.

§ 2169. (§ 747.) Specific Performance in Favor of Vendor.—It is well settled, with scarcely any dissent, that specific performance is granted in favor of a vendor of land as freely as in favor of a vendee, though the relief actually obtained by him is usually only a recovery of money—the purchase price.<sup>23</sup> Three theories have been advanced to explain this rule: (1) It is said that the vendor's remedy in law by damages is inadequate, since the measure of damages is the difference between the agreed price and the market value, whereas the vendor

23 "The suit by the vendor for the specific performance of an ordinary land contract is really brought for the recovery of money alone, and it differs from the suit to enforce a vendor's lien in the fact that the judgment is for the recovery of the money generally, and not out of the land itself as a special fund": 1 Pom. Eq. Jur., § 112, note 1. See, also, Pom. Spec. Perf., § 165, and cases cited. As examples of such suits, see Raymond v. San Gabriel Val. L. & W. Co., 53 Fed. 883, 4 C. C. A. 89; Hodges v. Kowing, 58 Conn. 12, 7 L. R. A. 87, 18 Atl. 979; Loveridge v. Shurtz, 111 Mich. 618, 70 N. W. 132; Moore v. Baker, 62 N. J. Eq. 208, 49 Atl. 836 (citing Pom. Eq. Jur., §§ 1402, 1405, 1407); Hammond v. Foreman, 48 S. C. 175, 26 S. E. 212; Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739. See, also, these recent cases: Donahoe v. Franks, 199 Fed. 262; McClurg v. Crawford, 209 Fed. 340, 126 C. C. A. 266; Wilkins v. Eanes, 126 Ark. 339, 190 S. W. 99; Waratah Oil Co. v. Reward Oil Co., 23 Cal. App. 638, 139 Pac. 91; Morgan v. Eaton, 59 Fla. 562, 138 Am. St. Rep. 167, 52 South. 305; Clark v. Cagle, 141 Ga. 703, L. R. A. 1915A, 317, 82 S. E. 21; Migatz v. Stieglitz, 166 Ind. 361, 77 N. E. 400; Staples v. Mullen, 196 Mass. 132, 81 N. E. 877; O. W. Kerr Co. v. Nygren, 114 Minn. 268, Ann. Cas. 1912C, 538, 130 N. W. 1112; Freeman v. Paulson, 107 Minn. 64, 131 Am. St. Rep. 438, 119 N. W. 651; Smith v. Smith, 84 N. J. Eq. 299, 93 Atl. 890; Dillon v. Ringleman, 55 Okl. 331, 155 Pac. 563; Larrabee v. Bjorkman, 79 Or. 467, 155 Pac. 974; Kerr v. Kerr, 216 Pa. St. 641, 9 Ann. Cas. 89, 66 Atl. 107; Bohlen v. Black, 237 Pa. St. 399, 85 Atl. 470; Curtis Land etc. Co. v. Interior Land Co., 137 Wis. 341, 129 Am. St. Rep. 1068, 118 N. W. 853; Heins v. Thompson & Flieth Lumber Co., 165 Wis. 563, 163 N. W. 173. But see contra, Porter v. Frenchman's Bay etc. Co., 84 Me. 195, 24 Atl. 814. As to the alternative remedy of the foreclosure of the vendor's lien, see post, §§ 862, 863, and cases cited; and Pom. Eq. Jur., § 1262.

might for particular reasons stand in need of the whole sum agreed to be paid.<sup>24</sup> The objection to this theory is, that it proves too much; since, if the same test were applied generally, damages might be an inadequate remedy in every instance of sale and purchase, of chattels as well as of land. (2) It is said that by the doctrine of equitable conversion the vendee is a trustee of the purchase price for the vendor, and the vendor, in obtaining specific performance, enforces this trust.<sup>25</sup> To this it may be answered, that it proves too little; for the doctrine of equitable conversion is not supposed to extend to contracts for the sale and purchase of chattels or things in action,26 yet the cases are not infrequent where such contracts have been enforced at the suit of the vendors therein.<sup>27</sup> (3) The rule is more satisfactorily accounted for by reference to the doctrine of mutuality; viz., that where an equitable remedial right in the vendee is recognized, a corresponding remedial

<sup>24</sup> Lewis v. Lechmere, 10 Mod. 503. See, also, Hodges v. Kowing, 58 Conn. 12, 7 L. R. A. 87, 18 Atl. 979, where the remedy in damages is said to be inadequate; Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

<sup>25</sup> Pom. Eq. Jur., 4th ed., § 221, note 6; Lewis v. Lechmere, 10 Mod. 503.

<sup>26</sup> Pom. Eq. Jur., 4th ed., § 221, note 6.

<sup>27</sup> See Withy v. Cottle, 1 Sim. & St. 174 (vendor of annuity); Adderley v. Dixon, 1 Sim. & St. 607 (vendor of debt); Cogent v. Gibson, 33 Beav. 557 (vendor of patent); Kennedy v. Wexham, Madd. & G. 355 (annuity); Law v. Smith, 68 N. J. Eq. 81, 59 Atl. 327; Bumgardner v. Leavitt, 35 W. Va. 194, 12 L. R. A. 776, 13 S. E. 67. See, also, Rothholz v. Schwartz, 46 N. J. Eq. 477, 19 Am. St. Rep. 409, 10 Atl. 312. Further cases are: David v. McRae, 183 Fed. 812 (stock); Harris v. New, 167 Ky. 262, 180 S. W. 375 (stock; under circumstances of the case, vendor obliged to give an indemnity bond); Law v. Smith, 68 N. J. Eq. 81, 59 Atl. 327 (sale of mortgage). But see United States Fire Apparatus Co. v. G. W. Baker Mach. Co., 10 Del. Ch. 421, 95 Atl. 294; Anderson v. Olsen, 188 Ill. 502, 59 N. E. 239; Templeton v. Warner, 89 Wash. 584, 154 Pac. 1081, 157 Pac. 458.

right should be admitted in favor of the vendor.<sup>28</sup> This is the usual explanation of the rule, and appears to reconcile most, if not all, of the cases.

§ 2170. (§ 748.) Contracts Concerning Chattels—Delivery Up of Unique, etc., Chattels.—The doctrine is well settled "that equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality.<sup>29</sup> Where, however, particular chat-

28 Pom. Eq. Jur., 4th ed., § 221, note 6; § 1401, note 1. The text is quoted in United States Fire Apparatus Co. v. G. W. Baker Mach. Co., 10 Del. Ch. 421, 95 Atl. 294. See Lewis v. Lechmere, 10 Mod. 503; Withy v. Cottle, 1 Sim. & St. 174; Adderley v. Dixon, 1 Sim. & St. 607; Cogent v. Gibson, 33 Beav. 557; Kennedy v. Wexham, Madd. & G. 355; Raymond v. San Gabriel Val. L. & W. Co., 53 Fed. 883, 4 C. C. A. 89; Phillips v. Berger, 2 Barb. 608, and the recent cases, Migatz v. Stieglitz, 166 Ind. 361, 77 N. E. 400; Dillon v. Ringleman, 55 Okl. 331, 155 Pac. 563; Heins v. Thompson & Flieth Lumber Co., 165 Wis. 563, 163 N. W. 173. See, also, ante, § 744, and note 3.

29 The text is quoted in Lewman & Co. v. Ogden Bros., 143 Ala. 351, 5 Ann. Cas. 265, 42 South. 102; Fox v. Fitzpatrick, 190 N. Y. 259, 82 N. E. 1103. See Hapgood v. Rosenstock, 23 Fed. 86; Graham v. Herlong, 50 Fla. 521, 39 South. 111; Ridenbaugh v. Thayer, 10 Idaho, 662, 80 Pac. 229 (quoting Pom. Eq. Jur., § 1402); Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co., 63 Md. 285; Gottschalk v. Stein, 69 Md. 51, 13 Atl. 625; Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735. See, further, these cases, mostly recent: Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co., 161 Fed. 215; A. G. Lehman v. Island City Pickle Co., 208 Fed. 1014; Friedman v. Fraser, 157 Ala. 191, 47 South. 320 (bonds); Block v. Shaw, 78 Ark. 511, 95 S. W. 806 (cotton); Cooper v. Rowland, 95 Ark. 569, 130 S. W. 559 (county scrip); Emirzian v. Asato, 23 Cal. App. 251, 137 Pac. 1072 (contract to grow and sell orange trees); Morrison v. Land, 169 Cal. 580, 147 Pac. 259 (contract to bequeath a sum of money); Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60; Dorman v. McDonald, 47 Fla. 252; 36 South. 52 (lumber); Neal v. Parker, 98 Md. 254, 57 Atl. 213; Bomer v. Canaday, 79 Miss. 222, 89 Am. St. Rep. 593, 55 L. R. A. 328, 30 tels have some special value to the owner over and above any pecuniary estimate,—the pretium affectionis,—and where they are unique, rare, and incapable of being reproduced by money damages, equity will decree a specific delivery of them to their owner, and the specific performance of contracts concerning them."30 "Anal-

South. 638 (lumber); New England Box Co. v. Prentiss, 75 N. H. 246, 72 Atl. 826 (lumber); Furman v. Clark, 11 N. J. Eq. 306; Bower v. Bowser, 49 Or. 182, 88 Pac. 1104; Meehan v. Owens, 196 Pa. St. 69, 46 Atl. 263; Wallace v. Baltimore & O. R. R. Co., 216 Pa. St. 311, 65 Atl. 665 (suit for delivery of railroad cars illegally withheld; adequate remedy by replevin); Lumley v. Miller, 23 S. D. 16, 119 N. W. 1014 (cattle); Webb v. Durrett (Tex. Civ. App.), 136 S. W. 1189; Fothergill v. Rowland, L. R. 17 Eq. 132.

30 Pom. Eq. Jur., § 1402. The text is quoted in Lewman & Co. v. Ogden Bros., 143 Ala. 351, 5 Ann. Cas. 265, 42 South. 102; Kocurek v. Matychowiak (Mo. App.), 185 S. W. 740 (contract to purchase a half interest in a race-horse); and cited in Omaha Lumber Co. v. Co-operative Inv. Co., 55 Colo. 271, 133 Pac. 1112. See, also, 1 Pom. Eq. Jur., 4th ed., § 185, and cases collected in note (c). "This class includes,-1. Articles of special value to their owner, but of no general pecuniary value; and 2. Articles of such great rarity and value that they cannot be replaced by money,-paintings, statues, etc. The jurisdiction will be exercised to compel their delivery by one who wrongfully detains them, or to compel the specific execution of a contract for their sale or delivery": Pom. Eq. Jur., § 1402, note. In Pusey v. Pusey, 1 Vern. 273, the bill was that an ancient horn which time out of mind had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold the land by, might be delivered up. In Duke of Somerset v. Cookson, 3 P. Wms. 389, the suit was to compel the delivery of an old silver patera having a Greek inscription and dedication to Hercules, which had been dug up on plaintiff's estate. Fells v. Read, 3 Ves. 70, was brought to recover a tobacco-box of a remarkable kind, which belonged to a club. Ld. Ch. Loughborough said: "The Pusey horn, the patera of the Duke of Somerset, were things of that sort of value that a jury might not give twopence beyond the weight. It was not to be cast to the estimation of people who had not those feelings. . . . It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it." The dresses and regalia of ogous to this jurisdiction and for the same reasons, equity will decree the delivery up to the lawful owner of

a lodge of Free Masons were recovered in Lloyd v. Loaring, 6 Ves. 773; a box of jewels in Saville v. Tankred, 1 Ves. Sr. 101. Family pictures were ordered to be delivered up in Lady Arundell v. Phipps, 10 Ves. 139; title deeds and valuable paintings in Lowther v. Lord Lowther, 13 Ves. 95; a finely carved cherry-stone in Pearne v. Lisle, Amb. 75, 77; in Falcke v. Gray, 4 Drew. 651, two very valuable jars. In the following cases specific performance was decreed: Williams v. Carpenter, 14 Colo. 17, 24 Pac. 558; Brady v. Yost, 6 Idaho, 273, 55 Pac. 542 ("newspaper business, printing plant, and material used in said business"). In the following cases delivery up of chattels was decreed.

Property of sentimental value.—Pusey v. Pusey, 1 Vern. 273 (the leading case); Wilkinson v. Stitt, 175 Mass. 581, 56 N. E. 830 (cup won as prize); Onondaga Nation v. Thacher, 61 N. Y. Supp. 1027, 29 Misc. Rep. 428 (affirmed, 53 App. Div. 561, 65 N. Y. Supp. 1014—wampum belts belonging to Indians); Dock v. Dock, 180 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. 411 (private letters).

Slaves.—Murphy v. Clark, 9 Miss. (1 Smedes & M.) 221; Hull v. Clark, 22 Miss. (14 Smedes & M.) 187; Horry v. Glover, Riley Eq. 53, 2 Hill Eq. 515; Young v. Burton, 1 McMull. Eq. 255; Bobo v. Grimke, 1 McMull. Eq. 304; Sims v. Shelton, 2 Strob. Eq. 221; Womack v. Smith, 11 Humph. 478, 54 Am. Dec. 51.

Miscellaneous.—Battalion Westerly Rifles v. Swan, 22 R. I. 333, 84 Am. St. Rep. 849, 47 Atl. 1090 (books of a militia company-no value ascertainable in money). See, also, Pom. Eq. Jur., § 185, where the author says: "The jurisdiction embraces suits to compel the restoration or delivery of possession of specific chattels of such a peculiar, uncommon, or unique character that they cannot be replaced by means of money, and are not susceptible of being compensated for by any practical or certain measure of damages, and in respect of which the legal actions of replevin, detinue, or trover do not furnish a complete remedy. This particular exercise of the jurisdiction extends, for a like reason, to suits to compel the delivery of deeds, muniments of title, and other written instruments. the value of which cannot, with any reasonable certainty, be estimated in money." Quoted in Williams v. Carpenter, 14 Colo. 477. 24 Pac. 558. For instances of the issuance of injunctions in aid of the remedy, see Lloyd v. Loaring, 6 Ves. 773; Hart v. Herwig, L. R. 8 Ch. App. 860; Elliott v. Jones (Del. Ch.), 101 Atl. 872.

deeds, and other written muniments of title."31 Where, however, the party seeking to recover the property has himself fixed a value at which he has agreed to sell, he cannot subsequently come into equity to obtain the specific delivery of the chattel.32

- § 2171. (§ 749.) Same—Other Grounds for Relief.—An agreement to furnish articles necessary to the vendee and which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, may be enforced, for it is impossible to ascertain how much the vendee would suffer from not being able to obtain such articles for use in his business.<sup>33</sup> "If a trust or fiduciary relation exists in refer-
- 31 Pom. Eq. Jur., § 1402, note; Pom. Eq. Jur., 4th ed., § 185, and cases in note (d). See, also, Beresford v. Driver, 14 Beav. 387, 16 Beav. 134; Folsom v. McCague, 29 Neb. 124, 45 N. W. 269 (contracts for sale of land); Pattison v. Skillman, 34 N. J. Eq. 344 (documents valuable to prove heirship); Baum's Appeal, 113 Pa. St. 58, 4 Atl. 461 (to compel the delivery of a deed held in escrow); Equitable Trust Co. v. Garis, 190 Pa. St. 544, 70 Am. St. Rep. 644, 42 Atl. 1022, 44 Wkly. Not. Cas. 41; McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec. 584 (valuable private maps); Kelly v. Lehigh Min. & Mfg. Co., 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511; Harrison v. Woodward, 11 Cal. App. 15, 103 Pac. 933; Motley v. Darling, 86 N. J. Eq. 185, 98 Atl. 384; Farnsworth v. Whiting, 104 Me. 488, 72 Atl. 314 (bill to recover key to safe-deposit box and bonds, notes and stock certificates).
- 32 Dowling v. Betjemann, 2 Johns. & H. 544. The text is quoted in Kocurek v. Matychowiak (Mo. App.), 185 S. W. 740. See, also, Lamb v. General Film Co., 130 La. 1026, 58 South. 867; Ryan v. Mc-Lane, 91 Md. 175, 80 Am. St. Rep. 438, 50 L. R. A. 501, 46 Atl. 340 (stock).
- 33 Adams v. Messinger, 147 Mass. 185, 6 Am. St. Rep. 679, 17 N. E. 491. See, also, Hapgood v. Rosenstock, 23 Fed. 86. In Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co., 63 Md. 285, specific performance was decreed of a contract to sell coal tar which plaintiff needed in order to fulfill existing contracts, and which it would be impossible to obtain otherwise than by purchasing "in other and distant cities, and transporting the same at

ence to the chattels, if an express trust has been created by the contract or an implied trust has arisen from the acts or omissions of the parties, then equity will exercise its jurisdiction to compel the specific performance of such contract, whether the chattels are common or special, since the court will always enforce a trust."<sup>34</sup> Insolvency of the defendant, rendering him unable to respond in damages, is recognized by dicta in a few

great expense and loss, the amount of which it is impossible to estimate in advance." In Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 26 Am. St. Rep. 214, 12 L. R. A. 563, 27 N. E. 1005, specific performance was decreed of a contract to furnish fish skins to be used in the manufacture of glue. It appeared that fish skins are of a very limited production, that most of the producers were under contract with defendant, and that unless relief were given it would be very difficult if not impossible for defendant to carry on his business. See, also, Rector of St. David's v. Wood, 24 Or. 396, 41 Am. St. Rep. 860, 34 Pac. 18, and the following recent cases: Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21; Great Lakes & St. L. T. Co. v. Scranton Coal Co., 239 Fed. 603, 152 C. C. A. 437 (defendant agreed to furnish boats for lake commerce; plaintiff can obtain no other boats small enough to go through canal); Omaha Lumber Co. v. Co-operative Inv. Co., 55 Colo. 271, 133 Pac. 1112 (sale of standing timber enforced on a showing that the supply was rapidly decreasing); Strause v. Berger, 220 Pa. St. 367, 69 Atl. 818 (sale of growing timber of special value to plaintiff and difficult to procure); Hall v. Philadelphia Co., 72 W. Va. 573, 78 S. E. 755 (provision in oil and gas lease giving lessor "free gas for domestic purposes," enforced, since gas in that locality obtainable only from lessee). See, however, Pom. Spec. Perf., § 27; and compare Lewman & Co. v. Ogden Bros., 143 Ala. 351, 5 Ann. Cas. 265, 42 South. 102 (even if equivalent chattel cannot be conveniently procured, plaintiff must show that damages are inadequate; mere convenience of location an insufficient ground for the jurisdiction).

34 Pom. Eq. Jur., § 1402, note, and cases cited. The text is cited in Brissell v. Knapp, 155 Fed. 809. See, also, Wood v. Roweliffe, 3 Hare, 304 (affirmed 2 Ph. 382); Livesley v. Johnston, 45 Or. 30, 106 Am. St. Rep. 647, 65 L. R. A. 783, 76 Pac. 13, 946.

cases as a sufficient ground for relief, although damages, if collectible, would be an adequate remedy.<sup>35</sup>

35 Parker v. Garrison, 61 Ill. 250; Ames v. Witbeck, 179 Ill. 458, 53 N. E. 969; Clark v. Flint, 22 Pick. 231, 33 Am. Dec. 733; Avery v. Ryan, 74 Wis. 591, 43 N. W. 317. In Ridenbaugh v. Thayer, 10 Idaho, 662, 80 Pac. 229, it is said that insolvency alone is not ground for relief. It is believed that in no case has insolvency alone been the ground for relief. The cases seem in conflict with sound principle in at least two respects. In the first place, such a rule makes one under such a contract a preferred creditor: Chafee v. Sprague, 16 R. I. 189, 13 Atl. 121. In the second place, the inadequacy of the legal relief which is the basis of equitable remedies is ordinarily in the nature of that relief in cases of a certain type, not in the difficulty of collection of damages in the individual instance. See Pom. Spec. Perf., §§ 26, 27.

Miscellaneous.—In a few cases it has been held that where a contract is to be performed in installments, that fact is sufficient to warrant relief: Buxton v. Lister, 3 Atk. 383; Stuart v. Pennis, 91 Va. 688, 22 S. E. 509; Omaha Lumber Co. v. Co-operative Inv. Co., 55 Colo. 271, 133 Pac. 1112 (sale of timber, where future profits would increase indefinitely and are difficult to estimate). There seems very little reason in support of this view, and it has been distinctly repudiated in other cases: Pollard v. Clayton, 1 Kay & J. 462; Fothergill v. Rowland, 17 Eq. 132, 140.

In Pollard v. Reardon, 65 Fed. 848, 13 C. C. A. 171, 21 U. S. App. 639, delivery of goods which could not be replevied because in the custody of a collector was decreed; and in Berry v. Friedman, 192 Mass. 131, 78 N. E. 305, on very special facts, delivery of an ordinary chattel was decreed, replevin being impossible, and the defendant being under no liability for damages to plaintiff.

Where part of an entire contract relates to personal property, and the rest to a subject-matter, such as land, over which equity jurisdiction is ordinarily exercised, specific performance may be had of the contract as a whole, including the clause relating to personal property: Kipp v. Laun, 146 Wis. 591, 131 N. W. 418; Dunham v. Slaughter, 268 Ill. 625, 109 N. E. 673; McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec. 584; Leach v. Fobes, 11 Gray (Mass.), 506, 71 Am. Dec. 732. See, also, the following miscellaneous cases: Raymond Syndicate v. Brown, 124 Fed. 80; Singer v. Carpenter, 125 Ill. 117, 17 N. E. 761; Hall v. Hiles, 2 Bush, 532; Williams v. Montgomery, 148 N. Y. 519, 43 N. E. 57; and cases collected in 4 Pom. Eq. Jur., § 1402, note 6.

- § 2172. (§ 750.) Things in Action.—"Contracts for the sale or assignment of things in action may be enforced by the purchaser, by compelling a transfer and delivery, where the legal damages might be too uncertain and conjectural to constitute an adequate compensation." Accordingly, a contract for the sale of the uncertain dividends which might become payable from the estate of a bankrupt—in other words, for the sale of a debt due by a bankrupt—may be specifically enforced; for damages cannot accurately represent the value of future dividends, and to compel the purchaser to take such damages would be to compel him to sell at a conjectural price. Takewise, a contract for the sale of an annuity may be enforced in equity.
- § 2173. (§ 751.) Patents.—Equity courts will take jurisdiction to compel the specific performance of contracts for the conveyance of patent rights, either at the suit of the vendor or of the vendee.<sup>39</sup> The grounds for

<sup>36</sup> Pom. Eq. Jur., § 1402.

<sup>37</sup> Wright v. Bell, 5 Price, 325; Adderley v. Dixon, 1 Sim. & St. 607; Gottschalk v. Stein, 69 Md. 51, 13 Atl. 625; Cutting v. Dana, 25 N. J. Eq. 265.

<sup>38</sup> In Withy v. Cottle, 1 Sim. & St. 174, Clifford v. Turrell, 1 Younge & C. Ch. 138, and Kenney v. Wexham, 6 Madd. 355, the agreements were for the purchase of annuities, and specific performance was had at the suit of the vendors. A contract for the payment of alimony to a divorced wife has been specifically enforced: Fleming v. Peterson, 167 Ill. 465, 47 N. E. 755, quoting the following cases as to annuities: Keenan v. Handley, 2 De Gex, J. & S. 283; Carberry v. Weston, 1 Brown Parl. C. 429; Marshall v. Thompson, 2 Munf. 412; Swift v. Swift, 3 Ir. Eq. 267.

<sup>39</sup> This paragraph is cited in Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767. See Cogent v. Gibson, 33 Beav. 557; Hapgood v. Rosenstock, 23 Fed. 86; Hull v. Pitrat, 45 Fed. 94; Corbin v. Tracy, 34 Conn. 325; Adams v. Messinger, 147 Mass. 185, 6 Am. St. Rep. 679, 17 N. E. 491; Electric Secret-Service Co. v. Gill-Alexander El. M. Co., 125 Mo. 140, 28 S. W. 486; Merrill v. Miller, 28 Mont. 134, 72 Pac. 423; McFarland v. Stanton Mfg.

the jurisdiction are two. In the first place, it is a thing which the vendor alone can supply; and we have already seen that this is treated by some authorities as sufficient to authorize relief. In the second place, damages for the breach cannot be accurately estimated, for the profits to be derived are future and conjectural.

§ 2174. (§ 752.) Shares of Stock.—The right to specific performance of contracts for the sale of corporate stock depends upon the character of the stock. In England it is held that a transfer of public stocks which are always to be had by any person who chooses to ap-

Co., 53 N. J. Eq. 649, 51 Am. St. Rep. 647, 33 Atl. 962; Spears v. Willis, 151 N. Y. 443, 45 N. E. 849; Reese's Appeal, 122 Pa. St. 392, 15 Atl. 807; Valley Iron Works Mfg. Co. v. Goodrick, 103 Wis. 436, 78 N. W. 1096; Fuller etc. Mfg. Co. v. Bartlett, 68 Wis. 73, 60 Am. Rep. 838, 31 N. W. 747 (implied contract for a license to manufacture machines embodying defendant's invention). Recent cases are: Indiana Mfg. Co. v. Nichols & Shepard Co., 190 Fed. 579; Thompson v. Automatic Fire Protection Co., 211 Fed. 120, 128 C. C. A. 22 (agreement to assign all inventions); Detroit Lubricator Co. v. Lavigne, 151 Mich. 650, 115 N. W. 988 (same); Portland Iron Works v. Willett, 49 Or. 245, 89 Pac. 421, 90 Pac. 1000 (same); McRae v. Smart, 120 Tenn. 413, 114 S. W. 729. Assignment of copyright: Benziger v. Steinhauser, 154 Fed. 151. The inadequacy of damages in such cases was explained by Carpenter, J., in Corbin v. Tracy, as follows: "All the data by which its value can be estimated are vet future and contingent. Experience may prove it to be worthless: another and better invention may supersede it; or it may itself be an infringement of some patent already existing. On the other hand, it may be so simple in its principle and construction as to defy all competition, and give its owner a practical monopoly of all branches of business to which it is applicable. In any event, its value cannot be known with any degree of exactness until after the lapse of time; and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages." To the effect that a vendor is entitled to the relief, see Cogent v. Gibson, 33 Beav, 557; but see Anderson v. Olsen, 188 Ill. 502, 59 N. E. 239. A parol contract to convey a patent may be specifically enforced: Whitney v. Burr, 115 Ill. 289, 3 N. E. 434.

ply for them in the market will not be decreed, for damages are adequate.<sup>40</sup> Shares of railway and other private corporations, which are limited in number and cannot always be had in the market, stand upon a different footing, and equity may grant its relief.<sup>41</sup> The rules in the United States are narrower, and, it would seem, more in accord with principle. Specific performance will not be decreed if the shares are readily obtainable in the open market.<sup>42</sup> If, however, the shares have no market rating, and cannot easily be obtained elsewhere, damages will be inadequate and specific performance will be granted.<sup>43</sup>

- 40 Cud v. Rutter, 1 P. Wms. 570.
- 41 Duncuft v. Albrecht, 12 Sim. 189; Poole v. Middleton, 29 Beav. 646.
  - 42 See cases cited in following note.
- 43 This paragraph is quoted in full in Bernier v. Griscom-Spencer Co., 161 Fed. 438; and cited in United States Fire Apparatus Co. v. G. W. Baker Mach. Co., 10 Del. Ch. 421, 95 Atl. 294. See Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084; New England Trust Co. v. Abbott, 162 Mass. 148, 154, 27 L. R. A. 271, 38 N. E. 432 (stock not in market); Northern Cent. R'y Co. v. Walworth, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253; Manton v. Ray, 18 R. I. 672, 49 Am. St. Rep. 811, 29 Atl. 998 (sufficient to allege that value of stock is not ascertainable, and that complainant cannot obtain it elsewhere). Recent cases are: Bernier v. Griscom-Spencer Co., 169 Fed. 889; Eckley v. Daniel, 193 Fed. 279; Blue Point Oyster Co. v. Haagenson, 209 Fed. 278; Ellis v. Treat, 236 Fed. 120, 149 C. C. A. 330; Moloney v. Cressler, 236 Fed. 636, 149 C. C. A. 632 (relief granted, as stock could not be bought in open market); Sherwood v. Wallin, 1 Cal. App. 532, 82 Pac. 566; Wait v. Kern River Mining, Milling & Developing Co., 157 Cal. 16, 106 Pac. 98 (relief granted, mining stock of unknown value); Bacon v. Grosse, 165 Cal. 481, 132 Pac. 1027; Gilfallan v. Gilfallan, 168 Cal. 23, Ann. Cas. 1915D, 784. 141 Pac. 623 (oil stock; relief granted); Cole v. Cole Realty Co., 169 Mich. 347, 135 N. W. 329; First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084; Baumhoff v. St. Louis etc. R. Co., 205 Mo. 248, 120 Am. St. Rep. 745, 104 S. W. 5; Dennison v. Keasby, 200 Mo. 408, 98 S. W. 546; Wood v. Kansas City Home Telephone Co., 223 Mo. 537, 123 S. W. 6 (citing Pom. Eq. Jur., § 1402); Whiting v. Enterprise Land etc. Co., 265 Mo. 374, 177

§ 2175. (§ 753.) Miscellaneous Agreements. — Specific performance may be had of a contract to insure, the jurisdiction being based upon the complications and embarrassments incident to an action at law to enforce the contract. Relief may be had in equity either before or after loss; and when sought after loss, the bill may be retained for the purpose of awarding the amount due. The same principles apply to life insurance contracts.

S. W. 589; Turley v. Thomas, 31 Nev. 181, 135 Am. St. Rep. 667; 101 Pac. 568; Safford v. Barber, 74 N. J. Eq. 352, 70 Atl. 371; Butler v. Wright, 186 N. Y. 259, 78 N. E. 1002; Waddle v. Cabana, 220 N. Y. 18, 114 N. E. 1054; Meisenhiemer v. Alexander, 162 N. C. 226, 78 S. E. 161; Deitz v. Stephenson, 51 Or. 596, 95 Pac. 803; Sherman v. Herr, 220 Pa. St. 420, 69 Atl. 899; Lathrop v. Columbia Collieries Co., 70 W. Va. 58, 73 S. E. 299. But see, contra, Barton v. De Wolf, 108 Ill. 195. Compare Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626 ("The stock . . . is not commonly offered for sale, and actual sales are very rare. The plaintiff may be unable to purchase an equal number of shares for the same price. But there is no evidence tending to show that he had any wish, or reason for wishing, to become the owner of the Abbott-Downing Company stock rather than any other stock of equal pecuniary value.") To the effect that a vendor may have specific performance in such a case, see Bumgardner v. Leavitt, 35 W. Va. 194, 12 L. R. A. 776, 13 S. E. 67. See, also, David v. McRae, 183 Fed. 812; Harris v. New, 167 Ky. 262, 180 S. W. 375; Cole v. Cole Realty Co., 169 Mich. 347, 135 N. W. 329; contra, G. W. Baker Mach. Co. v. United States Fire Apparatus Co. (Del.), 97 Atl. 613. Relief will not be awarded, of course, if the contract is, for any reason, unlawful: Foll's Appeal, 91 Pa. St. 434, 36 Am. Rep. 671.

44 Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. Ed. 187; Haden v. Farmers & Mechanics' Fire Ass'n, 80 Va. 683. But relief will not be given when the plaintiff was not bound before the loss: Insurance Co. of North America v. Schall, 96 Md. 225, 61 L. R. A. 300, 53 Atl. 925.

45 Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. Ed. 187; Hebert v. Mutual Life Ins. Co., 12 Fed. 807; Union Cent. Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263; Tucker v. Farmers' Mutual Fire Ass'n of West Virginia, 71 W. Va. 690, 77 S. E. 279.

46 Hebert v. Mutual Life Ins. Co., 12 Fed. 807; Union Cent. Life Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263. To the effect that

An agreement to execute a mortgage is of such character as to be capable of enforcement in equity;<sup>47</sup> as is also a contract to indemnify a party,<sup>48</sup> or to exonerate

the company may be compelled to issue a paid-up policy in accordance with the terms of its policy, see Lindenthal v. Germania Life Ins. Co., 174 N. Y. 76, 66 N. E. 629. To the effect that an agreement by a beneficiary to surrender may be specifically enforced, see Brett v. Warnick, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061.

47 Hermann v. Hodges, L. R. 16 Eq. 18; Hicks v. Turck, 72 Mich. 311, 40 N. W. 339 ("the remedy at law, when resorted to, is liable to a very great variety of perplexities and embarrassments arising from the want of the note promised. . . . The note was liable to run five years, and complainants had the right to have the amount owing thereon during all the time it did run secured by the mortgage''); Rothholz v. Schwarz, 46 N. J. Eq. 477, 19 Am. St. Rep. 409, 19 Atl. 312. Recent cases are: Baltimore & O. R. Co. v. Berkeley Springs etc. R. R. Co., 168 Fed. 770; Shannon v. Cavanaugh, 12 Cal. App. 434, 107 Pac. 574 (chattel mortgage, legal remedy being inadequate); Howard v. Cave, 162 Iowa, 506, 144 N. W. 307; Clark v. Van Cleef, 75 N. J. Eq. 152, 71 Atl. 260 (parol agreement, executed on plaintiff's part); Morris v. McCutcheon, 213 Pa. St. 349, 62 Atl. 982 (agreement to pledge estate); Heran v. Elmore, 37 S. D. 223, 157 N. W. 820 (oral agreement to give mortgage, where defendant insolvent); Hollister v. Sweet, 32 S. D. 141, 142 N. W. 255 (oral agreement, where plaintiff has performed). See, also, Sporle v. Whayman, 20 Beav. 607 (compelled to give memorandum of terms of deposit of title deeds). Compare International Harvester Co. of America v. Monroe Banking & Mercantile Co., 103 S. C. 254, 87 S. E. 1012 (where debt becomes due after suit brought, decree may establish mortgage and direct its foreclosure); Brown v. E. Van Winkle Gin & Mach. Works, 141 Ala. 580, 6 L. R. A. (N. S.) 585, 39 South. 243 (no specific performance unless legal remedy inadequate); Whipple v. Lee, 58 Wash. 253, 108 Pac. 601 (agreement to make partial releases); O'Donnell v. Chamberlin, 36 Colo. 395, 10 Ann. Cas. 931, 91 Pac. 39 (assignment of mortgage). As to the equitable lien created by such agreements, see 3 Pom. Eq. Jur., § 1237.

48 Count Ranelaugh v. Hayes, 1 Vern. 189; Reybold v. Herdman, 2 Del. Ch. 34; Champion v. Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343. See, also, Bosch Magneto Co. v. Rushmore, 85 N. J. Eq. 93, 95 Atl. 614 (agreement to give indemnity bond); Chicago, M. & St. P. R'y Co. of Idaho v. United States, 218 Fed. 288, 134 C. C. A. 84.

his property from liability.<sup>49</sup> On the other hand, a contract to lend or to borrow money cannot be specifically enforced.<sup>50</sup> The remedy has been applied to a great variety of special agreements, where the legal relief was inadequate; a few instances are given in the note.<sup>51</sup>

- 49 Reilly v. Roberts, 34 N. J. Eq. 299.
- 50 Rogers v. Challis, 27 Beav. 175 (agreement to borrow money not enforced, the court saying: "It is a simple money demand; the plaintiff says, I have sustained a pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which the plaintiff has sustained"); Sichel v. Mosenthal, 30 Beav. 371 (not of contract to lend money); Conklin v. People's Bldg. & Loan Ass'n, 41 N. J. Eq. 20, 2 Atl. 615.
- 51 Very v. Levy, 13 How. 345, 14 L. Ed. 173 (agreement to accept goods in satisfaction of a bond and mortgage); McMullen v. Vanzant, 73 Ill. 190 (maker of promissory note obtained possession of it from the holder under a promise to return it or execute another of the same tenor and amount; having destroyed it, he was compelled to execute a new note); Tarbell v. Tarbell, 10 Allen, 278 (antenuptial contract by which a woman agreed to relinquish her distributive share of her husband's estate); Sullings v. Sullings, 9 Allen, 234 (same); Tuttle v. Moore, 16 Minn, 123 (agreement by holder of notes to deliver them up to maker to be canceled, notwithstanding they are overdue, and in hands of original payee); Benwell v. Mayor etc. of Newark, 55 N. J. Eq. 260, 36 Atl. 668 (holder of coupon bonds of a city, containing a provision which entitles him to have them converted, at his option, into registered bonds); Kopplein v. Kopplein, 8 Tex. Civ. App. 625, 28 S. W. 220 (agreement by payee of note to indorse payments thereon). See, also, the following recent cases: Agreements to compromise litigation: Blount v. Wheeler (Dillaway), 199 Mass. 330, 17 L. R. A. (N. S.) 1036, 85 N. E. 477 (to divide personal estate, in compromise of will contest); Baxter v. Treasurer & Receiver General (Stevens), 209 Mass. 459, 95 N. E. 854 (same); Goodrich v. Webster, 74 N. H. 474, 69 Atl. 719 (same). Savage v. Edgar, 85 N. J. Eq. 420, 97 Atl. 164. Antenuptial agreements: Fear v. Fear, 152 Iowa, 700, 133 N. W. 109; Hannon v. Hannon, 46 Mont. 253, Ann. Cas. 1914B, 616, 127 Pac. 466. Contract settling existing indebtedness: Virtue v. Stanley, 87 Wash. 167, 151 Pac. 270. Agreement by A to vote certain stock as B wished: Puddy-

- § 2176. (§ 754.) Awards.—"An award is treated as the continuance of the agreement to submit. If it directs acts to be done which, if stipulated for in a contract, would render such contract capable of enforcement, then the award itself may be specifically enforced."<sup>52</sup> For example, awards directing the conveyance of land may be enforced in equity.<sup>53</sup> On the other hand, an award directing merely a payment of money will not be specifically enforced.<sup>54</sup> The question of the enforcement of contracts for submission to arbitration rests upon a different footing.<sup>55</sup>
- § 2177. (§ 755.) No Relief When Decree Would be Nugatory—Partnership Agreements.—"The court will not grant the remedy when by the terms of the contract itself the defendant would be entitled at any time to terminate the agreement and thus evade the decree."

shat v. Leith, [1916] 1 Ch. 200. For further instances, see 4 Pom. Eq. Jur., § 1402, note 6.

- 52 Pom. Eq. Jur., § 1402. See, also, Hall v. Hardy, 3 P. Wms. 187, note; Wood v. Griffith, 1 Swanst. 43; Bouck v. Wilber, 4 Johns. Ch. 405 (specific performance although a small mistake in description); Kirksey v. Fike, 27 Ala. 383, 62 Am. Dec. 768 (by an award, one of two partners engaged in tanning business was to receive one-half of the skins in the yard, one-half of the leather, and the use of one-half of the vats). See, also, cases cited in following note.
- 53 Whitney v. Stone, 23 Cal. 275; Penniman v. Rodman, 13 Met. 382; Emans v. Emans, 14 N. J. Eq. 114. See, also, Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.
- 54 Hall v. Hardy, 3 P. Wms. 187, note; Story v. Norwich etc. Co., 24 Conn. 94; Howe v. Nickerson, 14 Allen, 400; Memphis & C. R. R. Co. v. Scruggs, 50 Miss. 284, 291. But if such award fixes a lien upon land for the payment of money, it may be specifically enforced: Memphis & C. R. R. Co. v. Scruggs, 50 Miss. 284.
  - 55 See post, § 758.
- 56 Pom. Eq. Jur., § 1405, note. See Farson v. Fogg, 205 III. 326, 68 N. E. 755 (quoting Pom. Eq. Jur., § 1405); Garling v. Lain, 269 III. 337, 109 N. E. 972 (contract for right of way so long as friendly relations exist between the parties); State v. Cadwallader, 172 Ind.

Accordingly, it is held that an agreement to enter into or carry on a partnership at will cannot be specifically enforced, for it might be terminated at any time.<sup>57</sup> The doctrine is frequently stated more broadly to the effect that as a general rule the court will not decree specific performance of an agreement to perform and carry on a partnership.<sup>58</sup> Equity may, however, secure to a partner the interests in property to which by the partnership agreement he is entitled.<sup>59</sup>

- § 2178. (§ 756.) No Relief When Performance Depends on Consent of a Third Person.—It was the rule in England in early days that a husband who contracted to sell property in which his wife had an interest might be ordered to procure the consent of his wife. 60 In ac-
- 619, 87 N. E. 644, 89 N. E. 319; J. B. Brown & Sons v. Boston & M. R. R., 106 Me. 248, 76 Atl. 692 (citing Pom. Eq. Jur., § 1405); Southern Express Co. v. Western North Carolina R. Co., 99 U. S. 191, 25 L. Ed. 319; New Brunswick R. Co. v. Muggeridge, 4 Drew. 686, 698.
- 57 Hercy v. Birch, 9 Ves. 357. See, also, Somerby v. Buntin, 118
   Mass. 279, 19 Am. Rep. 459.
- 58 Scott v. Rayment, L. R. 7 Eq. 112 ("it is an agreement to form a partnership, and if so, it is an agreement on which the plaintiff may maintain an action at law for damages, and that is an appropriate remedy"); Hyer v. Richmond Traction Co., 168 U. S. 471, 42 L. Ed. 547, 18 Sup. Ct. 114; Meason v. Kaine, 63 Pa. St. 335. It is clear that this broader statement cannot be supported on the theory stated at the beginning of the section, but rather depends upon the doctrine described in the following sections.
- 59 Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459; Elliott v. Jones (Del. Ch.), 101 Atl. 872. In Homfray v. Fothergill, L. R. 1 Eq. 567, a provision in a partnership deed that the other partners should have the first opportunity to purchase the share of any partner desiring to sell was specifically enforced. See, also, England v. Curling, 8 Beav. 129.
- 60 "It was the ancient practice of the court, however, to order the husband to procure his wife's consent, and to imprison him until he succeeded": Pom. Spec. Perf., § 295, note. See Barrington v.

cordance with a principle similar to that laid down in the preceding section, it is now held, both in England and in America, that such an order is improper.<sup>61</sup> Performance in such a case is impossible and therefore will not be decreed. The question of the right of the purchaser to have specific performance from the husband with an abatement of the price is discussed elsewhere.<sup>62</sup> In general, specific performance will not be decreed when performance depends on the consent of a third person who is at liberty to withhold his consent.<sup>63</sup>

§ 2179. (§ 757.) Specific Performance Refused When Court cannot Render or Enforce a Decree. 64—"Although the contract is valid, and the defendant is able to do what he has undertaken to do, if, through the want of appropriate means and instrumentalities, the court is unable, while pursuing its ordinary modes of administering justice, either to render a decree or to enforce the

Horn, 5 Vin. Abr. 547, pl. 35, 2 Eq. Cas. Abr. 17, pl. 7; Hall v. Hardy, 3 P. Wms. 187; Morris v. Stephenson, 7 Ves. 474.

61 Emery v. Wase, 8 Ves. 505, 514-517, 5 Ves. 846, 848; Barbour v. Hickey, 2 App. D. C. 207, 213. In this last case, the court, per Alvey, C. J., said: "The husband ought not to be put in a position by a court of equity to tempt him to coerce his wife to join him in a deed, nor ought the wife, especially where she is not a party to the contract, to be put to the alternative of either executing and acknowledging the deed, or of allowing her husband to be committed to prison for contempt of court, because of the non-compliance with the decree for specific performance." See, also, Long v. Chandler, 10 Del. Ch. 339, 92 Atl. 256; Weed v. Terry, 2 Doug. (Mich.) 344, 45 Am. Dec. 257.

<sup>62</sup> See post, chapter XLI.

<sup>63</sup> Farson v. Fogg, 205 Ill. 326, 68 N. E. 755. Other instances of performance depending on the consent of a third person: Ellis v. Treat, 236 Fed. 120, 149 C. C. A. 330; Hurlbut v. Kantzler, 112 Ill. 482; Langford v. Taylor, 99 Va. 577, 39 S. E. 223; McLennan v. Church, 163 Wis. 411, 158 N. W. 73.

<sup>64</sup> Sections 757-760 are cited in Carrico v. Stevenson (Tex. Civ.), 135 S. W. 260.

decree when made, then the remedy will be refused.65 Cases where the court cannot render a decree: The following species of contracts will not be thus enforced: Agreements concerning the manufacture and sale of secret medicines and other secret commodities, where the contract recognizes the secret as not to be disclosed.66 Contracts for the sale or transfer of a goodwill, separate from or unconnected with the business and premises of which it is an incident. 67 Cases where the court cannot enforce its decree: This class includes the following species of contracts, for which the equitable remedy is refused"; the more important of which, together with the exceptions to the rule of non-enforcement, are described in the following paragraphs: Agreements to submit to arbitration, and contracts for sale at a price to be fixed by valuers;68 contracts for personal services: 69 contracts whose performance would be continuous, and would require protracted supervision and direction, including, especially, contracts for building and construction,70 for working mines, for operating railroads,71 and the like.

<sup>65</sup> The text is quoted in Greer v. Pope, 140 Ga. 743, 79 S. E. 846 (contract for personal services). Pom. Eq. Jur., § 1405, at note 10, is cited in New Idea Pattern Co. v. Whitner, 215 Pa. St. 193, 64 Atl. 518.

<sup>66 &</sup>quot;Newbery v. James, 2 Mer. 446; Williams v. Williams, 3 Mer. 157"; 4 Pom. Eq. Jur., § 1405, note 10.

<sup>67 &</sup>quot;Bozon v. Farlow, 1 Mer. 459; Baxter v. Conolly, 1 Jacob & W. 576; Coslake v. Till, 1 Russ. 376. But where the good-will is sold and transferred, together with the business and premises, the agreement may be directly enforced, or negatively enforced by an injunction: Darbey v. Whitaker, 4 Drew, 134, 139, 140; Chissum v. Dewes, 5 Russ. 29; Whittaker v. Howe, 3 Beav. 383"; 4 Pom. Eq. Jur., § 1405, note 10. See, also ante, volume I, chapter on Injunction Against Breach of Contract.

<sup>68</sup> See post, § 758.

<sup>69</sup> See post, § 759.

<sup>70</sup> See post, § 760.

<sup>71</sup> See post, § 761.

§ 2180. (§ 758.) Arbitration Agreements, etc. — An agreement to submit a matter to arbitration, or to sell at a price to be fixed by valuers, if the mode of fixing the price is an essential part of the contract, will not be specifically enforced, since it is beyond the power of the court to compel arbitrators to agree; nor will the court itself fix the price, since that would be to make a new agreement for the parties.<sup>72</sup>

§ 2181. (§ 759.) Contracts for Personal Services.— It is a familiar rule that contracts for personal services,

72 This paragraph is cited in Caldwell v. Caldwell, 157 Ala. 119, 47 South. 268. See Pom. Spec. Perf., §§ 291, 309, 149-151; Milnes v. Gery, 14 Ves. 100; Agar v. Macklew, 2 Sim. & St. 418; Vickers v. Vickers, L. R. 4 Eq. 529; Hug v. Van Burkleo, 58 Mo. 202; Greason v. Keteltas, 17 N. Y. 491; also these recent cases: Southern Lumber Corporation v. Doyle, 204 Fed. 829; Caldwell v. Caldwell, 157 Ala. 119, 47 South. 268; Saint v. Martel, 127 La. 73, 53 South. 432; Ferrell v. Ferrell, 253 Mo. 167, 161 S. W. 719; Mutual Life Ins. Co. v. Stephens, 214 N. Y. 488, L. R. A. 1917C, 809, 108 N. E. 856. For instances where specific performance was decreed, the court fixing the value, see Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304 (the arbitration clause held to be a subsidiary part of the agreement, and the value therefore fixed by reference to the master); Town of Bristol v. Bristol & W. Waterworks, 19 R. I. 413, 32 L. R. A. 740, 34 Atl. 359 (same); Springer v. Borden, 154 Ill. 668, 39 N. E. 603 (rent under a lease to be fixed by arbitrators; lease provided that if award should fail to be made, value should be fixed by the courts); Cooke v. Miller, 25 R. I. 92, 1 Ann. Cas. 30, 54 Atl. 927 (arbitrators fail to agree; specific performance because parties cannot be placed in statu quo); and see, further, City of Fayetteville v. Fayetteville Water, L. & P. Co., 135 Fed. 400; Omaha Lumber Co. v. Co-operative Inv. Co., 55 Colo. 271, 133 Pac. 1112 (appraisal of merchantable timber); Richardson v. Harkness, 59 Wash. 474, 110 Pac. 9; Klock Produce Co. v. Robertson, 90 Wash. 260, 155 Pac. 1044. Where the plaintiff has incurred great expense in reliance upon the contract, the court, on refusal of defendant to appoint an appraiser, may make the valuation itself: Castle Creek Water Co. v. Aspen, 146 Fed. 8, 8 Ann. Cas. 660, 76 C. C. A. 516; Coles v. Peck, 96 Ind. 333, 49 Am. Rep. 161.

As to enforcing awards, see ante, § 754.

where the full performance rests upon the personal will of the contracting party, will not be specifically enforced against him.<sup>73</sup> It is also generally true that they will not be enforced where the plaintiff is the one who has contracted to render the services, and there has been no full performance on his part, since mutuality in the equitable remedy is then lacking.<sup>74</sup> The indirect en-

73 The text is cited in Greer v. Pope, 140 Ga. 743, 79 S. E. 846 See Pickering v. Bishop of Ely, 2 Younge & C. Ch. 249; Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198, 7 L. R. A. 381; Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 18-Am. St. Rep. 278, 7 L. R. A. 779, 20 Atl. 467; Hamblin v. Dinneford, 2 Edw. Ch. (N. Y.) 529; Campbell v. Rust, 85 Va. 653, 8 S. E. 664 (agreement to mine and deliver ore); 4 Pom. Eq. Jur., § 1343. The opinion of Chancellor Walworth, in De Rivafinoli v. Corsetti, 4 Paige, 270, 25 Am. Dec. 532, is a locus classicus of judicial humor. See, also, the recent cases: General Electric Co. v. Westinghouse Electric Co., 144 Fed. 458 (sales agent); Adams v. Murphy, 165 Fed. 304, 91 C. C. A. 272; Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509 (manager of theater); Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449; Roquemore & Hall v. Mitchell Bros., 167 Ala. 475, 140 Am. St. Rep. 52, and note, 52 South. 423; American Laundry Co. v. E. & W. Dry Cleaning Co. (Ala.), 74 South. 58; Emirzian v. Asato, 23 Cal. App. 251, 137 Pac. 1072; Welty v. Jacobs, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723; H. W. Gossard Co. v. Crosby, 132 Iowa, 155, 6 L. R. A. (N. S.) 1115, 109 N. W 483 (an instructive statement of reasons for the rule); Edelen v. Samuels & Co., 126 Ky. 295, 103 S. W. 360 (to manufacture whisky); Heth v. Smith, 175 Mich. 328, 141 N. W. 583; Bomer v. Canaday, 79 Miss. 222, 89 Am. St. Rep. 593, 55 L. R. A. 328, 30 South. 638; Beach v. Bryan, 155 Mo. App. 33, 133 S. W. 635; Mowers v. Fogg, 45 N. J. Eq. 120, 17 Atl. 296; Schilling v. Moore, 34 Okl. 155, 125 Pac. 487 (agency to sell real estate); Carrico v. Stevenson (Tex. Civ. App.), 135 S. W. 260; Ryan v. Mutual Tontine Westminster Chambers Ass'n, [1893] 1 Ch. 116; Webb v. England, 29 Beav. 44.

74 Johnson v. Shrewsbury etc. Co., 3 De Gex, M. & G. 914; Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131; Moore v. Tuohy, 142 Cal. 342, 75 Pac. 896; Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030; also, the recent cases: Mallory v. Globe-Boston Copper Mining Co., 11 Ariz. 296, 94 Pac. 1116; Welty v. Jacobs, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723; Turley v. Thomas, 31 Nev. 181, 135 Am. St. Rep.

forcement of contracts for services of a unique and extraordinary character, by enjoining the breach of an express or implied stipulation not to do acts inconsistent with the rendering of the services, is a subject that has been treated elsewhere.<sup>75</sup>

§ 2182. (§ 760.) Contracts for Building or Construction.—The general rule has long been settled, after a period of conflict and uncertainty in the early cases, 76 that contracts for building and construction, and contracts to make repairs, will not be enforced in specie, 77

667, 101 Pac. 568; General Electric Co. v. Westinghouse Electric etc. Co., 144 Fed. 458, and post, §§ 769-776. See, however, the extraordinary decision in Jones v. Williams, 139 Mo. 1, 36, 61 Am. St. Rep. 436, 454, 39 S. W. 486, 40 S. W. 353, holding that a contract by which plaintiff was employed for a number of years as editor of a newspaper, with sole control, is not a contract for "personal services" within the meaning of the rule; cf. dissenting opinion of Sherwood, J., and cases there cited.

75 See volume I, chapter on Injunction Against Breach of Contracts.

76 In Jones v. Parker, 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1044, Holmes, J., makes the sweeping assertion that courts of equity "have enforced such contracts from the earliest days to the present time"; but it has been pointed out that the cases dating from the fifteenth century by which the learned judge supports his assertion are probably not cases of specific performance at all: 1 Ames, Cas. Eq. Jur., 68, note 4. In the eighteenth century, however, such contracts were enforced rather frequently. Lord Hardwicke, in City of London v. Nash, [1747] 3 Atk. 512, made the distinction that a covenant to build could be enforced, "for to build is one entire single thing"; but not a covenant to repair. By the end of that century, however, this distinction was abandoned: Lucas v. Comerford, [1790] 1 Ves. Jr. 235, 3 Bro. C. C. 166.

77 The authorities are fully reviewed in the opinion of Mr. Justice Miller in Ross v. Union Pac. R'y Co., 1 Woolw. 26, Fed. Cas. No. 12,080 (a railroad construction contract). See, also, Texas & P. R'y Co. v. Marshall, 136 U. S. 393, 407, 34 L. Ed. 385, 10 Sup. Ct. 846; Strong v. Richmond, P. & C. R. Co., 111 Fed. 511, 517 (railroad construction); Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430 (les-

on account of the inconvenience of enforcing a decree by the process of attachment for contempt, when numerous questions must usually arise under the decree in such a case as to whether there has been substantial performance, whether defective performance may be excused, what compensation should be made for the deficiency, and the like. Moreover, if the building is to be done on the plaintiff's land, the remedy at law is usually adequate, since he may do the work himself and sue at law for the cost. Several exceptions have been made to the rule by the English courts.<sup>78</sup> One of these exceptions

sor's covenant to repair). This paragraph is cited in Greer v. Pope, 140 Ga. 743, 79 S. E. 846. Recent cases are: La Hogue Drainage District No. 1 v. Watts, 179 Fed. 690, 103 C. C. A. 236 (construction of ditches); Bromberg v. Eugenotto Const. Co., 158 Ala. 323, 19 L. R. A. (N. S.) 1175, 48 South. 60 (contract to lease floor space in a building in course of construction); Pacific Electric R. Co. v. Campbell-Johnston, 153 Cal. 106, 94 Pac. 623 (railroad); Crane v. Roach, 29 Cal. App. 584, 156 Pac. 375; Robinson v. Luther, 134 Iowa, 463, 109 N. W. 775; Ward v. Newbold, 115 Md. 689, Ann. Cas. 1913A, 919, 81 Atl. 793; Sims v. Vanmeter Lumber Co., 96 Miss. 449, 51 South. 459 (to construct and maintain a tramroad); Atlantic & S. R'y Co. v. Board of Chosen Freeholders, 84 N. J. Eq. 618, 94 Atl. 602 (paving); City of Pittsburgh v. Pittsburgh R'ys Co., 234 Pa. St. 193, 83 Atl. 67 (repair of streets); Connell v. Yost, 62 W. Va. 66, 57 S. E. 299 (boring oil wells).

78 See 4 Pom. Eq. Jur., § 1402, note 6; cited in Cincinnati, B. & C. R. v. Wall, 48 Ind. App. 605, 96 N. E. 389; Indianapolis Northern Traction Co. v. Essington, 54 Ind. App. 286, 99 N. E. 757, 100 N. E. 765; La Hogue Drainage District No. 1 v. Watts, 179 Fed. 690, 103 C. C. A. 236; Board of Comm'rs v. A. V. Wills & Sons, 236 Fed. 362. "I must confess that I cannot altogether understand the principle upon which courts of equity have acted in sometimes granting orders for specific performance in these cases and sometimes not. . . . In early times they seem to have granted decrees for specific performance in such cases. [See note 76, supra.] Then came a period in which they would not grant such decrees on the ground that the courts could not undertake to supervise the performance of the contract. Later on they seem to have attached less importance to this consideration, and returned to some extent to the more ancient

has become firmly established. "Where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building [or other structure] of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages . . . specific performance ought to be ordered." 79

practice, holding that they could order specific performance in certain cases in which the works were specified by the contract in a sufficiently definite manner'': Collins, L. J., in Mayor etc. of Wolverhampton v. Emmons, [1901] 1 K. B. 515. See the highly instructive opinion in Board of Comm'rs v. A. V. Wills & Sons, 236 Fed. 362, where an extensive drainage contract was specifically enforced, on the grounds of public interest, inadequacy of the legal remedy, multiplicity of suits and the definiteness of the contract.

79 A. L. Smith, M. R., in Mayor etc. of Wolverhampton v. Emmons, [1901] 1 K. B. 515; Ryan v. Mutual Tontine etc. Ass'n, [1893] 1 Ch. 116, 128. See, also, Storer v. Great Western R'y Co., 2 Younge & C. Ch. 48 (a leading case; contract by railway company to build archway under track which divided plaintiff's farm); Wilson v. Furness R'y Co., L. R. 9 Eq. 28 (agreement to build road and wharf on land conveyed; per James, V. C. "It would be monstrous if the company, having got the whole benefit of the agreement, could turn round and say, 'This is a sort of thing which the court finds a difficulty in doing, and will not do.' Rather than allow such a gross piece of dishonesty to go unredressed the court would struggle with any amount of difficulties in order to perform the agreement''); Lytton v. Great Northern R'y Co., 2 Kay & J. 394 (agreement to construct railway siding on land conveyed, enforced); Sanderson v. Cockermouth R'y Co., 11 Beav. 497 (agreement to "make such roads, ways, and slips for cattle as might be necessary," enforced, though admittedly difficult); Molyneux v. Richard, [1906] 1 Ch. 34 (description sufficiently definite). The American cases directly in point are not so numerous, but clearly support the foregoing exception; see, e. g., Ross v. Purse, 17 Colo. 24, 28 Pac. 473 (agreement to dig a well); Post v. West Shore & B. R'v Co.. 123 N. Y. 580, 26 N. E. 7 (agreement by railway to construct crossing); Lawrence v. Saratoga Lake R'y Co., 36 Hun, 467 (an instructive opinion; agreement by railway to build bridges for overhead crossings, and a "neat and tasteful station building," enforced: § 2183. (§ 761.) Other Contracts Requiring Continuous Acts—Railroad Operating Agreements.—The general doctrine that equity will not affirmatively decree specific performance of a contract requiring continuous acts, especially if those acts involve skill, judgment, and

citing Pom. Eq. Jur., § 1402, and note). See, also, South & North Ala. R. Co. v. Highland Ave. & B. R. Co., 98 Ala. 400, 39 Am. St. Rep. 74, 13 South. 682 (agreement by defendant railroad to renew crossing over its tracks, or, if it failed to do so on notice, to permit plaintiff railroad to do the work on defendant's land, enforced). Recent cases are: Ferguson v. Omaha & S. W. R. Co., 227 Fed. 513, 142 C. C. A. 145 (agreement by railroad to make and repair wagon road and permanent crossings); Louisville & N. R. Co. v. Nelson, 145 Ga. 594, 89 S. E. 693 (covenant to open street); Fox v. Spokane International R'y Co., 26 Idaho, 60, 140 Pac. 1103 (railroad crossing); Cincinnati, B. & C. R. R. v. Wall, 48 Ind. App. 605, 96 N. E. 389 (agreement to erect fence); Indianapolis Northern Traction Co. v. Essington, 54 Ind. App. 286, 99 N. E. 757, 100 N. E. 765 (overhead crossing); Hartshorn v. Chicago Gt. Western R'y Co., 137 Iowa, 324, 113 N. W. 840 (railroad crossing); Patton Tp. v. Monongahela St. R'y Co., 226 Pa. St. 372, 75 Atl. 589 (repairing street); Dorsett v. Black Hills Traction Co., 30 S. D. 420, 138 N. W. 808 (building trolley line). As to enforcement of statutory duty of railroads to maintain crossings, see Indiana Union Traction Co. v. Seisler, 58 Ind. App. 507, 106 N. E. 911, 108 N. E. 44; Metuchen v. Pennsylvania R. Co., 71 N. J. Eq. 404, 64 Atl. 484; Newark v. Erie R. Co., 72 N. J. Eq. 447, 68 Atl. 413.

But see McCarter v. Armstrong, 32 S. C. 203, 8 L. R. A. 625, 10 S. E. 953 (agreement to construct and keep open a ditch on defendant's land; relief refused, because damages adequate, and "work was to be kept up forever"; citing Pom. Eq. Jur., §§ 1400, 1402, 1405); Yazoo & M. V. R. Co. v. Payne, 93 Miss. 50, 46 South. 405 (contract by railroad with grantor of right of way to construct drains and a crossing; relief refused, partly on ground that statutory remedy is adequate).

The complainant's equity may readily be outweighed by considerations of public policy, as in Kendall v. Frey, 74 Wis. 26, 17 Am. St. Rep. 118, 42 N. W. 466 (land conveyed to city on consideration that a city hall be erected thereon, which would benefit plaintiff's adjoining property; specific performance refused, since discretion of the city common council as to location of a public building should

technical knowledge<sup>80</sup> has been broken into, of late years, by an important exception in favor of certain contracts relating to the operation of railroads. In analogy to the cases mentioned in the last section, where the company, in consideration of the conveyance to it of land, was com-

not be interfered with); Gove v. City of Biddeford, 85 Me. 393, 27 Atl. 264 (contract by city to build a sewer not enforced, for same reason). See, also, post, §§ 795, 796.

The decision in Jones v. Parker, 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1044 (Holmes, J.), that a covenant by a lessor "reasonably to heat and light the demised premises" from the time when possession was taken by the lessee, should be specifically enforced by a decree ordering the installation of the necessary apparatus, is clearly not within the above exception, and appears to be unsupported by modern authority; see contra, e. g., Keith v. National Tel. Co., [1894] 2 Ch. 147, infra, in next note.

80 The text is quoted in Houston Electric Co. v. Glen Park Co. (Tex. Civ. App.), 155 S. W. 965. For further instances of specific performance refused because the execution of the decree would require supervision of acts, on part of plaintiff or defendant, extending over a considerable period of time, see Flint v. Brandon, 8 Ves. 159 (1803; working a gravel-pit); Blackett v. Bates, L. R. 1 Ch. App. 117 (1865; agreement relating to repair and use of railway); Powell Duffryn Coal Co. v. Taff Vale R'y Co., L. R. 9 Ch. App. 331 (1874; agreement as to operating railway); Ryan v. Mutual Tontine Westminster Chambers Ass'n, [1893] 1 .Ch. 116 (by landlord, to appoint a porter who should perform various services); Keith, Prowse & Co. v. Nat. Telephone Co., [1894] 2 Ch. 147 (to maintain telephone wires and apparatus for plaintiff; but injunction against cutting the wires); Rutland Marble Co. v. Ripley, 10 Wall. 339, 358, 19 L. Ed. 955 (working a quarry); Texas & P. R. Co. v. Marshall. 136 U. S. 406, 34 L. Ed. 390, 10 Sup. Ct. 846 (agreement by railroad. in consideration of large gift of land and money by plaintiff town, to establish its offices and shops there); Electric L. Co. v. Mobile & S. H. R'y Co., 109 Ala. 190, 55 Am. St. Rep. 927, 19 South. 721 (agreement by plaintiff to furnish electric power, by defendant to operate cars); Stanton v. Singleton, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146 (plaintiff's agreement to develop and operate mines); Fargo v. New York & N. E. R. Co., 3 Misc. Rep. 205, 23 N. Y. Supp. 360 (contract by railroad to supply facilities, cars, etc., to express company). In Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y.

pelled to comply with its agreement to erect certain structures for the grantor's benefit, its reasonable agreement to maintain a station on the land conveyed for the plaintiff's convenience, and to stop trains thereat, will

60, 68 Am. St. Rep. 749, 43 L. R. A. 854, 51 N. E. 408, it was held that the objection to specific performance on this ground cannot be taken by demurrer. See 68 Am. St. Rep. 753-762, for an excellent note reviewing the cases on this subject. Recent cases include: Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509; Sewerage & Water Board of New Orleans v. Howard, 175 Fed. 555, 99 C. C. A. 177 (pumping water into mains); Pantages v. Grauman, 191 Fed. 317, 112 C. C. A. 61; United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 Fed. 947, 114 C. C. A. 583; York Haven Water & Power Co. v. York Haven Paper Co., 201 Fed. 270, 119 C. C. A. 508 (contract to furnish water-power "for all time"); Blue Point Oyster Co. v. Haagenson, 209 Fed. 278 (contract to sell entire product for twenty years); Stewart v. White, 189 Ala. 192, 66 South. 623; Saunders v. McDonough, 191 Ala. 119, 67 South. 591; Pacific Electric R. Co. v. Campbell-Johnston, 153 Cal. 106, 94 Pac. 623 (operating railroad); Greer v. Pope, 140 Ga. 743, 79 S. E. 846 (contract to give telephone connection for ninety-nine years); Beckham v. Munger Oil & Cotton Co. (Tex. Civ. App.), 185 S. W. 991 (maintenance of cotton-gin).

The objections to the exercise of the jurisdiction are forcibly stated in a leading case: "Even if the contract was sufficiently specific, so that the party, when ordered to operate the railroad, would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solution, not once, as in the case of the archway, the erection of which was ordered in Storer v. Great Western Railway [supra, note 79], but in instances innumerable, and for an indefinite time. Instead of the final order being the end of litigation, it would be its fruitful and continuous source, and that, too, of litigation not in the regular course of judicial proceedings, but irregularly, on a summary application. And such application to be made by either party, one when he conceived there had not been a faithful compliance with the order, and the other when exemption from some provision might be claimed, on the ground of inability or unforeseen events": Port Clinton R. R. Co. v. Cleveland & T. R. Co., 13 Ohio St. 544, 556. The whole opinion in this case is one of the most instructive on the general subject.

be enforced,<sup>81</sup> if that is consistent with the company's larger duty to operate its road so as to promote the public convenience.<sup>82</sup> But the exception has taken a much wider scope than this. Trackage and operating contracts between railroads, of the utmost complexity, have recently been the subject of decrees of specific performance, although in making their decrees the courts have conceded that they would be called upon from time to time to alter and adapt to changing circumstances their regulations for carrying the decrees into effect, during

While the passage above quoted states as forcibly as possible the reason usually given in support of the rule,—viz., the inconvenience to the court,—it seems to the author that there is some ground for conjecture that the rule really rests upon a deeper reason of public policy; a feeling, perhaps not expressed in the decisions, that the daily and hourly ordering of the affairs of an individual or a group of individuals, for an indefinite term of years, in obedience to the terms of a chancery decree, and with its personal sanction for disobedience is, in effect, such an impairment of personal freedom as is hostile to the whole spirit of English and American institutions.

81 The text is quoted in Houston Electric Co. v. Glen Park Co. (Tex. Civ. App.), 155 S. W. 965; Harper v. Virginian R'y Co., 76 W. Va. 788, 86 S. E. 919 (contract enforced against covenantor's successor in title); and cited in Taylor v. Florida East Coast R. Co., 54 Fla. 635, 127 Am. St. Rep. 155, 14 Ann. Cas. 472, 16 L. R. A. (N. S.) 307, 45 South. 574. See Hood v. North Eastern R'y Co., L. R. 8 Eq. 666, 5 Ch. 525 [1869]; Lawrence v. Saratoga Lake R'y Co., 36 Hun, 467; also Herzog v. Atchison, T. & S. F. R. Co., 153 Cal. 496, 17 L. R. A. (N. S.) 428, 95 Pac. 898; Parrott v. Atlantic & N. C. R. Co., 165 N. C. 295, Ann. Cas. 1915D, 265, 81 S. E. 348; but see Blanchard v. Detroit etc. Co., 31 Mich. 43, 18 Am. Rep. 142 (dictum).

82 The text is quoted in Houston Electric Co. v. Glen Park Co. (Tex. Civ. App.), 155 S. W. 965; Harper v. Virginian R'y Co., 76 W. Va. 788, 86 S. E. 919 (proof of injury to the public must be made by the defendant). See Conger v. New York, W. L. & B. R. R. Co., 120 N. Y. 29, 23 N. E. 983; Herzog v. Atchison, T. & S. F. R. Co., 153 Cal. 496, 17 L. R. A. (N. S) 428, 95 Pac. 898; Parrott v. Atlantic & N. C. R. Co., 165 N. C. 295, Ann. Cas. 1915D, 265, 81 S. E. 348 (right reserved to defendant to apply to railroad commission for discontinuance of the station, should circumstances change).

a long period of years.<sup>83</sup> In the first of this series of cases an important element affecting the decision was a direct public benefit that resulted from not leaving the complainant to its remedy of damages; but no such

83 The text is quoted in Houston Electric Co. v. Glen Park Co. (Tex. Civ. App.), 155 S. W. 965 (enjoining street railway from discontinuing service); Harper v. Virginian R'y Co., 76 W. Va. 788, 86 S. E. 919; cited, and distinguished, in Atlantic & S. R'y Co. v. Board of Chosen Freeholders, 84 N. J. Eq. 618, 94 Atl. 602. See Joy v. St. Louis, 138 U. S. 1, 34 L. Ed. 843, 11 Sup. Ct. 243 (1891; Blatchford, J.); Union Pac. R'y Co. v. Chicago, R. I. & P. R'y Co., 163 U. S. 564, 41 L. Ed. 265, 16 Sup. Ct. 1173 (1896; Fuller, C. J.), affirming Union Pac. R'y Co. v. Chicago, R. I. & P. R'y Co., 51 Fed. 309, 2 C. C. A. 174, 10 U. S. App. 98 (1892; Sanborn, Cir. J.), and Chicago, R. I. & P. R'y Co. v. Union Pac. R'y Co., 47 Fed. 15 (1891; Brewer, J.); Prospect Park & C. I. R. R. Co. v. Coney Island & B. R. R. Co. (1894), 144 N. Y. 152, 26 L. R. A. 610, 39 N. E. 17; Schmidt v. Louisville & N. R. Co., 101 Ky. 441, 38 L. R. A. 809, 41 S. W. 1015. See, also, Wolverhampton & W. R. Co. v. London & N. W. R. Co., L. R. 16 Eq. Cas. 433 (agreement that defendant company should work the plaintiff's line, and during the continuance of the agreement develop and accommodate the local and through trade thereof and carry over it certain specific trade. But this case seems analogous, in principle, to those cited in the last two notes, since "the question is, whether the defendants, being in possession, they are not at liberty to depart from the terms on which it was stipulated that they should have that possession'').

In Joy v. St. Louis, supra, the A company acquired, under contract, the right to run its trains over the line of the B company, through a large public park adjacent to the city of St. Louis, with the right to numerous terminal facilities. The contract was unlimited in time, and contained complicated provisions regulating the running of trains, and prescribing the duties of superintendents, train masters, and other officers. A special reason for decreeing specific performance was found in the fact that railroads entering St. Louis from the west must cross this park and that it was desirable, in order to maintain its usefulness as a park, that they should all use a single set of tracks. In Union Pac. R'y Co. v. Chicago, R. I. & P. Co., the U. Co. agreed with the C. Co. to grant the latter the joint use of the former's bridge and tracks between Omaha and Council Bluffs, for the term of nine hundred and ninetynine years, to make regulations for the movement of trains of both

element appears to have been present in the cases that followed this precedent. Whether this remarkable series of decisions is to be taken as a virtual abandonment, on the part of the influential courts which rendered them, of the rule against specific enforcement of continuing contracts, or merely as an arbitrary exception in favor of operating agreements among railroads, is a question on which, unfortunately, these decisions themselves shed little light.<sup>84</sup>

companies over these tracks with equal regard to the rights of both parties, under the direction of the superintendent of the U. P. Co. There was no special reason of public convenience in the case, as in Joy v. St. Louis; nor was there in Prospect Park & C. I. R. R. Co. v. C. I. & B. R. R. Co., supra (defendants agreed to operate a line of horse-cars in connection with plaintiff's line so as to make a through route, but when it afterwards became an active competitor of plaintiff, discontinued such connection). Schmidt v. Louisville & N. R. Co. was an agreement by the lessee of a railroad to operate the road for a term of thirty years. Contra to these cases, see the instructive opinion in Port Clinton R. R. Co. v. Cleveland & T. R. R. Co., 13 Ohio St. 544, an extract from which is given supra, note 80.

Recent cases are: Cedar Rapids & I. C. R'y & Light Co. v. Chicago, R. I. & P. R'y Co., 145 Iowa, 528, 124 N. W. 323 (agreement by defendant railroad to allow another railroad to use spur-track to plaintiff's power plant); New River Lumber Co. v. Tennessee R'y Co., 136 Tenn. 661, 191 S. W. 334.

84 The text is quoted in Harper v. Virginian R'y Co., 76 W. Va. 788, 86 S. E. 919. Several of the opinions meet the objection to the exercise of the jurisdiction in these cases by pointing to the experience of the courts of equity in railroad management through the instrumentality of receivers; one of them (47 Fed. 26, per Brewer, J.) even indulges in frank expressions of admiration for such management; and in the Kentucky case the lower court is actually directed to place the road in the hands of a receiver "if that is deemed best" for the purpose of enforcing its orders. It hardly needs to be pointed out that a receiver has hitherto been supposed to be a provisional and temporary remedy, not one extending over a period of thirty or of nine hundred and ninety-nine years.

This line of precedents has had less influence than might be expected in relaxing the general rule against specific enforcement of

continuing contracts. Such influence may be seen in the following cases: Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21 (contract to deliver defendant's whole oil product to plaintiff's pipe-line for ten years); Board of Comm'rs v. A. V. Wills & Sons, 236 Fed. 362 (extensive drainage contract); Great Lakes & St. L. T. Co. v. Scranton Coal Co., 239 Fed. 603, 152 C. C. A. 437 (contract to provide boats for a period of three years); Stephens v. Ohio State Telephone Co., 240 Fed. 759 (suit to compel telephone company to exercise its franchise); Cumberland Telephone & Tel. Co. v. City of Hickman, 129 Ky. 220, 111 S. W. 311 (same); Edison Illuminating Co. v. Eastern Pennsylvania Power Co., 253 Pa. St. 457, 98 Atl. 652 (to compel maintenance of electric plant in state of efficiency for ninety-nine years).

## CHAPTER XXXVIII.

## ELEMENTS AND INCIDENTS OF THE CONTRACT ESSENTIAL TO SPECIFIC PERFORMANCE.

## ANALYSIS.

- § 762. The jurisdiction discretionary.
- § 763. Contract must be upon a valuable consideration.
- §§ 764-768. Contract must be complete, certain, and definite.
  - § 765. Incompleteness of proof.
  - § 766. How far parol evidence can be used to make certain or definite.
  - § 767. Incompleteness and uncertainty may relate to the parties, price, subject-matter, conditions, etc.
  - § 768. Uncertainty and indefiniteness alone as a defense.
- §§ 769-776. The doctrine of mutuality.
  - § 769. The rule restated.
  - § 770. Contracts whose terms are not mutual; (a) Where plaintiff could avoid performance.
  - § 771. (b) Where plaintiff's non-enforceable promise has been performed.
  - § 772. (c) Where plaintiff's inability is cured before decree.
  - § 773. Unilateral contracts—Options.
  - § 774. Contracts terminable at the will of one party.
  - § 775. Indirect enforcement by enjoining the breach of defendant's negative covenant.
  - § 776. Fraud or other personal bar of the defendant.
- §§ 777-783. Mistake as a defense to specific performance.
  - § 777. Rescission and reformation.
  - § 778. What mistakes are a defense to specific performance.
  - § 779. Misdescription and ambiguity.
  - § 780. Mistake induced, or contributed to, by the plaintiff.
  - § 781. Mistake known to plaintiff.
  - § 782. Mistake due to defendant's negligence.
  - § 783. Mistake due solely to defendant.
  - § 784. Concealment or non-disclosure of material facts as a defense.
- §§ 785-800. Unfairness and hardship as a defense.
  - § 786. Unfairness and advantage.

- § 787. Inequality—(a) In making the contract—(b) In the operation of the contract.
- § 788. Intoxication.
- § 789. Improvidence of the undertaking.
- § 790. Inadequacy of consideration with other grounds.
- § 791. Unintended harsh consequence.
- § 792. Inadvertent covenant or act.
- § 793. Greatly oppressive consequence.
- § 794. Injury to third persons.
- § 795. Inconvenience to the public.
- § 796. Performance no benefit to plaintiff.
- § 797. Subsequent events which should have been contemplated, no defense.
- § 798. Subsequent events, not in possible contemplation, often a defense.
- § 799. Direct act of either party.
- § 800. Forfeiture.
- §§ 801-804. A purchaser need not accept a doubtful or unmarketable title.
  - § 802. The standard for determining a "doubtful" title.
  - § 803. Where the doubt arises from an unsettled question of law.
  - § 804. Where the doubt arises from an extrinsic fact or the construction of a document.

The Jurisdiction Discretionary.— § 2184. (§ 762.) "The object of the foregoing paragraphs is to formulate the general rules which determine the classes of contracts in which the equitable jurisdiction may be exercised. But even when a particular contract belongs to such a class, the right to its specific performance is not absolute, like the right to recover a legal judgment. The granting the equitable remedy is, in the language ordinarily used, a matter of discretion, not of an arbitrary, capricious discretion, but of a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of judges and text-writers. The term 'discretionary' as thus used is, in my

1 4 Pom. Eq. Jur., § 1404, and cases cited in the note. is quoted in Donahoe v. Franks, 199 Fed. 262; Rexford v. Southern Woodland Co., 208 Fed. 295; Cincinnati B. & C. R. R. v. Wall, 48 Ind. App. 605, 96 N. E. 389; Mitchell v. Mutch (Iowa), 164 N. W. 212; Mattingly's Ex'r v. Brents, 155 Ky. 570, 159 S. W. 1157; Dillon v. Ringleman, 55 Okl. 331, 155 Pac. 563. This paragraph, or section 1404, Pom. Eq. Jur., is cited in Mundy v. Shellaberger, 161 Fed. 503, 88 C. C. A. 445; Alabama Cent. R. Co. v. Long, 158 Ala. 301, 48 South. 363; Marshall v. Keach, 227 Ill. 35, 118 Am. St. Rep. 247, 10 Ann. Cas. 164, 81 N. E. 29; Zempel v. Hughes, 235 Ill. 424, 85 N. E. 641; Funck v. Farmers' Elevator Co., 142 Iowa, 621, 24 L. R. A. (N. S.) 108, 121 N. W. 53 (dissenting opinion); Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767; J. B. Brown & Sons v. Boston & M. R. Co., 106 Me. 248, 76 Atl. 692; Somerville v. Coppage, 101 Md. 519, 61 Atl. 318; McLaughlin v. Leonhardt, 113 Md. 261, 77 Atl. 647; Caldwell v. Virginia Fire & Marine Ins. Co., 124 Tenn. 593, 139 S. W. 698; Pom. Eq. Jur., §§ 1404 et seg., are cited in Gibson v. Riehle, 26 Colo. App. 127, 140 Pac. 933; Cummings v. Nielson, 42 Utah, 157, 129 Pac. 619.

That granting the remedy is a matter of discretion, see, in general, among innumerable cases: King v. Hamilton, 4 Pet. 311, 7 L. Ed. 869: Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509; Hudson v. Layton, 5 Harr. (Del.) 74, 48 Am. Dec. 167; Godwin v. Springer, 233 Ill. 229, 84 N. E. 234; Fish v. Leser, 69 Ill. 394; New York Brokerage Co. v. Wharton, 143 Iowa, 61, 119 N. W. 969; Shoop v. Burnside, 78 Kan. 871, 98 Pac. 202; Offutt v. Offutt, 106 Md. 236, 124 Am. St. Rep. 491, 12 L. R. A. (N. S.) 232, 67 Atl. 138; Whalen v. Baltimore & O. R. Co., 108 Md. 11, 129 Am. St. Rep. 423, 17 L. R. A. (N. S.) 130, 69 Atl. 390; George Gunther, Jr., Brewing Co. v. Brywezynski, 107 Md. 696, 69 Atl. 514; Lanahan v. Cockey, 108 Md. 620, 71 Atl. 314; Banaghan v. Malaney, 200 Mass. 46, 128 Am. St. Rep. 378, 19 L. R. A. (N. S.) 871, 85 N. E. 839; Chicago, K. & S. R. Co. v. Lane, 150 Mich. 162, 113 N. W. 22; Lemp Hunting & Fishing Club v. Hackmann, 172 Mo. App. 549, 156 S. W. 791; Lopeman v. Colburn, 82 Neb. 641, 118 N. W. 116; Seymour v. Delancey, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270; Miles v.

opinion, misleading and inaccurate. The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions, and incidents, which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity.<sup>2</sup>

Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261; Pearson v. Millard, 150 N. C. 303, 63 S. E. 1053; Spengler v. Sonnenberg, 88 Ohio St. 192, Ann. Cas. 1914D, 1083, 52 L. R. A. (N. S.) 510, 102 N. E. 737; Naughton v. Morford Wood Co., 90 Ohio St. 61, 106 N. E. 659; Hawkins v. Doe, 60 Or. 437, Ann. Cas. 1914A, 765, 119 Pac. 754; Wetherby v. Griswold, 75 Or. 468, 147 Pac. 388; Friend v. Lamb, 152 Pa. St. 529, 34 Am. St. Rep. 672, 25 Atl. 577; Free v. Little, 31 Utah, 449, 88 Pac. 407; Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 S. E. 770; Voight v. Fidelity Inv. Co., 49 Wash. 612, 96 Pac. 162.

That the discretion is not arbitrary and capricious, but a sound judicial discretion, see Hess v. Bowen, 241 Fed. 659; Cumberledge v. Brooks, 235 Ill. 249, 85 N. E. 197; Anderson v. Anderson, 251 Ill. 415, Ann. Cas. 1912C, 556, 96 N. E. 265; Edelen v. Samuels & Co., 126 Ky. 295, 103 S. W. 360; Posey v. Kimsey, 146 Ky. 205, 142 S. W. 703; Friend v. Smith, 191 Mich. 99, 157 N. W. 347; Beheret v. Myers, 240 Mo. 58, 144 S. W. 824; Long v. Needham, 37 Mont. 408, 96 Pac. 731; Law v. Smith, 68 N. J. Eq. 81, 59 Atl. 327; Seymour v. Delancey, 6 Johns. Ch. (N. Y.) 222; Pearson v. Millard, 150 N. C. 303, 63 S. E. 1053.

<sup>2</sup> The text is quoted in Cincinnati, B. & C. R. R. v. Wall, 48 Ind. App. 605, 96 N. E. 389; Mitchell v. Mutch (Iowa), 164 N. W. 212; Adams v. Georgia-Carolina Power Co., 101 S. C. 170, 85 S. E. 312. See, also, Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523; Anderson v. Anderson, 251 Ill. 415, Ann. Cas. 1912C, 556, 96 N. E. 265; Black v. Miller, 158 Iowa, 293, 138 N. W. 535; Western Securities Co. v. Atlee, 168 Iowa, 650, 151 N. W. 56; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Abrahams v. King, 111 Md. 104, 73 Atl. 694; J. I. Case Threshing Mach. Co. v. Farnsworth, 28 S. D. 432, 134 N. W. 819; Steadman v. Handy, 102 Va. 382, 46 S. E. 380. "These elements, conditions, and incidents, as collected from the cases, are the following: The contract must be concluded, cer-

So far as these essential elements and conditions do not relate to the existence of contracts binding in equity, they are nothing but expressions and applications of the fundamental principles, He who seeks equity must

tain, unambiguous [post, §§ 764-768], mutual [see post, §§ 769-776], and upon a valuable consideration [see post, § 763]; it must be perfectly fair in all its parts [see post, §§ 785-800]; free from any misrepresentation [see 2 Pom. Eq. Jur., §§ 889, 899] or misapprehension [see post, §§ 777-783], fraud or mistake [see post, §§ 777-784], imposition or surprise [see post, §§ 781, 784, etc.]; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant [see post, §§ 785-800]; and finally: it must be capable of specific execution through a decree of the court [see ante, §§ 755-761]." 4 Pom. Eq. Jur., § 1404, note 2; quoted in Matthes v. Wier, 10 Del. Ch. 63, 84 Atl. 878. As to the requirement that the defendant must have the capacity and ability to perform the contract by obeying the decree of the court, and the rules as to compensation to plaintiff for his partial incapacity, or (in some cases) damages ' awarded in equity where his incapacity is total, see post, chapter XLI.

The formula as to discretion, as it is actually employed by the courts, in the majority of cases simply calls attention to the fact that the case is governed by equitable principles, not by legal rules; as, for example, in Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414 (uncertainty of the contract); Offutt v. Offutt, 106 Md. 236, 124 Am. St. Rep. 491, 12 L. R. A. (N. S.) 232, 67 Atl. 138 (same); Maltby v. Thews, 171 Ill. 264, 49 N. E. 486 (fraud); Somerville v. Coppage, 101 Md. 519, 61 Atl. 318 (mistake); Gottfried v. Bray, 208 Mo. 652, 106 S. W. 639 (same); Hudson v. Layton, 5 Harr. (Del.) 74, 48 Am. Dec. 167 (laches); Boldt v. Early, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 271 (same); Reid v. Mix, 63 Kan. 745, 55 L. R. A. 706, 66 Pac. 1021 (same); Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789 (same); Marthinson v. King, 150 Fed. 48, 82 C. C. A. 360 (as to adequacy of legal remedy); Edelen v. Samuels & Co., 126 Ky. 295, 103 S. W. 360 (as to decree calling for supervision by court). Sometimes it simply means that the court must use care in weighing the evidence: Sugar v. Froehlich, 229 Ill. 397, 82 N. E. 414; Hawkins v. Doe, 60 Or. 437, Ann. Cas. 1914A, 765, 119 Pac. 754; Dewey v. Spring Valley Land Co., 98 Wis. 83, 73 N. W. 565.

do equity, and He who comes into equity must come with clean hands."3

§ 2185. (§ 763.) Contract must be upon a Valuable Consideration.—Equity will not decree specific performance of a contract except upon a sufficient consideration for the promise, such as would satisfy a court of law in dealing with a contract.<sup>4</sup> It must be a *valuable*, and not

3 4 Pom. Eq. Jur., § 1404; quoted in Cincinnati, B. & C. R. R. v. Wall, 48 Ind. App. 605, 96 N. E. 389. For particular instances of the application of these maxims, see 1 Pom. Eq. Jur., §§ 392, 393, 400, 459.

In cases of unfairness or hardship, the courts are often called upon to exercise a true discretion, with little guidance from rules or precedents: See Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Stone v. Pratt, 25 Ill. 25; Whalen v. Baltimore & O. R. Co., 108 Md. 11, 129 Am. St. Rep. 423, 17 L. R. A. (N. S.) 130, 69 Atl. 390; Banaghan v. Malaney, 200 Mass. 46, 128 Am. St. Rep. 378, 19 L. R. A. (N. S.) 871, 85 N. E. 839; Wetherby v. Griswold, 75 Or. 468, 147 Pac. 388; Friend v. Lamb, 152 Pa. St. 529, 34 Am. St. Rep. 672, 25 Atl. 577; and post, §§ 785 et seq.

4 Gustin v. Union School Dist., 94 Mich. 502, 34 Am. St. Rep. 362, 54 N. W. 156; Maryland Clay Co. v. Simpers, 96 Md. 1, 53 Atl. 424; Lamprey v. Lamprey, 29 Minn. 151, 155, 12 N. W. 514; Stubbings v. Durham, 210 Ill. 542, 71 N. E. 586; Boles v. Caudle, 133 N. C. 528, 45 S. E. 835. See, also, Jefferys v. Jefferys, Craig & P. 138; Smith v. Reynolds, 8 Fed. 696, 3 McCrary, 157; Alabama Cent. R. Co. v. Long, 158 Ala. 301, 48 South. 363; Schaadt v. Mutual Life Ins. Co., 2 Cal. App. 715, 84 Pac. 249; Baum v. Concord Land & Improvement Co., 24 Colo. App. 397, 133 Pac. 760; Maloy v. Boyett, 53 Fla. 956, 43 South. 243; Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874; Stone v. Pratt, 25 Ill. 25; McDaniels v. Whitney, 38 Iowa, 60; McKean v. Read, Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318; Berry v. Frisbie, 120 Ky. 337, 86 S. W. 558; Higgins v. Butler, 78 Me. 520, 7 Atl. 276; Harper v. Davis, 115 Md. 349, Ann. Cas. 1913A, 861, 35 L. R. A. (N. S.) 1026, 80 Atl. 1012 (promise to devise in consideration of services which have been rendered without any understanding that compensation was to be made, not specifically enforced); Kirk v. Middlebrook, 201 Mo. 245, 100 S. W. 450; Tunison v. Bradford, 49 N. J. Eq. 210, 22 Atl. 1073; Cowles v. Rochester Folding Box Co., 179 N. Y. 87, 71 N. E. 468; Hardy v. Ward, 150 N. C. 385, 64 S. E. merely a good, consideration, as blood and affection,<sup>5</sup> and there must be a consideration in fact, and not merely one stated.<sup>6</sup> Equity will never decree specific performance of a voluntary undertaking or promise.<sup>7</sup> Equity goes further than the court of law, and looks behind the seal of a specialty, and will not give its aid to enforcing the sealed instrument if there is no consideration found.<sup>8</sup>

§ 2186. (§ 764.) Contract must be Complete, Certain, and Definite.—A contract that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced in equity. There is required a greater degree

171; Taylor v. Staples, 8 R. I. 170, 5 Am. Rep. 556; Keffer v. Grayson, 76 Va. 517, 44 Am. Rep. 171; Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 21 L. R. A. 133, 17 S. E. 558; Coleman v. Larson, 49 Wash. 321, 95 Pac. 262.

Consideration existed in the cases following: Kelly v. Keith, 77 Ark. 31, 90 S. W. 150; Gibson v. Riehle, 26 Colo. App. 127, 140 Pac. 933; Chicora Fertilizer Co. v. Dunan, 91 Md. 144, 50 L. R. A. 401, 46 Atl. 347; Law v. Smith, 68 N. J. Eq. 81, 59 Atl. 327; Winslow v. White, 163 N. C. 29, 79 S. E. 258 (marriage); Clark v. Hindman, 46 Or. 67, 79 Pac. 56. For the exception to the rule in the cases of a parol gift of land, under the doctrine of part performance, see post, § 828.

- <sup>5</sup> Camden v. Dewing, 47 W. Va. 310, 81 Am. St. Rep. 797, 34 S. E.
   911; Jefferys v. Jefferys, Craig & P. 139; Barret v. Geisinger, 179
   Ill. 240, 53 N. E. 576, 578.
  - 6 Lamprey v. Lamprey, 29 Minn. 156, 12 N. W. 514.
  - 7 Jefferys v. Jefferys, Craig & P. 139.
- 8 Lamprey v. Lamprey, supra, p. 155. "Equity always requires an actual consideration in the case of executory contracts, and permits evidence as to the want of it without regard to the seal." See also, Jefferys v. Jefferys, Craig & P. 138; Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874; Tunison v. Bradford, 49 N. J. Eq. 210, 22 Atl. 1073. As to the effect of the seal in rendering an offer irrevocable, see post, § 773. See this subject treated more at length in 1 Pom. Eq. Jur., § 370; 3 Pom. Eq. Jur., § 1293.

As to inadequacy of the consideration as a defense to specific performance, see post, §§ 789, 790, and especially, 2 Pom. Eq. Jur., §§ 925-928, where the doctrine is fully stated and explained.

of certainty and definiteness for specific performance than to obtain damages at law.9 For specific performance is demanded that degree of certainty and definiteness which leaves in the mind of the chancellor or court no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is to compel done. 10 "The element of completeness denotes that the contract embraces all the material terms; that of certainty denotes that each one of these terms is expressed in a sufficiently exact and definite manner. An incomplete contract, therefore, is one from which one or more material terms have been entirely omitted. An uncertain contract is one which may indeed embrace all the material terms, but one or more of them is expressed in so inexact, indefinite, or obscure language, that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect."11

- 9 See Stanton v. Singleton, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146; Marsh v. Lott, 8 Cal. App. 384, 97 Pac. 163; Blanchard v Detroit etc. R. Co., 31 Mich. 43, 18 Am. Rep. 142; Soloman v. Wilmington Sewerage Co., 142 N. C. 439, 6 L. R. A. (N. S.) 391, 55 S. E. 300; Grayson Lumber Co. v. Young, 118 Va. 122, 86 S. E. 826.
- 10 The text is quoted in Stay v. Tennile, 159 Ala. 514, 49 South 238 (uncertainty as to time when right to purchase "if owner wishes to sell," may be exercised); Waldo v. Lockard, 96 Neb. 490, 148 N. W. 510; McRae v. Smart, 120 Tenn. 413, 114 S. W. 729; Van Dyke v. Norfolk Southern R. Co., 112 Va. 835, 72 S. E. 659; and cited in Cline v. Strong, 52 Ind. App. 286, 100 N. E. 569. See, also, Riverside Land & Irr. Co. v. Sawyer, 24 Colo. App. 442, 134 Pac. 1011; Faucett v. Northern Clay Co., 84 Wash. 382, 146 Pac. 857 (where contract by its terms provides a binding way of making it certain); Kipp v. Laun, 146 Wis. 591, 131 N. W. 418; McKee v. Higbee, 180 Mo. 263, 79 S. W. 407, where to obtain specific performance, the court holds the contract must be "clear, definite and unequivocal," such as "to leave no room for any reasonable doubt."
- 11 Pom. Spec. Perf., § 145. The text is quoted in Van Dyke v. Norfolk Southern R. Co., 112 Va. 835, 72 S. E. 659 (writing indi-

§ 2187. (§ 765.) Incompleteness of Proof. — Wherever the contract rests in whole or in part on parol evidence, the elements of incompleteness, uncertainty, and indefiniteness may exist when the proof is insufficient,

cated that there were essential terms and conditions to be agreed upon).

As to completeness of the contract, in general, see Kane v. Luckman, 131 Fed. 609; Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874; Callanan v. Chapin, 158 Mass. 113, 32 N. E. 941; Potts v. Whitehead, 20 N. J. Eq. 55, 160; Whitehill v. Lowe, 10 Utah, 419, 37 Pac. 589; Creecy v. Grief, 108 Va. 320, 61 S. E. 769. Terms which the law implies need not be stated: Lawson v. Mullinix, 104 Md. 156, 64 Atl. 938 (promise to buy); Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118 (plaintiff's acceptance).

As to certainty in material terms of the contract, see, in general, Price v. Griffith, 1 De Gex, M. & G. 80; Preston v. Preston, 95 U. S. 200, 24 L. Ed. 494; Bradley v. Heyward, 164 Fed. 107; Davis & Roesch Temperature Controlling Co. v. Tagliabue, 159 Fed. 712, 86 C. C. A. 466; Jones v. Jones, 155 Ala. 644, 47 South. 80; Alabama Central R. Co. v. Long, 158 Ala. 301, 48 South. 363; Mallory v. Globe-Boston Copper Min. Co., 11 Ariz. 296, 94 Pac. 1116; Berry v. Woodburn, 107 Cal. 504, 40 Pac. 802; Reymond v. Laboudigue, 148 Cal. 691, 84 Pac. 189; Diamond State Iron Co. v. Todd, 6 Del. Ch. 163, 14 Atl. 27; Edwards v. Rivis, 35 Fla. 89, 17 South. 416; Hamilton v. Harvey, 121 Ill. 469, 2 Am. St. Rep. 118, 13 N. E. 210; Island Coal Co. v. Streitlemier, 139 Ind. 83, 37 N. E. 340; Offutt v. Offutt, 106 Md. 236, 124 Am. St. Rep. 491, 12 L. R. A. (N. S.) 232, 67 Atl. 138; Schwanebeck v. Smith, 77 Md. 314, 24 L. R. A. 168, 26 Atl. 409; Fogg v. Price, 145 Mass. 513, 14 N. E. 741; Johnson v. Skillman, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; Collins v. Harrell, 219 Mo. 279, 118 S. W. 432; Stanton v. Driffkorn, 83 Neb. 36, 118 N. W. 1092; Krah v. Wassmer, 75 N. J. Eq. 109, 71 Atl. 404; Stanton v. Miller, 58 N. Y. 192; Hardy y. Ward, 150 N. C. 385, 64 S. E. 171; Wagonblast v. Whitney, 12 Or. 83, 6 Pac. 399; James v. Penn Tanning Co., 221 Pa. St. 634, 70 Atl. 885; McCarty v. Kyle, 4 Coldw. (Tenn.) 348; Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 S. E. 770; Hissam v. Parish, 41 W. Va. 686, 56 Am. St. Rep. 892. 24 S. E. 600; Metcalf v. Hart, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407.

conflicting, and leaving room for doubt as to what the precise terms were, for the plaintiff is bound to establish clearly and satisfactorily the existence of the contract and its terms.<sup>12</sup>

§ 2188. (§ 766.) How Far Parol Evidence can be Used to Make Certain or Definite. 13—However, it is not required that the written contract itself should furnish the sole evidence of such certainty and definiteness, where it is complete in its material terms, and there is sufficient certainty and definiteness for the court to supply, either by proper reference to other documents or by properly admissible parol evidence as to extrinsic facts, the necessary degree of exactness. 14 But parol evidence can never be given to supply an omitted term or make definite and certain that which the parties left indefinite and uncertain; in a word, parol evidence cannot show the intent of the parties if it cannot be found in the con-

- 12 The text is cited in Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35. See Deeds v. Stephens, 10 Idaho, 332, 79 Pac. 77; Wolfinger v. McFarland (N. J.), 54 Atl. 862; Kelly v. Short (Tex. Civ. App.), 75 S. W. 877; Dreiske v. Eisendrath Co., 214 Ill. 199, 73 N. E. 379; McKee v. Higbee, 180 Mo. 263, 79 S. W. 407; House v. Clemens, 16 Daly, 3, 9 N. Y. Supp. 484 (contract found sufficiently definite and enforced by injunction); Cable v. Jones, 179 Mo. 606, 78 S. W. 780 (sufficient certainty found and specific performance given). For a fuller treatment of this subject, see post, § 829a.
- 13 This paragraph is quoted in full in Crawford v. Workman, 64 W. Va. 10, 61 S. E. 319.
- 14 Peay v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885 (parol evidence by extrinsic circumstances to show the property referred to by the written instrument); Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414 (where the description became certain by reference to the probate record and attorney's letter referred to); Ross v. Purse, 17 Colo. 24, 28 Pac. 473 (contract for a well to be dug on lot 10. Could be made certain and definite by reference to town plats).

tract.<sup>15</sup> Parol evidence can only be used to "fit the description to the land."<sup>16</sup>

§ 2189. (§ 767.) Incompleteness and Uncertainty may Relate to the Parties, Price, Subject-matter, Conditions, etc.—The material terms, or the existence of the contract, may be uncertain or lacking, in reference to: (1) the parties contracting, or (2) the price or some definite means of ascertaining it, 17 (3) the subject-matter, (4) conditions, etc. Thus, (1) the parties must be capable of being determined from the written contract; 18

15 The rule has been well stated in Fry v. Platt, 32 Kan. 62, 3 Pac. 781, as follows: That in order to satisfy the requirements both of the statute of frauds and of certainty in the contract, "it is required that the whole contract with all its essentials be in writing, that its terms be definite and certain or that they can be made definite and certain in reference to other instruments in writing, or by reference to extrinsic and existing facts which may be shown to the court."

But an indefinite description may be aided by the fact that the plaintiff has been put in possession: Ottumwa etc. R'y Co. v. Mc-Williams, 71 Iowa, 164, 32 N. W. 315 (contract to convey right of way of necessary width); Keepers v. Yocum, 84 Kan. 554, Ann. Cas. 1912A, 748, and note, 114 Pac. 1063; Chicago, K. & S. R. Co. v. Lane, 150 Mich. 162, 113 N. W. 22; Fred Gorder & Son v. Pankonin, 83 Neb. 204, 131 Am. St. Rep. 629, 119 N. W. 449; Muller v. Brautigan, 84 N. J. Eq. 574, 94 Atl. 584; Mundy v. Irwin, 20 N. M. 43, 145 Pac. 1080; Inglis v. Fohey, 136 Wis. 28, 116 N. W. 857 (boundary marked after contract executed). And see Repetto v. Baylor, 61 N. J. Eq. 501, 48 Atl. 774 (right of selection of the lot to be conveyed).

- 16 Halsell v. Renfrow, 14 Okl. 674, 2 Ann. Cas. 286, 78 Pac. 118.
- 17 Fry v. Platt, 32 Kan. 62, 3 Pac. 781.
- 18 Halsell v. Renfrow, 14 Okl. 674, 2 Ann. Cas. 286, 78 Pac. 118; Fritz v. Mills, 170 Cal. 449, 150 Pac. 375; Thompson v. Burns, 15 Idaho, 572, 99 Pac. 111; Mertz v. Hubbard, 75 Kan. 1, 121 Am. St. Rep. 352, 12 Ann. Cas. 485, 8 L. R. A. (N. S.) 733, 88 Pac. 529; Frahm v. Metcalf, 75 Neb. 241, 13 Ann. Cas. 312, 106 N. W. 227; Myers v. Metzger, 63 N. J. Eq. 779, 52 Atl. 274; Davimos v. Green, 83 N. J. Eq. 596, 92 Atl. 96; Cohen v. Pool, 84 N. J. Eq. 77, 189, 94 Atl. 37; Collins v. Keller, 62 Or. 169, 124 Pac. 681; Brown v.

;

(2) there must be a price stated, or some means of ascertaining it within the power of equity to enforce; 19 (3) the land or other subject-matter, must be described with sufficient definiteness to identify it, with the aid of such parol evidence as is properly admissible to apply the written description. 20 Thus, a contract to convey "your

Hughes, 244 Pa. 397, 90 Atl. 651; and see Hissam v. Parish, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600; Broemsen v. Agnic, 70 W. Va. 106, 73 S. E. 253 (sufficient certainty in designation of parties).

19 Reynolds v. Kirk, 105 Ala. 446, 17 South. 95 (where a promissory note contained price of the land, date of payment, and other terms, it was sufficient to satisfy the statute of frauds); Meyer v. Lincoln Realty Co., 14 Cal. App. 756, 113 Pac. 333 (rental); Folsom v. Harr, 218 Ill. 369, 109 Am. St. Rep. 297, 75 N. E. 987; Hayes v. O'Brien, 149 Ill. 403, 23 L. R. A. 555, 37 N. E. 73 (provision for purchase at the same price as any other person may have offered, sufficiently definite); Bradley Real Estate Co. v. Robbins, 7 Ind. Ter. 94, 103 S. W. 777; Wolf v. Lodge, 159 Iowa, 162, 140 N. W. 429; Fry v. Platt, 32 Kan. 62, 3 Pac. 781; Fogg v. Price, 145 Mass. 513, 14 N. E. 741; Pray v. Clark, 113 Mass. 283 (uncertainty in rental); Chicago, K. & S. R. Co. v. Lane, 150 Mich. 162, 113 N. W. 22; Holland v. Holland, 195 Mich. 513, 161 N. W. 892; Livingston Waterworks v. City of Livingston, 53 Mont. 1, L. R. A. 1917D, 1074, 162 Pac. 381; Carpenter v. Tinglof, 76 N. H. 454, 84 Atl. 51; La Belle Coke Co. v. Smith, 221 Pa. St. 642, 70 Atl. 894; Cummings v. Nielson, 42 Utah, 157, 129 Pac. 619; Huston v. Harrington, 58 Wash. 51, 107 Pac. 874; Barnes v. Cole, 77 W. Va. 704, 88 S. E. 184; Metcalf v. Hart, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407. A contract to sell for a "fair price," or the like, means that the price is to be ascertained by the court, and is not uncertain; Lister Agricultural Chemical Works v. Selby, 68 N. J. Eq. 271, 59 Atl. 247; and see Joy v. St. Louis, 138 U. S. 1, 34 L. Ed. 843, 11 Sup. Ct. 243; Kipp v. Laun, 146 Wis. 591, 131 N. W. 418.

20 Preston v. Preston, 95 U. S. 200, 24 L. Ed. 494; Webb v. Jones, 163 Ala. 637, 50 South. 887 (sufficient description of right of way); Preble v. Abrahams, 88 Cal. 245, 22 Am. St. Rep. 301, 26 Pac. 99 (parol proof of surrounding circumstances to aid the description); McMahon v. Plumb, 88 Conn. 547, 92 Atl. 113; Rhode v. Gallat, 70 Fla. 536, 70 South. 471; Warner v. Marshall, 166 Ind. 88, 75 N. E. 582 (description sufficient, with aid of extrinsic evidence); Bacon v. Leslie, 50 Kan. 494, 34 Am. St. Rep. 134, 31 Pac. 1066; Posey v. Kimsey, 146 Ky.

lot," where the vendor owned three lots, is not enforceable, and parol evidence cannot be brought in to show

205, 142 S. W. 703; Hall v. Cotton, 167 Ky. 464, L. R. A. 1916C, 1124, 180 S. W. 779; Meramec Portland Cement etc. Co. v. Kreis, 261 Mo. 160, 168 S. W. 1148; McCarn v. London, 83 Neb. 201, 119 N. W. 251; Brooks v. Wentz, 61 N. J. Eq. 474, 49 Atl. 147; Alston v. Savage, 173 N. C. 213, 91 S. E. 842 ("a certain tract of land in L. township now being advertised for sale," definite under the circumstances); Roadman v. Harding, 63 Or. 122, 126 Pac. 993; James v. Penn Tanning Co., 221 Pa. St. 634, 70 Atl. 885 (no description of the land from which timber to be taken); Safe Deposit & Trust Co. v. Diamond Coal & Coke Co., 234 Pa. 100, L. R. A. 1917A, 596, 83 Atl. 54; Grayson Lumber Co. v. Young, 118 Va. 122, 86 S. E. 826; Kight v. Kight, 64 W. Va. 519, 63 S. E. 335; Reger v. McAllister, 70 W. Va. 52, 73 S. E. 48; Freeburgh v. Lamoureux, 15 Wyo. 22, 85 Pac. 1054. See, also, Higginbotham v. Cooper, 116 Ga. 741, 42 S. E. 1000 (contract called for "lot on Clark St. bought at tax sale." As plaintiff did not show there were no other lots on Clark street, bought at tax sale and owned by vendor, he could not have specific performance); Kirkpatrick v. Pettis, 127 Iowa, 611, 103 N. W. 956 (location of land not shown by section, street, or other definite description); Powers v. Rude, 14 Okl. 381, 79 Pac. 89; Ferguson v. Blackwell, 8 Okl. 489, 495, 58 Pac. 647; Meyer v. Quiggle, 140 Cal. 495, 74 Pac. 40 (to pay for services in cash or land at option of plaintiff); Knight v. Alexander, 42 Or. 521, 71 Pac. 657 (to convey one hundred acres of "west end of my land"; indefinite, as not clear whether contract applied to land about to be acquired or not); Rock Island & Pac. R'y Co. v. Dimick, 144 Ill. 628, 19 L. R. A. 105, 32 N. E. 291 (here the contract was to keep open two passageways under the railroad track, but did not state their size, location, or nature. Extrinsic evidence showed two former ways in existence. Contract held definite, and enforced); Ross v. Purse, 17 Colo. 24, 28 Pac. 473 (contract for a well enforced, though no term as to depth of well or kind of timbering: Inference that ordinary well intended).

A reference to natural features of the land may assist the description: Minneapolis & St. L. R'y Co. v. Cox, 76 Iowa, 306, 14 Am. St. Rep. 216, 41 N. W. 24 ("the grove thereon").

A mere statement that the land lies on a certain road, or stream, etc., or at the intersection of certain roads, etc., is insufficient, as only one or two boundaries are thereby ascertained: Island Coal Co. v. Streitlemier, 139 Ind. 83, 37 N. E. 340; Reed v. Reed, 93 N. C. 462. Compare Carr v. Howell, 154 Cal. 372, 97 Pac. 885; Clower v.

the intent of the parties as to one particular lot.<sup>21</sup> But, to give the classic instance, a contract to convey "my mill" where vendor owned but one mill, is good.<sup>22</sup> It

Godwin, 140 Ga. 128, 78 S. E. 714 (statement of three boundaries sufficient).

The popular name of the land often serves to identify it, if its boundaries can be ascertained by the usual rules of evidence: Clark v. Cagle, 141 Ga. 703, L. R. A. 1915A, 317, 82 S. E. 21; Koch v. Streuter, 218 Ill. 546, 2 L. R. A. (N. S.) 210, 75 N. E. 1049 ("Ideal Fruit Farm"); Bacon v. Leslie, 50 Kan. 494, 34 Am. St. Rep. 134, 31 Pac. 1066; Noyes v. Bragg, 220 Mass. 106, 107 N. E. 669; Long v. Needham, 37 Mont. 408, 96 Pac. 731.

21 Farthing v. Rochelle, 131 N. C. 563, 43 S. E. 1.

22 For similar instances of identification by statement of ownership, mode of acquisition, etc., see Colerick v. Hooper, 3 Ind. 316, 56 Am. Dec. 505; Waring v. Ayres, 40 N. Y. 357. See, also, Baxter v. Calhoun, 222 Fed. 111 (land devised by A to B); Hines v. Roller, 239 Fed. 486, 152 C. C. A. 364 (all property defendant owns in a certain locality); Farmer v. Sellers (Ala.), 39 South. 772 (land purchased by owner at a sheriff's sale); Hodges v. Kowing, 58 Conn. 12, 7 L. R. A. 87, 18 Atl. 979 (owner's "place" at S.); South Florida Citrus Land Co. v. Walden, 59 Fla. 606, 51 South. 554 (all land owned by defendant in a certain locality); Ames v. Ames, 46 Ind. App. 597, 91 N. E. 509 ("all her interest in real estate formerly owned by A, deceased''); Western Securities Co. v. Atlee, 168 Iowa, 650, 151 N. W. 56 ("our electric light and power plant"); Clawson v. Brewer, 67 N. J. Eq. 201, 58 Atl. 598, affirmed, 70 N. J. Eq. 803, 67 Atl. 1102 (property received under will of owner's husband); Bateman v. Riley, 72 N. J. Eq. 316, 73 Atl. 1006; Collerd v. Tully, 77 N. J. Eq. 439, 77 Atl. 1079; Burns v. Witter, 56 Or. 368, 108 Pac. 129 ("my farm containing forty acres"); Kennedy v. Gramling, 33 S. C. 367, 26 Am. St. Rep. 676, 11 S. E. 1081 (correspondence of the parties shows that the property was that rented by one from the other); Lathrop v. Columbia Collieries Co., 70 W. Va. 58, 73 S. E. 299. But see Eaton v. Wilkins, 163 Cal. 742, 127 Pac. 71 ("our land of 1060 acres," insufficient); Gilman v. Brunton, 94 Wash. 1, 161 Pac. 835.

If the ownership by the vendor is not mentioned in the contract, whether the fact that he owns but one tract serves to identify it as the land in question is a point on which the cases disagree: Compare Nippolt v. Kammon, 39 Minn. 372, 40 N. W. 266, holding proof

is, as a general thing, not necessary to specify the town, county and state where the land is located, since the implication is that the location is that where the contract is made.<sup>23</sup> However, a contract to convey lot 56, block 12, has been held bad for uncertainty, as there is no governmental division of blocks.<sup>24</sup> The number of a city lot is usually a sufficient description without specifying the boundaries of the lot.25 Not only must the specific thing be identified, it must be defined. A contract to take a certain tract, of land or any other piece of defendant's land, is too indefinite.<sup>26</sup> A contract to convey a certain quantity of land, merely, or a certain quantity out of a specified larger tract, is too uncertain to be specifically enforced.<sup>27</sup> (4) Conditions, etc. The contract

of such fact insufficient, with Bacon v. Leslie, 50 Kar. 494, 34 Am. St. Rep. 134, 31 Pac. 1066; Minge v. Green, 176 Ala. 343, 58 South. 381; Joyce v. Tomasini, 168 Cal. 234, 142 Pac. 67; Cumberledge v. Brooks, 235 Ill. 249, 85 N. E. 197; Beaton v. Fussell (Tex. Civ. App.), 166 S. W. 408.

23 Ross v. Purse, 17 Colo. 24, 28 Pac. 473; Kilday v. Schancupp, 91
Conn, 29, 98 Atl. 335; Engler v. Garrett, 100 Md. 387, 59 Atl. 648;
Flegel v. Dowling, 54 Or. 40, 135 Am. St. Rep. 812, 19 Ann. Cas. 1159,
102 Pac. 178; but see Allen v. Kitchen, 16 Idaho, 133, 18 Ann. Cas.
914, L. R. A. 1917A, 563, 100 Pac. 1052; Broadway Hospital & Sanitarium v. Decker, 47 Wash. 586, 92 Pac. 445.

24 Glos v. Wilson, 198 Ill. 44, 64 N. E. 734.

Kilday v. Schancupp, 91 Conn. 29, 98 Atl. 335 (street number);
Matthes v. Wier, 10 Del. Ch. 63, 84 Atl. 878 (same); Nowicki v. Kopelczak, 195 Mich. 678, 162 N. W. 266 (same); Riley v. Hodgkins, 57
N. J. Eq. 278, 41 Atl. 1099; Flegel v. Dowling, 54 Or. 40, 135 Am. St.
Rep. 812, 19 Ann. Cas. 1159, 102 Pac. 178. Compare Agnew v. Southern Ave. Land Co., 204 Pa. St. 192, 53 Atl. 752.

26 Ensminger v. Peterson, 53 W. Va. 324, 44 S. E. 218.

27 Hines v. Copeland, 23 Cal. App. 36, 136 Pac. 728; Hamilton v. Harvey, 121 Ill. 469, 2 Am. St. Rep. 118, 13 N. E. 210; Wetmore v. Watson, 253 Ill. 88, 38 L. R. A. (N. S.) 331, 97 N. E. 237; Miller v. Campbell, 52 Ind. 125; Hall v. Cotton, 167 Ky. 464, L. R. A. 1916C, 1124, 180 S. W. 779; Roberts v. Bennett, 166 Ky. 588, 179 S. W. 605; Pierson v. Ballard, 32 Minn. 263, 20 N. W. 193; Cole v. Cole, 99 Miss. 335, Ann. Cas. 1913E, 332, 34 L. R. A. (N. S.) 147, 54 South. 953

must be complete, definite and certain as to whatever conditions are annexed, terms of credit where given, place of performance, time of performance unless a reasonable time is inferred, and other terms that are made by the contract.<sup>28</sup> Thus, a contract to furnish a city

(tract to be chosen by vendee); Barnes v. Rea, 219 Pa. St. 287, 68 Atl. 839; Grayson Lumber Co. v. Young, 118 Va. 122, 86 S. E. 826; McMillan v. Wright, 56 Wash. 114, 105 Pac. 176; Auer v. Mathews, 129 Wis. 143, 108 N. W. 45. But see McCarty v. May (Tex. Civ. App.), 74 S. W. 804, where a contract which gave a right to select fifty acres out of a larger tract was enforced; and see Peckham v. Lane, 81 Kan. 489, 19 Ann. Cas. 369, 25 L. R. A. (N. S.) 967, 106 Pac. 464; Asberry v. Mitchell, 121 Va. 276, 93 S. E. 638.

<sup>28</sup> Fry v. Platt, 32 Kan. 62, 3 Pac. 781; Walpole v. Orford, 3
Ves. Jr. 402; Meyer Land Co. v. Pecor, 18 S. D. 466, 101 N. W. 39;
Moore v. Galupo, 65 N. J. Eq. 194, 55 Atl. 628; Brown v. Swarthout,
134 Mich. 585, 96 N. W. 951; Burke v. Mead, 159 Ind. 252,
64 N. E. 880; Welsh v. Williams, 85 Miss. 301, 37 South. 561.

If no time for payment is specified, a reasonable time is generally to be inferred: McClurg v. Crawford, 209 Fed. 340, 126 C. C. A. 266 (at close of transaction); Dunlop v. Baker, 239 Fed. 193, 152 C. C. A. 181; Whittier v. Gormley, 3 Cal. App. 489, 86 Pac. 726 (on delivery of deed); Joyce v. Tomasini, 168 Cal. 234, 142 Pac. 67 (delivery of deed and payment presumed to be concurrent); Ullsperger v. Meyer, 217 Ill. 262, 3 Ann. Cas. 1032, 2 L. R. A. (N. S.) 221, 75 N. E. 482; Ames v. Ames, 46 Ind. App. 597, 91 N. E. 509 (payment and conveyance concurrent); Bushman v. Faltis, 184 Mich. 172, 150 N. W. 848 (rent payable at end of year); McMillan v. McMillan, 77 S. C. 511, 58 S. E. 431; Broemsen v. Agnic, 70 W. Va. 106, 73 S. E. 253. Compare Zakrzewski v. Fisher, 278 Ill. 557, 116 N. E. 117. But certainty as to the time of payments is essential if payment is expressly deferred by the contract; Klein v. Markarian, 175 Cal. 37, 165 Pac. 3 (uncertainty as to amount and number of deferred payments); Wright v. Raftree, 181 Ill. 464, 54 N. E. 998; Tharp University School v. Komus Realty Co., 159 Ky. 386, 167 S. W. 136; Moore v. Galupo, 65 N. J. Eq. 194, 55 Atl. 628; Strack v. Roetzel, 46 Okl. 695, 148 Pac. 1017; Meyer Land Co. v. Pecor, 18 S. D. 466, 101 N. W. 39 (specified sum "per year"); Buck v. Pond, 126 Wis. 382, 105 N. W. 909. As to time of payment on contract to give a mortgage, see Caplan v. Buckner, 123 Md. 590, 91 Atl. 481 (reasonable time); Green v. Richards, 23

with light, allowing the substitution of electric light for gas, but leaving the number and price of the electric lights for later agreement is unenforceable for incompleteness in a material term.<sup>29</sup> Similarly a contract to take milk from plaintiff is unenforceable where neither price, amount, time nor place of delivery was named by the contract.<sup>30</sup>

N. J. Eq. 32; Poole v. Tannis, 137 Wis. 363, 118 N. W. 188, 864 (uncertain).

Uncertainty as to the manner of securing deferred payments: Marsh v. Lott, 8 Cal. App. 384, 97 Pac. 163; Klein v. Markarian, 175 Cal. 37, 165 Pac. 3; Leslie v. Mathwig, 131 Minn. 159, 154 N. W. 951; Ladd v. Stevenson, 112 N. Y. 325, 8 Am. St. Rep. 748, 19 N. E. 842, affirming 43 Hun, 541 ("satisfactory security"). Compare Horton v. McKee, 68 Fed. 404; Wagner v. Eustathiw, 169 Cal. 663, 147 Pac. 561 (payment by installments to be secured by mortgage, usual form of mortgage presumed to be intended); Ehrenstrom v. Phillips, 9 Del. Ch. 74, 77 Atl. 80; Harrell v. Neef, 80 Kan. 308, 102 Pac. 838 (mortgage to contain usual terms).

The duration of a lease needs to be specified: Marshall v. Berridge, 19 Ch. D. 233; Oxford v. Crow, [1893] 3 Ch. 535; McKnight v. Broadway Inv. Co., 147 Ky. 535, 145 S. W. 377; Lanahan v. Cockey, 108 Md. 620, 71 Atl. 314; Ward v. Newbold, 115 Md. 689, Ann. Cas. 1913A, 919, 81 Atl. 793; and see Zimmerman v. Rhoads, 226 Pa. 174, 75 Atl. 207 (contract for sale of coal in place, not fixing times for payment of royalty, nor duration of contract).

29 Gas Light & Coke Co. v. City of Albany, 139 Ind. 660, 39 N. E. 462.

30 Giles v. Dunbar, 181 Mass. 22, 62 N. E. 985.

As to uncertainty in contracts for personal services, see Bomer v. Canaday, 79 Miss. 222, 89 Am. St. Rep. 593, 55 L. R. A. 328, 30 South. 638 (to cut and saw timber); Offutt v. Offutt, 106 Md. 236, 124 Am. St. Rep. 491, 12 L. R. A. (N. S.) 232, 67 Atl. 138 (contract to support sufficiently certain); Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710 (same); and see ante, § 759,

Contracts to form corporations, uncertain: See Loewenberg v. De Voigne, 145 Mo. App. 710, 123 S. W. 99; Rudiger v. Coleman, 199 N. Y. 342, 92 N. E. 665; Davis v. Wynne (Tex. Civ. App.), 190 S. W. 510.

§ 2190. (§ 768.) Uncertainty and Indefiniteness Alone as a Defense.—Many contracts are unenforceable for uncertainty and indefiniteness alone, rather than on the ground of incompleteness; or for these three elements combined.<sup>31</sup> Thus, where a daughter let her father have a sum of money to purchase a home in exchange for his promise to leave it to her by will, and five years later the father bought a home, she was refused specific performance because of the indefiniteness.<sup>32</sup> Where the agreement was for certain lots in either section 8 or 9, there was no incompleteness of the contract, but there was such uncertainty that equity could not enforce the contract without making a new contract itself, which it always refuses to do.<sup>33</sup>

§ 2191. (§ 769.) The Doctrine of Mutuality—The Rule Restated.—The frequent statement of the rule of mutuality,—"that the contract to be specifically enforced must as a general rule, be mutual,—that is to say, such, that it might, at the time it was entered into, have been enforced by either of the parties against the other,"<sup>34</sup> is open to so many exceptions that it is of little value as a rule.<sup>35</sup> But in view of the firm place that the doctrine

As to uncertainty in contracts for building or construction, see Stanton v. Singleton, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146; Morey v. Terre Haute Traction and Light Co., 47 Ind. App. 16, 93 N. E. 710; Metcalf v. Hart, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407 (to make improvements). Compare Ross v. Purse, 17 Colo. 24, 28 Pac. 473 (agreement to dig a well, certain). See, also, ante, § 760.

- 31 Russel v. Agar, 121 Cal. 396, 66 Am. St. Rep. 35, 53 Pac. 926.
- 32 Leary v. Corvin, 181 N. Y. 222, 106 Am. St. Rep. 542, 2 Ann. Cas. 664, 73 N. E. 984.
- 33 Rampe v. Buehler, 203 Ill. 384, 67 N. E. 796. For a collection of older authorities on the requisites of completeness and certainty, see 4 Pom. Eq. Jur., § 1405, note 2.
  - 34 Fry, Spec. Perf., 3d ed., 215.
- 35 Pom. Eq. Jur., § 1405, note 3. The above passage of the text is quoted in General Electric Co. v. Westinghouse El. Co., 151 Fed.

of mutuality has obtained in the courts of equity, it seems well to attempt a restatement that shall be more free from exceptions. The following forms seem to meet the cases generally. "Equity will not compel specific performance by a defendant, if after performance the common-law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract." "The court will not grant specific performance to plaintiff and at the same time leave defendant to

664; Montgomery Light & Power Co. v. Montgomery Traction Co., 191 Fed. 657; United States v. Chicago M. & St. P. R'y Co. of Idaho, 207 Fed. 164; G. W. Baker Mach. Co. v. United States Fire Apparatus Co. (Del.), 97 Atl. 613; Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93; Wright v. Suydam, 72 Wash. 587, 131 Pac. 239; and cited in Great Northern R'y Co. v. Sheyenne Telephone Co., 27 N. D. 256, 145 N. W. 1062.

The doctrine was the subject of a thorough and critical historical investigation by Professor William Draper Lewis, of the University of Pennsylvania, in 49 Am. Law Reg., O. S., 270, 383, 497, 507, 559; 50 Am. Law Reg., O. S., 65, 251, 329, 394, 523; 51 Am. Law Reg., O. S., 591. Professor Lewis's results were summed up in a wellknown article by Professor James Barr Ames in 3 Columbia Law Rev. 1. The obscurity of this "somewhat ambiguous, though euphonistic, doctrine" (Bacon v. Kentucky Cent. R. Co., 95 Ky. 373, 382, 25 S. W. 747) has been frequently commented upon by the courts. See Lamprey v. St. Paul etc. R'y Co., 89 Minn. 187, 94 N. W. 555, 557; here the court says: "The early equitable doctrine that it [the right to specific performance] must be mutual was based largely upon notions of expediency rather than principles of abstract justice, and has been materially modified." In Peterson v. Chase, 115 Wis. 239, 91 N. W. 687, 688, the court, speaking of the rule of mutuality, observes, "The exceptions or apparent exceptions to it, are so numerous, and so important, that the decided cases illustrating them now constitute an almost equal volume of authority." Also in Frank v. Stratford-Handcock, 13 Wyo. 37, 110 Am. St. Rep. 963, 67 L. R. A. 571, 77 Pac. 134, the court says of the rule of mutuality, "The exceptions are so thoroughly established that it would seem more accurate to consider them as a part of, or modification of, the doctrine itself." See, also, Pom. Spec. Perf., § 237; 1 Harv. Law Rev. 104, by Professor Langdell.

36 3 Columbia Law Rev. 1, by Professor J. B. Ames.

the legal remedy of damages for possible future breaches on plaintiff's part."<sup>37</sup> This rule, it is believed, covers the circumstances in equity where, according to the weight of authority, the court refuses its aid for lack of mutuality.

So far as there is a principle of mutuality, it is a mutuality of remedy in equity at the time of filing the bill that is required, and not a mutuality in the terms of the contract when the contract is made.<sup>38</sup> Equity is

37 36 Cyc. 622, by the present writer. In the first edition of the present work, the rule was thus stated: If, at the time of the filing of the bill in equity, the contract being yet executory on both sides, the defendant, himself free from fraud or other personal bar, could not have the remedy of specific performance against the plaintiff. then the contract is so lacking in mutuality that equity will not compel the defendant to perform but will leave the plaintiff to his remedy at law. The rule as thus formulated was quoted in General Electric Co. v. Westinghouse El. Co., 151 Fed. 664; United States v. Chicago, M. & St. P. R'y Co. of Idaho, 207 Fed. 164; Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696; Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93; Wright v. Suydam, 72 Wash. 587, 131 Pac. 239. This statement of the rule, unfortunately, is itself open to too many exceptions to be useful as a guide. Thus, it hardly covers the familiar case where the vendee may have specific performance with abatement for a serious defect, though the vendor, on the same facts, could not force the title on the vendee (post, § 833); and it contradicts the better view of the matters treated post, in §§ 774, 775. The rule as to mutuality is not a rule of reciprocity,-that relief will be denied unless defendant, if he had seen fit to sue instead of the plaintiff's suing, would have succeeded in his suit; but, so far as it can be justified at all, is merely designed to secure performance on the plaintiff's part of his executory promise by the one decree in equity.

38 The text is quoted in General Electric Co. v. Westinghouse El. Co., 151 Fed. 664; Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93; Wright v. Suydam, 72 Wash. 587, 131 Pac. 239. This paragraph is cited in Triumph Electric Co. v. Thullen, 228 Fed. 762; Olson & Nessa v. Rogness, 173 Iowa, 331, 155 N. W. 301; Heth v. Smith, 175 Mich. 328, 141 N. W. 583; Webb v. Durrett (Tex. Civ. App.), 136

entirely willing to grant plaintiff the performance he applies for, but if it finds that in doing so the defendant, without fault, is left in turn to a remedy at law only, it refuses to lend its aid to such an unequal result.<sup>39</sup> Therefore any original lack of mutuality in the terms of the contract will have no influence if the court finds that giving the plaintiff his relief will no longer leave the defendant to the law for relief.<sup>40</sup> Keeping in mind this general principle enables a ready disposal of the so-called exceptions to the rule of mutuality. These cases will now be considered.

§ 2192. (§ 770.) 1. Contracts Whose Terms are not Mutual—(a). Where Plaintiff Could Avoid Performance. Where a contract for the sale of lands is signed only by the defendant, it is clear that the plaintiff need never have performed his agreement. There was a clear lack of mutuality in the terms. Yet it was early held that

S. W. 1189; Armstrong v. Maryland Coal Co., 67 W. Va. 589, 69
S. E. 195. See, also, J. I. Case Threshing Mach. Co. v. Farnsworth,
28 S. D. 432, 134 N. W. 819. Sections 769-776 are cited in Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84
N. E. 53; Carrico v. Stevenson (Tex. Civ. App.), 135 S. W. 260.

The fact is, that the rule in its older formulation—that mutuality of remedy must exist from the time the contract was entered into—has been entirely devoured by the generally admitted exceptions, as will appear from the sections following. In every class of cases where the courts have been called upon to apply the old formula they have found, by an overwhelming majority, that the case fell within one of the "exceptions." Cases cited by the text-writers and the courts in support of the older rule are merely minority cases that dissent from some particular one of the "exceptions."

- 39 Chadwick v. Chadwick, 121 Ala. 580, 25 South. 631 (where a son agreed to support his mother for life, and the mother agreed to convey certain land to him, she will not be compelled to convey the land). To the same effect are Ikerd v. Beavers, 106 Ind. 483, 7 N. E. 326; O'Brien v. Perry, 130 Cal. 526, 62 Pac. 927.
- 40 The text is quoted in Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93; Wright v. Suydam, 72 Wash. 587, 131 Pac. 239.

the contract could be enforced against the party who had signed.<sup>41</sup> The modern cases all agree upon the point.<sup>42</sup> The filing of the bill made the *remedy* mutual. From that moment the defendant would not need to trust to the law for damages. The principle is consistently applied throughout. Thus, an infant, it is said, cannot have specific performance, for the filing of the bill by his next friend does not bind him, and the lack of mutuality still

41 Hatton v. Gray, 2 Cas. Ch. 164.

42 The text is quoted in Le Vine v. Whitehouse, 37 Utah, 260, Ann. Cas. 1912C, 407, 109 Pac. 2; and cited in Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93; Johnson v. Manfield (Tex. Civ. App.), 166 S. W. 927; Armstrong v. Maryland Coal Co., 67 W. Va. 589, 69 S. E. 195. See, also, Martin v. Pycroft, 2 De Gex, M. & G. 785; Woodward v. Davidson, 150 Fed. 840; Broatch v. Boysen, 175 Fed. 702, 99 C. C. A. 278; Vance v. Newman, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574; Bradford v. Parkhurst, 96 Cal. 102, 31 Am. St. Rep. 189, 30 Pac. 1106; Harper v. Goldschmidt, 156 Cal. 245, 134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689, 104 Pac. 451; Copple v. Aigeltinger, 167 Cal. 706, 140 Pac. 1073; Hodges v. Kowing, 58 Conn. 12, 7 L. R. A. 87, 18 Atl. 979; Ehrenstrom v. Phillips, 9 Del. Ch. 74, 77 Atl. 80; Matthes v. Wier, 10 Del. Ch. 63, 84 Atl. 878; Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97; Ullsperger v. Meyer, 217 Ill. 262, 3 Ann. Cas. 1032, 2 L. R. A. (N. S.) 221, 75 N. E. 482; Breen v. Mayne, 141 Iowa, 399, 118 N. W. 441; Schneider v. Anderson, 75 Kan. 11, 121 Am. St. Rep. 356, 88 Pac. 525; Wiley v. Hellen, 83 Kan. 544, 112 Pac. 158; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Engler v. Garrett, 100 Md. 387, 59 Atl. 648; Jaeger v. Shea, 130 Md. 1, 99 Atl. 954; Old Colony R. Corp. v. Evans, 6 Gray (Mass.), 25, 66 Am. Dec. 394; Smith v. Mathis, 174 Mich. 262, 140 N. W. 548; Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791; Marqueze v. Caldwell, 48 Miss. 23, and cases cited; White v. Weaver, 68 N. J. Eq. 644, 61 Atl. 25; Krah v. Wassmer, 75 N. J. Eq. 109, 71 Atl. 404; Miller v. Cameron, 45 N. J. Eq. 95, 1 L. R. A. 554, 15 Atl. 842; Jasper v. Wilson, 14 N. M. 482, 23 L. R. A. (N. S.) 982, 94 Pac. 951; Davis v. Martin, 146 N. C. 281, 59 S. E. 700; Beddow v. Flage, 22 N. D. 53, 132 N. W. 637; George Wiedemann Brewing Co. v. Maxwell, 78 Ohio St. 54, 84 N. E. 595; Flegel v. Dowling, 54 Or. 40, 135 Am. St. Rep. 812, 19 Ann. Cas. 1159, 102 Pac. 178; Ives v. Hazard, 4 R. I. 14, 67 Am. Dec. 500; Burdine v. Burdine, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992; Western Timber Co. v.

continues.<sup>43</sup> But if the infant on reaching his majority files the bill on his voidable contract, he may now have specific performance, for any lack of mutuality is thereby cured.<sup>44</sup> The remedy has become mutual. Similarly, where a husband and wife seek to enforce their contract against the vendee, although no mutuality existed before, the vendee being unable to compel performance, the filing of the bill makes the remedy mutual, and equity is satisfied.<sup>45</sup>

§ 2193. (§ 771.) (b) Where Plaintiff's Non-enforceable Promise has Been Performed.<sup>46</sup>—There is a considerable class of cases where equity cannot compel performance of plaintiff's undertaking from the incapacity of the parties, or the nature of the plaintiff's promise. Of

Kalama River Lumber Co., 42 Wash. 620, 114 Am. St. Rep. 137, 7 Ann. Cas. 667, 6 L. R. A. (N. S.) 397, 85 Pac. 338; Watkins v. Davison, 61 Wash. 662, 112 Pac. 743; Wright v. Suydam, 72 Wash. 587, 131 Pac. 239. But see Clegg v. Brannan (Tex. Civ. App.), 190 S. W. 812.

- 43 Flight v. Bolland, 4 Russ. 299; Solt v. Anderson, 63 Neb. 734, 89 N. W. 306, 93 N. W. 205; Richards v. Green, 23 N. J. Eq. 536, 538; Ten Eyck v. Manning, 52 N. J. Eq. 47, 51, 27 Atl. 900; Tarr v. Scott (Pa.), 4 Brewst. 49. But see Seaton v. Tohill, 11 Colo. App. 211, 53 Pac. 170; Guy v. Hansow, 86 Kan. 933, 122 Pac. 879; Asberry v. Mitchell, 121 Va. 276, 93 S. E. 638 (after performance by the infant; infants as much bound by decrees as adults). The English case, though supported by American dicta, has been justly criticised as depriving the infant of the advantage of contracts which are beneficial to him.
  - 44 Clayton v. Ashdown, 9 Vin. Abr. 393, pl. 2.
- 45 Fennelly v. Anderson, 1 Ir. Eq. 706; Chamberlin v. Robertson, 31 Iowa, 408; Logan v. Bull, 78 Ky. 607; Freeman v. Stokes, 12 Phila. 219; Jarnigan v. Levisy, 6 Lea, 397; Mullens v. Big Creek etc. Co. (Tenn. Ch. App.), 35 S. W. 439; Hoover v. Calhoun, 16 Gratt. 109.
- 46 This paragraph is cited in Green v. Bay City & P. H. R. Co., 158 Mich. 436, 123 N. W. 4 (plaintiff's agreement to procure rights of way); Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93.

such character are agreements for personal service,<sup>47</sup> agreements to care for and support the defendant, agreements to furnish the services, or secure the assent, of third persons, agreements calling for the exercise of skill, taste, and discretion of the plaintiff, various kinds of agreements calling for continuous acts,<sup>48</sup> for building,

47 Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449; Stocker v. Wedderburn, 3 Kay & J. 393; Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509; Pantages v. Grauman, 191 Fed. 317, 112 C. C. A. 61; Los Angeles & Bakersfield Oil & Dev. Co. v. Occidental Oil Co., 144 Cal. 528, 78 Pac. 25; Stanton v. Singleton, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146; Jolliffe v. Steele, 9 Cal. App. 212, 98 Pac. 544; Welty v. Jacobs, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723; Newman v. French, 138 Iowa, 482, 128 Am. St. Rep. 212, 18 L. R. A. (N. S.) 218, 116 N. W. 468; Heth v. Smith, 175 Mich. 328, 141 N. W. 583; McCall v. Atchley, 256 Mo. 39, 164 S. W. 593; Haffner v. Dobrinski, 17 Okl. 438, 88 Pac. 1042; Deitz v. Stephenson, 51 Or. 596, 95 Pac. 803. See, also, ante, § 759.

48 Iron Age Pub. Co. v. Western Union Tel. Co., supra; Marble Co. v. Ripley, 10 Wall. 339, 358, 19 L. Ed. 955; Blackett v. Bates, L. R. 1 Ch. 117; Tombigbee Valley R. Co. v. Fairford Lumber Co., 155 Ala: 575, 47 South. 88; Pacific Electric R. Co. v. Campbell-Johnston, 153 Cal. 106, 94 Pac. 623; Bartholomae & Roesing Brewing & M. Co. v. Modzelewski, 269 Ill. 539, 109 N. E. 1058 (manufacturing). See, however, the interesting case, Zelleken v. Lynch, 80 Kan. 746, 46 L. R. A. (N. S.) 659, 104 Pac. 563. There the defendant orally agreed to make a lease for a long term and the plaintiff to "mine continuously" for the duration of the term. Plaintiff spent \$30,000 in improvements. The court, in a highly instructive opinion, held that it would be a gross failure of justice to refuse specific performance, since the amount of the plaintiff's damages was conjectural. "The court has no occasion to anticipate culpable conduct on the plaintiff's part and speculate upon how the defendant might protect himself should he some time need protection. . . . If equity has no remedy to prevent the defendant from confiscating to its own use this increment to the value of its land, from compelling the plaintiff to sacrifice its expenditure of time and labor. and money, and from cutting off the plaintiff from the just profits of the venture, it is a very anæmic system, and needs to be recruited with a stock of robust, virile principles which will enable it to cope with fraud."

and agreements where plaintiff's promise is too indefinite for equity to compel its execution.49 So long as such a contract remains executory, the filing of the bill does not make the remedy mutual, and in these cases equity refuses specific performance against the defendant because of the lack of mutuality; in fact, because it would leave defendant in the unjust position of having no assurance of performance on plaintiff's part. that equity is concerned only with the mutuality at the time of filing of the bill is clearly shown by those cases where the contract is executed on plaintiff's part. terms are the same, but defendant would no longer need to trust an inadequate remedy at law, and equity compels him to perform; 50 as, where plaintiff agreed to work for defendant a certain length of time, and defendant to make conveyance at once. Before plaintiff has performed the personal service, he could not have spe-

<sup>49</sup> Solt v. Anderson, 63 Neb. 734, 89 N. W. 306, 93 N. W. 205; Stanton v. Singleton, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146.

<sup>50</sup> The text is quoted in Wright v. Suydam, 72 Wash. 587, 131 Pac. 239. See Thurber v. Meves, 119 Cal. 35, 50 Pac. 1053, 51 Pac. 536; Dickson v. Stewart, 71 Neb. 424, 115 Am. St. Rep. 596, 98 N. W. 1085; Philadelphia Ball Club v. La Joie, supra; Rank v. Garvey, 66 Neb. 767, 92 N. W. 1025, 99 N. W. 666; Friend v. Mallory, 52 W. Va. 53, 43 S. E. 115; Burdine v. Burdine, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992; Howe v. Watson, 179 Mass. 30, 60 N. E. 415; Burnell v. Bradbury, 67 Kan. 762, 74 Pac. 279; Moayon v. Moayon, 24 Ky. Law Rep. 1641, 72 S. W. 33; Baumhoff v. Oklahoma City E. & G. & P. Co., 14 Okl. 127, 77 Pac. 40. Recent cases are: Mississippi Glass Co. v. Franzen, 143 Fed. 501, 6 Ann. Cas. 707, 74 C. C. A. 135; Chicago, M. & St. P. R'y Co. of Idaho v. United States, 218 Fed. 288, 134 C. C. A. 84; Brown v. Sebastopol, 153 Cal. 704, 19 L. R. A. (N. S.) 178, 96 Pac. 363; Crovatt v. Baker, 130 Ga. 507, 61 S. E. 127; Oswald v. Nehls, 233 Ill. 438, 84 N. E. 619; Turley v. Thomas, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568; Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051; Dingman v. Hilberry, 159 Wis. 170, 149 N. W. 761. But see, contra, Pantages v. Grauman, 191 Fed. 317, 112 C. C. A. 61.

cific performance, but after his part is executed, he can compel conveyance of the land.<sup>51</sup>

§ 2194. (§ 772.) (c) Where Plaintiff's Inability is Cured Before Decree.—A clear instance of this sort is the inability of the plaintiff to make a title, because the title is in another. The defendant may have known this at the time of the bargain. Equity will not compel him to perform before the title is in, but should the plaintiff get in the title before the decree, defendant must perform.<sup>52</sup>

51 The text is quoted in Carrico v. Stevenson (Tex. Civ.), 135 S. W. 260. See, also, Magee v. Magee, 174 Cal. 276, 162 Pac. 1023; Prusiecke v. Ramzinski (Tex. Civ. App.), 81 S. W. 771.

52 This paragraph is cited in Olson & Nessa v. Rogness, 173 Iowa, 331, 155 N. W. 301; Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93. See Reeves v. Dickey, 10 Gratt. 138; Tison v. Smith, 8 Tex. 147; Luckett v. Williamson, 37 Mo. 388; Oakey v. Cook, 41 N. J. Eq. 350, 7 Atl. 495; Guild v. Atchison R. R. Co., 57 Kan. 70, 57 Am. St. Rep. 312, 33 L. R. A. 77, 45 Pac. 82; Bruce v. Tilson, 25 N. Y. 194; Jenkins v. Fahey, 73 N. Y. 355; Logan v. Bull, 78 Ky. 607, 618; Maryland Construction Co. v. Kuper, 90 Md. 529, 45 Atl. 197; Mussleman's Appeal, 65 Pa. St. 480, 71 Pa. St. 465; Lyles v. Kirkpatrick, 9 S. C. 265; Dresel v. Jordan, 104 Mass. 407; Hepburn v. Dunlop, 1 Wheat. 179, 196, 4 L. Ed. 65 (specific performance will be given if title is made.good any time before the decree); Murrell v. Goodyear, 1 De Gex, F. & J. 432; Langford v. Pitt, 2 P. Wms. 629; Mason v. Caldwell, 10 Ill. 196, 208, 209, 48 Am. Dec. 330; Core v. Wigner, 32 W. Va. 277, 9 S. E. 36. Recent cases are: Mackey Wall Plaster Co. v. United States Gypsum Co., 244 Fed. 275; Wolff v. Cloyne, 156 Cal. 746, 106 Pac. 104 (vendor obtains title before suit); Cohen v. Segal, 253 Ill. 34, 97 N. E. 222 (sufficient if vendor is ready at time of performance); Heller v. McGuin, 261 Ill. 588, 104 N. E. 158 (title at time of decree, sufficient). There are a number of cases contra, but it is apparent they do not represent the better view and are not consistent with the generally accepted principle that performance by plaintiff cures any lack of mutuality: See, contra, Norris v. Fox, 45 Fed. 406; Gage v. Cummings, 209 Ill. 120, 70 N. E. 679 (but the case relies on Fry's rule that mutuality must exist at time of making the contract); Luse v. Deitz, 46 Iowa, 205;

§ 2195. (§ 773.) 2. Unilateral Contracts—Options.<sup>53</sup> Unilateral contracts have really nothing to do with any rule of mutuality.<sup>54</sup> Before the act which constitutes the acceptance is completed, there is no contract for equity to consider. After such act is performed, and there is a unilateral contract, there cannot be any question of mutuality, as the promisor has already obtained his advantage and is bound to perform his part.

Courts of equity often speak of enforcing an option as if such enforcement were an apparent exception to the rule of mutuality.<sup>55</sup> In fact, mutuality has nothing to

Ten Eyck v. Manning, 52 N. J. Eq. 47, 51, 27 Atl. 900; Chilhowie v. Gardiner, 79 Va. 305. See the question discussed further, post, § 808.

53 This paragraph is cited in Stay v. Tennile, 159 Ala. 514, 49 South. 238; Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791; Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93; Johnson v. Manfield (Tex. Civ. App.), 166 S. W. 927; City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 N. W. 555.

54 Spires v. Urbahn, 124 Cal. 110, 56 Pac. 794; Perkins v. Hadsell, 50 Ill. 216; Welsh v. Whelpley, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744.

55 Willard v. Tayle, 8 Wall. 557, 19 L. Ed. 501; Brown v. Slee, 103 U. S. 828, 26 L. Ed. 618 (option to sell); Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394 (same); Marthinson v. King, 150 Fed. 48, 82 C. C. A. 360; Wheeling Creek Gas, Coal & Coke Co. v. Elder, 170 Fed. 215; Hoogendorn v. Daniel, 178 Fed. 765, 102 C. C. A. 213; Frank v. Schnuettgen, 187 Fed. 515, 109 C. C. A. 281; Schnuettgen y. Frank, 213 Fed. 440, 130 C. C. A. 76; Conley Camera Co. v. Multiscope & Film Co., 216 Fed. 892, 133 C. C. A. 96; Wilson v. Seybold, 216 Fed. 975; Dunlop v. Baker, 239 Fed. 193, 152 C. C. A. 181; Ross v. Parks, 93 Ala. 153, 30 Am. St. Rep. 47, 11 L. R. A. 148, 8 South. 368; Bethea v. McCullough, 195 Ala. 480, 70 South. 680; Masberg v. Granville (Ala.), 75 South. 154; Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678; Swanston v. Clark, 153 Cal. 300, 95 Pac. 1117 (option in lease); Cates v. McNeil, 169 Cal. 697, 147 Pac. 944; Strachan v. Drake, 61 Colo. 444, 158 Pac. 310; South Florida Citrus Land Co. v. Walden, 59 Fla. 606, 51 South. 554; Perry v. Paschal, 103 Ga. 134, 29 S. E. 703; Turman v. Smarr, 145 Ga. 312, 89 S. E. 214; Adams v. Peabody Coal Cc., 220 Ill. 469, 82 N. E. 645; Corbett v. Cronkdo ordinarily with contracts of option. The option is only a binding offer. The promisor has parted with

hite, 239 Ill. 9, 87 N. E. 874; Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535; Wolf v. Lodge, 159 Iowa, 162, 140 N. W. 429 (option in lease); Western Securities Co. v. Atlee, 168 Iowa, 650, 151 N. W. 56; Larson v. Smith, 174 Iowa, 619, 156 N. W. 813 (option in lease); Thomas v. Gottlieb etc. Brewing Co., 102 Md. 417, 62 Atl. 633; Brewer v. Sowers, 118 Md. 681, 86 Atl. 228; King v. Kaiser (Prospect Point Fishing Club), 126 Md. 213, 94 Atl. 780 (option of renewal in lease); O'Brien v. Boland, 166 Mass, 481, 44 N. E. 602; First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084; Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 14 Ann. Cas. 652, 111 S. W. 480; Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; New England Box Co. v. Prentiss, 75 N. H. 246, 72 Atl. 826; Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840; Lister Agricultural Chemical Works v. Selby, 68 N. J. Eq., 271, 59 Atl. 247; Cohen v. Pool, 84 N. J. Eq. 77, 189, 94 Atl. 37; Chas. J. Smith Co. v. Anderson, 84 N. J. Eq. 681, 95 Atl. 358; Borel v. Mead, 3 N. M. (39) 84, 2 Pac. 222; Ward v. Albertson, 165 N. C. 218, 81 S. E. 168; Beddow v. Flage, 22 N. D. 53, 132 N. W. 637; George Wiedemann Brewing Co. v. Maxwell, 78 Ohio St. 54, 84 N. E. 595; West v. Washington R. Co., 49 Or. 436, 90 Pac. 666; People's St. R'y Co. v. Spencer, 156 Pa. St. 85, 36 Am. St. Rep. 22, 27 Atl. 113; Corson v. Mulvany, 49 Pa. St. 88, 88 Am. Dec. 485; McSwain v. Atlantic Coast Lumber Corp. (Davis), 96 S. C. 155, 80 S. E. 87; Knott v. Thomas (Tex. Civ. App.), 180 S. W. 1114; Watkins v. Robertson, 105 Va. 269, 115 Am. St. Rep. 880, 5 L. R. A. (N. S.) 1194, 54 S. E. 33; Carter v. Hook, 116 Va. 812, 83 S. E. 386; Connor v. Clapp, 42 Wash. 642, 85 Pac. 342; Pollock v. Brookover, 60 W. Va. 75, 6 L. R. A. (N. S.) 403, 53 S. E. 795; Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830; Mountain Park Land Co. v. Snidow, 77 W. Va. 54, 86 S. E. 915; Frank v. Stratford-Handcock, 13 Wyo. 37, 110 Am. St. Rep. 963, 67 L. R. A. 571, 77 Pac. 134. See, however, dicta in Levin v. Dietz, 194 N. Y. 376, 20 L. R. A. (N. S.) 251, 87 N. E. 454; In re Heckmann's Estate, 236 Pa. 193, 84 Atl. 689.

<sup>56</sup> Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150 (contracts of option convey no equitable title).

Of course there must be some consideration for the option, to render it an irrevocable offer: Canty v. Brown, 11 Cal. App. 487, 105 Pac. 428; Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874; Warren v. Costello, 109 Mo. 338, 32 Am. St. Rep. 669, 19 S. W. 29; Levin v.

the right to withdraw his offer.<sup>57</sup> There is nothing to enforce in equity before the exercise of the option, as

Dietz, 194 N. Y. 376, 20 L. R. A. (N. S.) 251, 87 N. E. 454; Winders v. Kenan, 161 N. C. 628, 77 S. E. 687; Sprague v. Schotte, 48 Or. 609, 87 Pac. 1046 (withdrawal by conveyance to third person); Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 21 L. R. A. 133, 17 S. E. 558. As to the effect of a seal, see following notes. consideration, however, for holding the offer open, may be small or even nominal: Ross v. Parks, 93 Ala. 153, 30 Am. St. Rep. 47, 11 L. R. A. 148, 8 South. 368 (fifty cents); Bethea v. McCullough, 195 Ala. 480, 70 South. 680 (one dollar; need not be actually paid); Marsh v. Lott, 8 Cal. App. 384, 97 Pac. 163 (twenty-five cents); Seyferth v. Groves & Sand Ridge R. R. Co., 217 Ill. 483, 75 N. E. 522 (same); Adams v. Peabody Coal Co., 230 Ill. 469, 82 N. E. 645 (one dollar); Brewer v. Sowers, 118 Md. 681, 86 Atl. 228; Ward v. Albertson, 165 N. C. 218, 81 S. E. 168. Contra, see Rude v. Levy, 43 Colo. 482, 127 Am. St. Rep. 123, 24 L. R. A. (N. S.) 91, 96 Pac. 560; Murphy, Thompson & Co. v. Reed, 125 Ky. 585, 128 Am. St. Rep. 259, 10 L. R. A. (N. S.) 195, 101 S. W. 964. If the option is contained in a lease, the consideration is found in the coverants of the lease: Swanston v. Clark, 153 Cal. 300, 95 Pac. 1117; Turman v. Smarr, 145 Ga. 312, 89 S. E. 214; Wolf v. Lodge, 159 Iowa, 162, 140 N. W. 429; Wright v. Kaynor, 150 Mich. 7, 113 N. W. 779; Tebeau v. Ridge, 261 Mo. 547, L. R. A. 1915C, 367, 170 S. W. 871; Richardson v. Harkness, 59 Wash. 474, 110 Pac. 9; and see Rohling v. Thole, 256 Ill. 425, 100 N. E. 138 (conveyance with option to repurchase. all in one contract, sufficient consideration).

The question of consideration for keeping the offer open is, of course, not involved where the offer is accepted before it is withdrawn. The case is then not one of an "option," but of an ordinary offer and acceptance: Smith v. Bangham, 156 Cal. 359, 28 L. R. A. (N. S.) 522, 104 Pac. 689; McCowen v. Pew, 18 Cal. App. 302, 123 Pac. 191; Murphy, Thompson & Co. v. Reed, 125 Ky. 585, 128 Am. St. Rep. 259, 10 L. R. A. (N. S.) 195, 101 S. W. 964; Carter v. Hook, 116 Va. 812, 83 S. E. 386.

57 O'Brien v. Bolland, supra: The defendant sent word that he withdrew his offer (the option), which was under seal. The plaintiff then sent an acceptance. The court said: "In the present case, because the offer was under seal, it was an irrevocable covenant, conditional upon acceptance within ten days, and the written acceptance within that time made it a mutual contract which plaintiff can enforce."

the promisee has already obtained his right,—to have the offer kept open. Upon the exercise of the option, i. e., the acceptance of the offer,—and the filing of the bill by the promisee would be one way of exercising it,the option ceases as an option, and equity has an ordinary bilateral contract to deal with.58 Thus it is usually said that an option to renew a lease is enforceable at the will of the lessee having the option. In fact the lessee must first exercise his option, and then he has a binding contract for the renewal, and not an option.<sup>59</sup> It can make no difference that defendant has tried to withdraw the option. He bound himself not to do so. This view is further supported by the enforcement of an exercised option which was under seal, and without actual consideration. 60 The offer being under seal cannot be withdrawn. Upon its acceptance, the court cannot be concerned with the lack of consideration (which is a good defense to specific performance in equity), for it is the contract and not the option that is being enforced. There is a class of option contracts, that are not in the nature of a mere binding offer which may be made into a bilateral contract by the exercise of the option, but are themselves bilateral

<sup>&</sup>lt;sup>58</sup> Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918; O'Brien v. Bolland, 166 Mass. 481, 44 N. E. 602. The text is cited in Great Northern R'y Co. v. Sheyenne Telephone Co., 27 N. D. 256, 145 N. W. 1062.

<sup>59</sup> O'Brien v. Bolland, supra.

<sup>60</sup> Borel v. Mead, 3 N. M. 84, 2 Pac. 222; O'Brien v. Bolland, 166 Mass. 481, 44 N. E. 602; Watkins v. Robertson, 105 Va. 269, 115 Am. St. Rep. 880, 5 L. R. A. (N. S.) 1194, 54 S. E. 33; Schaeffer v. Herman, 237 Pa. St. 86, 85 Atl. 94; Adams v. Peabody Coal Co., 230 Ill. 469, 82 N. E. 645. The cases contra, Crandall v. Willig, 166 Ill. 233, 46 N. E. 755, Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874, and Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 21 L. R. A. 133, 17 S. E. 558, must be considered as wrong in principle. Graybill v. Brugh should rest upon another ground—intervening equitable right of a third party,—if it is to be supported.

contracts for a privilege which may be exercised by the promisee, but which he is under no obligation to exercise. These options are usually for mining or prospecting privileges. Where the option is so worded that the exercise of the privilege may be delayed indefinitely, specific performance is refused, and the refusal is sometimes based on the ground of lack of mutuality.<sup>61</sup> In such cases the right obtained by the option, to prospect or not, since it keeps the defendant out of the use of his land for an indefinite time, is bad for inequality and indefiniteness rather than for lack of mutuality.

§ 2196. (§ 774.) Contracts Terminable at the Will of the Plaintiff.—The latest extension of the defense of lack of mutuality is to contracts which are terminable at the will or option of the plaintiff; a common example being the contract to lease for purposes of mineral exploration and development, with a stipulation that the lease may be surrendered at any time at the will of the lessee. A line of cases holds that inasmuch as specific performance would be refused at the suit of the lessor, since the lessee would have it in his power to render the decree of the court nugatory by immediately surrendering his lease, therefore the lessee, however ready, willing and able to comply with his part of the contract for a considerable length of time, must fail of relief.<sup>62</sup> The

<sup>61</sup> Federal Oil Co. v. Western Oil Co., 121 Fed. 674, 57 C. C. A.
428. See, also, Starcher Bros. v. Duty, 61 W. Va. 373, 123 Am. St.
Rep. 990, 9 L. R. A. (N. S.) 913, 56 S. E. 524.

<sup>62</sup> The rule in question is not of very long standing. It dates from a dictum in Rutland Marble Co. v. Ripley (1870), 10 Wall. 339, 359, 19 L. Ed. 955, and the decision in Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265 (Cooley, J.). The cases succeeding these appear to have followed these eminent courts on the assumption that the rule was established by a long line of unquestioned authorities; none of them bear internal evidence of having examined the subject on principle. See Brooklyn Club v. McGuire, 116 Fed. 782, 783; Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498, 509, 3

well-known rule that specific performance is to be refused of a contract to enter into a partnership at will is pointed to as proof.63 The analogy, however, does not bar examination. The plaintiff, in the cases in question, gives a sufficient practical demonstration of his desire to carry out the contract and not abandon it by going to the expense of bringing suit.64 But the fallacy of these decisions goes deeper than this. Relief is refused, not because the court is unable to secure such performance as is due from the plaintiff while he elects to keep the contract alive, but because the court is unable to compel the plaintiff to do something that he had never contracted to do, viz., to keep the contract alive for a definite, predetermined period. These holdings assume that the doctrine as to mutuality is an artificial rule of reciprocity, and wholly lose sight of its fundamental purpose, which is simply to secure performance on the plaintiff's part of his executory promise.65

The better view is that of the circuit court in Singer Sewing Machine Co. v. The Button-Hole Co.<sup>66</sup> There

Am. St. Rep. 758, 3 South. 449; Harrisburg Club v. Athletic Ass'n, 8 Pa. Co. Ct. Rep. 337, 342; Kenyon v. Weissberg, 240 Fed. 536 (contract of employment); Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53 (oil and gas lease); Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696 (same); Advance Oil Co. v. Hunt (Ind. App.), 116 N. E. 340 (same); Kolachny v. Galbreath, 26 Okl. 772, 38 L. R. A. (N. S.) 451, 110 Pac. 902 (same); Hill Oil & Gas Co. v. White, 53 Okl. 748, 157 Pac. 710 (same). See, also, cases and comment in 36 Cyc. 632, note 50, by the present writer.

- 63 See ante, § 755.
- 64 The decision in Rust v. Conrad was deemed so detrimental to the development of the mineral resources of Michigan that it was promptly nullified by legislation in that state: See Grummett v. Gingrass, 77 Mich. 369, 43 N. W. 999.
  - 65 See ante, § 769, and notes.
- 66 Sturgis v. Galindo, 59 Cal. 28, 31, 43 Am. Rep. 239; Singer Sewing Machine Co. v. Union Button-Hole etc. Co., 1 Holmes, 253, Fed. Cas. No. 12,904; Philadelphia Ball Club v. La Joie, 202 Pa. St. 210, 90 Am. St. Rep. 627, 58 L. R. A. 227, 51 Atl. 973. See, also,

the court held that the objection of lack of mutuality would not prevent the enforcement of the contract, so long as it was actually kept alive by plaintiff's continued performance.

§ 2197. (§ 775.) Indirect Enforcement by Enjoining the Breach of Defendant's Negative Covenant.—A similar objection, for lack of mutuality, is urged to the indirect enforcement of a contract by an injunction against the violation of a negative clause of the defendant's agreement, where neither the defendant nor the plaintiff could have specific performance of the affirmative side of the agreement, 67 as in the case where defendant agrees to sing in plaintiff's theater, and in no other place. 68 But the answer of equity is a conditional decree—an injunction which is good so long as plaintiff continues to do his part, but dissolvable upon his failure to perform. 69 While a clear lack of mutu-

Zelleken v. Lynch, 80 Kan. 746, 46 L. R. A. (N. S.) 659, 104 Pac. 563 (dicta); McCall Co. v. Wright, 198 N. Y. 143, 31 L. R. A. (N. S.) 249, 91 N. E. 516; Edison Illuminating Co. v. Eastern Pennsylvania Power Co., 253 Pa. 457, 98 Atl. 652. Compare Guffey v. Smith, 237 U. S. 101, 59 L. Ed. 856, 35 Sup. Ct. 526 (holding that the rule in Rust v. Conrad does not apply to the situation where it is most commonly invoked, viz., on behalf of the lessee in an oil and gas lease, against the holder of a later lease, since the remedy there is not specific performance, but injunction against trespass; the court declining to pass upon the merits or validity of the rule itself).

- 67 Philadelphia Ball Club v. La Joie, 202 Pa. St. 210, 90 Am. St. Rep. 627, 58 L. R. A. 227, 51 Atl. 973.
  - 68 Lumley v. Wagner, 1 De Gex, M. & G. 604.
- 69 This paragraph is cited in General Electric Co. v. Westinghouse El. Co., 151 Fed. 664; Montgomery Light & W. Power Co. v. Montgomery Traction Co., 191 Fed. 657, 219 Fed. 963. See Stocker v. Wedderburn, 3 Kay & J. 393, 404; for a good instance of the flexibility of a conditional decree, see McCaul v. Braham, 16 Fed. 37, 42. See, also, Metropolitan Co. v. Ewing, 42 Fed. 198, 7 L. R. A. 381; Arena etc. Club v. McPartland, 41 App. Div. 352, 58 N. Y. Supp. 477, 478; Singer Co. v. Union Button-Hole Co., 1 Holmes,

ality exists in the terms of the agreement, inasmuch as one of the terms is unenforceable in equity, yet the final test shows that the remedy of a conditional decree does not leave the defendant to a legal remedy, as plaintiff must give performance so long as he receives it. In Hills v. Croll<sup>70</sup> the court refused to grant the injunction against breach of the negative covenant on the ground of lack of mutuality, as it could not enforce the affirmative part of the agreement. But the case is inconsistent with the ruling case of Lumley v. Wagner,<sup>71</sup> as since pointed out by the English judges,<sup>72</sup> and cannot be now regarded as sound.<sup>73</sup>

§ 2198. (§ 776.) Fraud or Other Personal Bar of the Defendant.—There is no lack of mutuality, in the eye of equity, where the defendant's inability to enforce the contract arises from any inequitable conduct on his part, such as sharp practice, fraud, concealment, unfairness, etc., which creates a personal bar against his obtaining

255, 257, Fed. Cas. No. 12,904; Philadelphia Ball Club v. La Joie, 202 Pa. St. 210, 90 Am. St. Rep. 627, 58 L. R. A. 227, 51 Atl. 973 ("If granted now, it [the injunction] can be easily dissolved whenever a change of circumstances or in the attitude of the plaintiff should seem to require it"); Port Clinton R. R. Co. v. Cleveland & Tol. R. R. Co., 13 Ohio St. 544, 550 (semble). See, further, Montgomery Traction Co. v. Montgomery Light & Water Power Co., 229 Fed. 672, 144 C. C. A. 82; Great Lakes & St. L. Transp. Co. v. Scranton Coal Co., 239 Fed. 603, 152 C. C. A. 437; Newman v. French, 138 Iowa, 482, 128 Am. St. Rep. 212, 18 L. R. A. (N. S.) 218, 116 N. W. 468 (restraining conveyance by vendor of property so long as vendee continued to render services); Butterick Pub. Co. v. Rose, 141 Wis. 533, 124 N. W. 647.

<sup>70</sup> Hills v. Croll, 2 Phill. Ch. 60. See, also, Bartholomae & Roesing Brewing & M. Co. v. Modzelewski, 269 Ill. 539, 109 N. E. 1058.

<sup>71</sup> Lumley v. Wagner, supra.

<sup>72</sup> Catt v. Tourle, 4 Ch. App. 654, 660.

<sup>73</sup> Dietrichsen v. Cabburn, 2 Phill. Ch. 52.

specific performance. His lack of remedy from his own act is no defense to the complainant's petition.<sup>74</sup>

- § 2199. (§ 777.) Mistake; Rescission and Reformation.—As mistake is no defense in a court of law to the obligation under his contract, one must look for relief, if at all, in equity. For certain kinds of mistakes equity will give the affirmative relief of rescission, or reformation with specific performance. For other kinds of mistake only the negative relief is given of a refusal to decree specific performance against the defendant setting up the defense of mistake. And in many cases of mistake, no relief of any kind is obtainable. We are here more particularly concerned with that class of mistakes which only serve as a defense to a suit for specific performance.
- § 2200. (§ 778.) What Mistakes are a Defense to Specific Performance.—In the cases of mistake, as in other matters in equity, it is plain that a set of circumstances insufficient to give a right to the radical step of rescission, in which all rights in law or equity are can-
- 74 Ex parte Lacey, 6 Ves. 625; South Eastern Co. v. Knott, 10 Hare, 122.
- 75 Newland v. First Baptist Church Soc., 137 Mich. 335, 100 N. W. 612.
- 76 As to reformation and rescission for mistake, see ante, chapter XXXII; 2 Pom. Eq. Jur., § 870. The elements of mistake of law requisite to any equitable relief have been fully considered in 2 Pom. Eq. Jur., §§ 841-851; of mistake of fact, Id., §§ 852-856. As to parol evidence of mistake, fraud or surprise, see Id., §§ 857-859; defense of mistake in suits for specific performance Id., § 860, and §§ 778-783 in the present treatise; proof of mistake on plaintiff's part in same suits, Pom. Eq. Jur., §§ 861-863; effect of statute of frauds on the proof of mistake, fraud, or surprise, Id., §§ 864-867. The sections here following deal with the somewhat exceptional instances where mistake is a defense to a suit for specific performance, but probably would not warrant rescission or reformation at the suit of the defendant therein.

celed, may well be sufficient for equity, using its discretionary power, to refuse its aid to enforce the contract against the party making the mistake, although it will not protect him from the consequences of his contract in law. Mutual mistake which gives a right to reformation or rescission, would of course give a right to the lesser relief of refusal of specific performance if the affirmative relief were not insisted upon. Usually, in the cases to be described, where relief is given, it will be found that the question is not purely one of mistake, but that the related principles of hardship or unfairness. of sharp practice, or innocent misrepresentation, in combination with the mistake, determine equity to refuse its aid to the plaintiff, although the court may ground its decision on mistake. But there are certain principles of relief growing out of pure mistake which will now be examined.

§ 2201. (§ 779.) Misdescription and Ambiguity. — Where the terms are so ambiguous that the defendant could reasonably, and did in fact, put a different meaning upon them than the plaintiff, it is clear there was never the requisite consensus ad idem, and no valid contract at law or in equity. But even where there is a sufficient consensus ad idem to make a contract valid and enforceable at law, if equity is satisfied that there was sufficient misdescription or ambiguity as to the substance of the contract for the defendant to be justified reasonably in the mistake made by him in understanding the particulars of the contract, equity will not decree a specific performance against him. The substance of the contract against him. The substance against him.

<sup>77</sup> Raffles v. Wichelham, 2 Hurl. & C. 906.

<sup>78</sup> Burckhalter v. Jones, 32 Kan. 5, 3 Pac. 559; Swaisland v. Dearsley, 29 Beav. 430; Higginson v. Clowes, 15 Ves. 516, 524; Denny v. Hancock, 6 Ch. App. 1. See 2 Pom. Eq. Jur., 4th ed., § 860, note 3, where this principle is fully stated. See, also, Smith v. Toth, 61 Ind. App. 42, 111 N. E. 442. But a misinterpretation of the con-

- § 2202. (§ 780.) Mistake Induced, or Contributed to, by the Plaintiff.—Wherever the mistake was materially contributed to, or induced by the acts or words of the plaintiff, equity will not decree a specific performance against the defendant, if the mistake is material.<sup>79</sup> The plaintiff's part in misleading the defendant, whether the plaintiff was innocent in intention or not, prevents him from casting the consequences of the mistake on the defendant by the aid of equity.
- § 2203. (§ 781.) Mistake Known to Plaintiff.—When the plaintiff knows of the defendant's mistake, or must reasonably suppose a mistake had been made, the circumstances are often such that the plaintiff cannot equitably ask a court of chancery to force a hard bargain due to this mistake on the defendant.<sup>80</sup> A mistake which in itself might not be sufficient ground to save the defendant from his bargain, may often protect the defendant when the plaintiff knew of the advantage he was getting when the contract was made.<sup>81</sup>
- § 2204. (§ 782.) Mistake Due to Defendant's Negligence.—Where the court is satisfied that the mistake is due to the defendant's culpable negligence, it will not, as a general rule, accept the mistake as a defense, the

tract by the plaintiff will not prevent him from enforcing specific performance: Preston v. Luck, 27 Ch. D. 497.

- 79 Denny v. Hancock, L. R. 6 Ch. App. 1; Mason v. Armitage, 13 Ves. 25; Goddard v. Jeffreys, 51 L. J. Ch. 57; Bascombe v. Beckwith, L. R. 8 Eq. 100; Western R. R. Co. v. Babcock, 6 Met. 346; Van Praeger v. Everidge, [1902] 2 Ch. App. 266, 271; 2 Pom. Eq. Jur., 4th ed., § 860, at note 2. See, also, Smith v. Toth, 61 Ind. App. 42, 111 N. E. 442; Louisville R'y Co. v. Kellner-Dehler Realty Co., 148 Ky. 765, 147 S. W. 424; Allen v. Kirk, 219 Pa. 574, 69 Atl. 50.
  - 80 Chute v. Quincy, 156 Mass. 189, 30 N. E. 550.
- 81 Chute v. Quincy, supra; Twining v. Neil, 38 N. J. Eq. 470;
  Boorum v. Tucker, 51 N. J. Eq. 135, 141, 26 Atl. 456; Mansfield
  v. Sherman, 81 Me. 365, 17 Atl. 300; Webster v. Cecil, 30 Beav. 62.

plaintiff not being barred himself by any act of inequitable advantage.82

§ 2205. (§ 783.) Mistake Due Solely to Defendant. The most difficult cases are those where the mistake is due solely to the defendant, without negligence on his part, or inducement or advantage taken by the plaintiff. It is plain that not every material mistake in such a case will enable the defendant to avoid performance of the contract.<sup>83</sup> The rule may be stated that where the mistake is solely due to the defendant, but without his fault, equity will refuse specific performance only where the mistake is of a vital part of the contract,—of the corpus of the agreement,—and of such nature that enforcement would be a great hardship.<sup>84</sup> Thus, it is said by Justice

82 Tamplin v. James, L. R. 15 Ch. D. 215; Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479; Western R. R. Co. v. Babcock, 6 Met. 346; McKenzie v. Hesketh, 7 Ch. D. 675, 682; Cape Fear Lumber Co. v. Matheson, 69 S. C. 87, 48 S. E. 111; 2 Pom. Eq. Jur., 4th ed., § 856, at note 2. For an instructive instance of negligence not culpable within the meaning of the rule, see Denny v. Hancock, L. R. 6 Ch App. 1.

83 The text is quoted in Edwards v. Trinity & B. V. R'y Co., 54 Tex. Civ. App. 334, 118 S. W. 572. See Tamplin v. James, L. R. 15 Ch. D. 215 (leading English case on mistake, holds that defendant's mistake must be vital); Stewart v. Kennedy, L. R. 15 App. Cas. 75, 105; Van Praeger v. Everidge, [1902] 2 Ch. App. 266, 271; Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479.

84 The text is quoted in Edwards v. Trinity & B. V. R'y Co., 54 Tex. Civ. App. 334, 118 S. W. 572. See Webster v. Cecil, 30 Beav. 62; Malins v. Freeman, 2 Keen, 25; Mansfield v. Sherman, 81 Me. 365, 17 Atl. 300; Goddard v. Jeffreys, 51 L. J. Ch. 57, where Kay, J., states the rule: "If he [the defendant] was not misled by any act of the vendors—if the mistake was entirely his own—then the court ought not to let him off his bargain on the ground of a mistake made by himself solely, unless the case is one of considerable harshness and hardship"; Leslie v. Thompson, 9 Hare, 268, 273; Day v. Wells, 30 Beav. 220; Van Praeger v. Everidge, [1902] 2 Ch. App. 266, 271. To the same effect, Bradley v. Heyward, 164 Fed. 107; Naughton v. Elliott, 68 N. J. Eq. 259, 59 Atl. 869. Compare Cawley v. Jean, 189 Mass. 220, 75 N. E. 614.

Fry that for a mere mistake in acreage equity will not refuse specific performance. "The mistake is not one which goes to the corpus with which the court deals. is not a mistake as to the essential part. . . . A mere difference in quantity has never been held to be a bar to specific performance." Where the mistake is such that the whole contract is one the defendant had no intention of entering into, as where the defendant bid in one lot of land thinking it was an entirely different piece, 86 equity will not compel him to perform the agreement; neither will it where the mistake, though not total, is so great that it should have suggested to the plaintiff that a mistake had been made,87 or if that element be lacking, where the difference arising from the mistake is so great that the defendant is subjected to an entirely different operation of the contract, hard and oppressive upon him.88

It is thus apparent that in most cases of mistake solely due to the defendant, the court is finally governed by the principle of hardship and unfairness equally with that of mistake.

Where the defendant's mistake is solely due to a failure to make an inquiry which he was bound to make, he cannot object to the results of his negligence, and performance will be given against him.<sup>89</sup>

§ 2206. (§ 784.) Concealment or Non-disclosure of Material Facts as a Defense.—The doctrine of equity relating to those fraudulent concealments which furnish

<sup>85</sup> McKenzie v. Hesketh, L. R. 7 Ch. D. 675, 682.

<sup>86</sup> Malins v. Freeman, 2 Keen, 25. See, also, the similar case, Diffenderffer v. Knoche, 118 Md. 189, 84 Atl. 416.

<sup>87</sup> Webster v. Cecil, 30 Beav. 62. See supra, § 781.

<sup>88</sup> Baxendale v. Seale, 19 Beav. 601; Chute v. Quincy, 156 Mass. 189, 30 N. E. 550; Day v. Wells, 30 Beav. 220; Western R. R. Co. v. Babcock, 6 Met. 346.

<sup>89</sup> Tamplin v. James, L. R. 15 Ch. D. 215.

a basis for the remedy of rescission or cancellation, and, a fortiori, a defense to specific performance, has been fully described elsewhere.90 It was there shown that such concealment, as distinguished from misrepresentation, 91 is, in general, a ground for avoiding the contract only where it involves the breach of some fiduciary duty to disclose the whole truth—a duty arising either (1) from a pre-existing relation of confidence between the parties, or (2) from a confidence reposed, by one party in the other, in the particular transaction in question, or (3) from the essential nature of the contract itself.92 It was also there intimated that the mere non-disclosure of a material fact known only to one party, in circumstances that do not afford sufficient ground for the cancellation of the contract, may nevertheless influence the court to refuse specific performance of the contract against the party who was misled.93 This view is supported by dicta of the highest authority, and by many decisions; and it may fairly be said to be a general rule of American equity that non-disclosure by the complainant of material facts, knowledge of which was obtained by superior facilities of information on his part. of which facts the defendant was ignorant, and was known by the complainant to be ignorant, is, in connection with marked inadequacy of consideration, sufficient to render the contract too unfair and unconscionable for specific enforcement.94

<sup>90</sup> In 2 Pom. Eq. Jur., §§ 900-907.

<sup>91</sup> As to the elements of misrepresentation requisite to equitable relief in general, see 2 Pom. Eq. Jur., §§ 876-899. That innocent misrepresentations are a defense to specific performance, see Id., § 889.

<sup>92 2</sup> Pom. Eq. Jur., § 902, and cases cited; concealments by a vendee, § 903; concealments by a vendor, § 904. The chief instance of the third class—contracts essentially fiduciary—is the contract of insurance: Id., § 907.

<sup>93 2</sup> Pom. Eq. Jur., § 905.

<sup>94</sup> The cases generally concern the vendee's failure to disclose

§ 2207. (§ 785.) Unfairness and Hardship as a Defense to Specific Performance.—"The contract must be perfectly fair, equal, and just in its terms and its cir-

facts known to him, greatly enhancing the value of the land. Chancellor Walworth said by way of dictum, in Livingston v. Peru Iron Co., 2 Paige, 390, 391: "I am not aware of any case in our own courts, or in England, where the simple suppression, by the buyer, of a fact which materially enhanced the value of the property, has been deemed sufficient to set aside the sale, on the ground of fraud. The rule is different where the purchaser applies to a court of equity to enforce the specific performance of an agreement. In such a case this court will not enforce a specific performance of the contract, if the complainant has intentionally concealed a material fact from the adverse party, the disclosure of which would have prevented the making of the agreement; but he will be left to his remedy at law." To the same effect are statements by Chancellor Kent, 2 Comm. 490, approved by Judge Story, 1 Eq. Jur., § 206; by Kindersley, V. C., in Falcke v. Gray, 28 L. J. Ch. 28, 31; by Brewer, J., in Missouri R. Ft. S. & G. R. Co. v. Brickley, 21 Kan. 275. See, also, decisions in Byars v. Stubbs, 85 Ala. 256, 4 South. 755, quoting 2 Pom. Eq. Jur., § 905 (in this case, however, the vendor had offered to constitute the vendee, plaintiff, his agent for the purpose of effecting a sale, so that the non-disclosure may possibly be viewed as a breach of confidence); Margraf v. Muir, 57 N. Y. 155 ("The plaintiff lived near the lot and knew its value. defendant lived at a distance and did not know its value. While the plaintiff did not make any misrepresentations, he concealed his knowledge of the recent rise in value of the lot and took advantage of her ignorance, and thus got from her a contract to convey to him the lot for but a little more than one-third of its value." The contract was held unconscionable, and the plaintiff left to his recovery of damages); Woolums v. Horsley, 93 Ky. 582, 20 S. W. 781 (land worth fifteen dollars an acre purchased for forty cents an acre; vendee knew of vendor's ignorance of its value as mineral land; vendor, aged, feeble and uneducated; contract held unconscionable); Hetfield v. Willey, 105 Ill. 286 (suit by vendor of a partnership interest: vendor did not disclose certain large liabilities of the firm which did not appear on the firm's books, but made no representations as to the value of his interest; specific performance refused): Trigg v. Read, 5 Humph. (Tenn.) 529, 541, 542. In all these cases the complainant had facilities which the defendant did not possess. for knowing the real value of the property. This circumstance was cumstances. The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive." '1f,

lacking, however, in Cowan v. Sapp, 81 Ala. 525, 8 South. 212 (agreement to compromise a debt, entered into by a creditor in ignorance of a judgment, execution and levy, made on creditor's behalf on debtor's lands in another state, which facts were known to the debtor but not to the creditor; though debtor may have supposed that creditor was apprised of these facts, contract "can scarcely be said to be just, fair, and reasonable," so as to entitle debtor to specific performance of the compromise agreement). In striking contrast with the last-named case, see the decision in Turner v. Green, [1895] 2 Ch. 205, where a party to a compromise agreement failed to communicate knowledge, just received by telegraph, of a decision in the pending litigation favorable to the other. The judgment of Chitty, J., granting specific performance of the agreement, treats concealment as a defense to specific performance as based solely on the breach of some fiduciary duty-an illustration of the recent tendency of the English courts to the narrowing of equitable doctrines. It seems difficult to reconcile the case, on principle, with those in which the defendant's mistake was obvious to the plaintiff, and relief was refused on that ground: Ante, § 781. See, also, Phillips v. Homfray, L. R. 6 Ch. App. 770, in 2 Pom. Eq. Jur., § 903, note 2.

Recent cases in support of the American rule are: Menseh v. Gail (Del. Ch.), 74 Atl. 832; Banaghan v. Malaney, 200 Mass. 46, 128 Am. St. Rep. 378, 19 L. R. A. (N. S.) 871, 85 N. E. 839 (aged and inexperienced woman, vendor, selling to agent, who had knowledge of prospective rise in value); Gibb v. Mintline, 175 Mich. 626, 141 N. W. 538; but see Lucas v. Long, 125 Md. 420, 94 Atl. 12. The English rule of Turner v. Green is limited in Carlish v. Salt, [1906] 1 Ch. 335, holding that the vendor is under a duty to disclose a material defect in title, or in the subject of the sale, "which defect is exclusively within his knowledge, and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions."

95 Pom. Eq. Jur., 4th ed., § 1405. The text is quoted in Hess v. Bowen, 237 Fed. 510; Greison v. Winey, 226 Fed. 302; Hartigan v. Hartigan, 58 W. Va. 610, 52 S. E. 720. This paragraph is cited in Great Northern R'y Co. v. Sheyenne Telephone Co., 27 N. D. 256, 145 N. W. 1062. Section 1405, Pom. Eq. Jur., is cited in Porter v. Anderson, 14 Cal. App. 716, 113 Pac. 345; Phelan v. Neary, 22 S. D.

then, the contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other inequitable feature: or if its enforcement would be oppressive or hard on the defendant, or would prevent his enjoyment of his own rights, or would work any injustice; or if the plaintiff has obtained it by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by non-disclosure of material facts, or by any other unconscientious means,—then a specific performance will be refused. It necessarily follows that a less strong case is sufficient to defeat a suit for specific performance than is requisite to obtain the remedy."96 ... "The oppression or hardship may result from unconscionable provisions of the contract itself; or it may result from the situation of the parties, unconnected with the terms of the contract or with the circumstances of its' negotiation and execution; that is, from external facts or events or circumstances which control or affect the situation of the defendant,"97

The foregoing statement of the equitable doctrine of hardship is best understood by an analysis of the circumstances where equity has found that kind and degree of hardship which leads it to refuse its aid. Such analysis indicates that the hardship which defeats specific performance usually arises from one or more of the grounds following.

§ 2208. (§ 786.) Unfairness and Advantage.—The plaintiff's conduct may amount to a personal bar to specific performance, as in the cases of sharp practice, concealment, contrivance, etc., or even if he is not barred by inequitable conduct, he may have obtained the contract

<sup>265, 117</sup> N. W. 142; Caldwell v. Virginia Fire & Marine Ins. Co., 124 Tenn. 593, 139 S. W. 698.

<sup>96</sup> Pom. Eq. Jur., 4th ed., § 1405, note 5. Quoted in Greison v.
Winey, 226 Fed. 302; Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072.
97 Pom. Eq. Jur., 4th ed., § 1405, note 6.

under such conditions of advantage, that equity regards it as unfair, and its enforcement a hardship. Such cases arise where the plaintiff takes advantage of the condition of the defendant, as of his pressing necessity, to drive a very hard bargain.<sup>98</sup>

§ 2209. (§ 787.) Inequality.—Even though the plaintiff was free from intention to take an unfair advantage, if the actual result is an inequality and unfair advantage, equity will not aid the plaintiff. The inequality which equity regards may be of two kinds, (a) that in the *inception*, existing when the contract is made, either between the parties or arising from the situation; <sup>99</sup> as,

98 Fish v. Leser, 69 Ill. 394; Union Coal Mining Co. v. McAdam, 38 Iowa, 663, 664. Other instances of "sharp practice": Grieson v. Winey, 240 Fed. 691; Blondel v. Bolander, 80 Neb. 531, 114 N. W. 574; Kennerly v. Aleck, 86 N. J. Eq. 336, 98 Atl. 445. See, also, 2 Pom. Eq. Jur., § 948, on the subject of this and the following sections.

Contracts Inherently One-sided or Unconscionable.-Apart from any consideration of sharp practice, or proved inequitable conduct, or inequality in the capacity of the parties, the courts in many cases, in the exercise of a true equitable discretion, have refused specific performance, because the contract in its terms was too unfair or onesided for enforcement by a court of conscience: See Tildersley v. Clarkson, 30 Beav. 419; Marks v. Gates, 154 Fed. 481, 12 Ann. Cas. 120, 14 L. R. A. (N. S.) 317, 83 C. C. A. 321; Clark v. Rosario Mining & Milling Co., 176 Fed. 180, 99 C. C. A. 534; Alabama Cent. R. Co. v. Long, 158 Ala. 301, 48 South. 363; Swint v. Carr, 76 Ga. 322, 2 Am. St. Rep. 44; Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072; Godwin v. Springer, 233 Ill. 229, 84 N. E. 234; Wilson v. Larson, 138 Iowa, 708, 116 N. W. 703; George Gunther, Jr., Brewing Co. v. Brywczynski 107 Md. 696, 69 Atl. 514; Banaghan v. Malaney, 200 Mass. 46, 128 Am. St. Rep. 378, 19 L. R. A. (N. S.) 871, 85 N. E. 839; Miller v. Laneda, 75 Or. 349, 146 Pac. 1090; Latta v. Hax; 219 Pa. St. 483, 68 Atl. 1016; Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 S. E. 770.

99 Cuff v. Dorland, 50 Barb. 438; Friend v. Lamb, 152 Pa. St. 529,
34 Am. St. Rep. 672, 25 Atl. 577. Sec, also, Ames v. Ames, 46 Ind.
App. 597, 91 N. E. 509; Steltzer v. Compton, 167 Iowa, 266, 149
N. W. 243; Miller v. Tjexhus, 20 S. D. 12, 104 N. W. 519.

where defendant acted under great and pressing necessity, or was otherwise at a disadvantage by reason of old age, mental weakness, poverty, ignorance, inexperience, sex, etc., or (b) that inequality which the court of equity finds in the operation of the contract, 100 as where the terms are so indefinite, unqualified, or assented to with such lack of caution, that their enforcement would produce an inequality not foreseen by the defendant. Thus, in the first instance, (a) where a buyer dealt with an aged invalid woman, without male advisers, although the buyer used no undue influence, took no advantage, and gave a fair price, he was refused specific performance as he had not taken the precaution to call in male advisers to render their situation equal. 101 (b) Of the second type, inequality in operation, is that class of numerous oil-lease cases, where for a slight consideration and an agreement to give royalties, the plaintiff

100 East St. Louis R'y Co. v. E. St. Louis, 182 Ill. 433, 439, 55 N. E. 533 (franchise not exercised for ten years. The city's growth had greatly increased value of the franchise. The company was not allowed to exercise the franchise. "The court will not decree specific performance of a contract grossly unequal in its terms): Sanders v. Newton, 140 Ala. 335, 27 South. 340 (here the defendant was to convey land and pay a sum of money, plaintiff to deliver in return certain machinery. By the terms plaintiff could keep all the machinerv as security for the money, and yet demand conveyance of the land. The court refused to decree a conveyance of the land, on the ground of inequality); Goodwine v. Kelley, 33 Ind. App. 57, 70 N. E. 832 (where the defendant was bound to give immediate delivery of a grocery business, and plaintiff later to convey certain land of which he did not then have the title, and pay a sum of money. Equity refused to compel a conveyance of the grocery store, as it would place the defendant at a disadvantage if the plaintiff should not get in the title to the land); Ferguson v. Blackwell, 8 Okl. 489, 58 Pac. 647 (unqualified agreement to give one-half of profits in any business defendant should engage in is "so manifestly overbalanced in favor of the plaintiff that it will not receive the aid of a court of equity").

101 Cuff v. Dorland, 50 Barb. 438.

has the right to prospect for oil on defendant's land, and no time limit is set upon this right. As he is not obliged to make any prospect, and may indefinitely keep the defendant out of the use of his land, the operation of the contract is so unequal that equity declines to enforce it.<sup>102</sup>

§ 2210. (§ 788.) Intoxication. — Complete intoxication, such that the defendant had no comprehension of his act, "that extreme state of intoxication that deprives a man of his reason,"103 would be ground for complete relief in equity, 104 rescission, as well as a defense to specific performance. Ordinary intoxication is not a ground for rescission where the plaintiff did not cause it or make it a means of fraud, but it generally has the effect of neutralizing the equities of the parties, in a suit for specific performance, so that the court "will not act on either side." As the Master of the Rolls, Sir William Grant, said, "A court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication."106 But, "intoxication which merely exhibarates and does not materially affect the understanding and the will, does not constitute a defense to the enforcement of an executory agreement, and much less is it any ground for affirmative relief."107

§ 2211. (§ 789.) Improvidence of the Undertaking. Under some circumstances, especially where any in-

<sup>102</sup> Federal Oil Co. v. Western Oil Co., 121 Fed. 674, 57 C. C. A. 428; similarly see Federal Oil Co. v. Western Oil Co., 112 Fed. 373; Berry v. Frisbie, 120 Ky. 337, 86 S. W. 558.

<sup>103</sup> Cook v. Clayworth, 18 Ves. 12, 15.

<sup>104</sup> Ibid. On this subject, see, further, 2 Pom. Eq. Jur., § 949.

<sup>105</sup> Cragg v. Holme, 18 Ves. 14, note (12).

<sup>106</sup> Cook v. Clayworth, 18 Ves. 12, 15.

<sup>107</sup> Pom. Eq. Jur., § 949, note 1, and cases cited. See, also, Corrigan v. Ralph, 265 Ill. 571, 107 N. E. 155.

equality exists between the parties, a highly improvident contract will not be enforced, as in the instance of a widow without capital agreeing to purchase an estate for fifty thousand dollars, in installments. The court found it was so probable that she was undertaking an arrangement that could only end in disaster for her, that it would not force the bargain upon her. 108 A better instance of pure improvidence without inequality is found in the defendant's undertaking to assign in gross all his future inventions; equity refused to compel the observance of this agreement. 109 Where a woman agreed to convey land valued at twelve hundred dollars for a horse worth one hundred dollars, equity would not force her to convey the land. 110 On the other hand, where no other element enters than a bad bargain or mere inadequacy in consideration, it is the rule in equity to enforce the contract. The mere fact that defendant entered into a losing bargain or one where plaintiff will reap great gains is clearly never a ground to refuse specific performance.111

- 108 Friend v. Lamb, 152 Pa. St. 529, 34 Am. St. Rep. 672, 25 Atl. 577. See, also, Marsh v. Lott, 8 Cal. App. 384, 97 Pac. 163 (a contract calling for postponed payment of \$70,000 in four years, but without any security specified, unconscionable).
- 109 Bates Mach. Co. v. Bates, 87 Ill. App. 225; or where, for a trifling consideration, defendant agreed to give plaintiff as extensive interest in all the defendant's after-acquired property; Marks v. Gates, 154 Fed. 481, 12 Ann. Cas. 120, 14 L. R. A. (N. S.) 317, 83 C. C. A. 321. But see Fairchild v. Dement, 164 Fed. 200; Chadeloid Chemical Co. v. H. B. Chalmers Co., 243 Fed. 606, 156 C. C. A. 304.
- 110 Higgins v. Butler, 78 Me. 520, 7 Atl. 276 (this case presented, however, the further elements of misapprehension of her rights by defendant, and conflicting and uncertain evidence).
- 111 The text is cited in Larson v. Smith, 174 Iowa, 619, 156 N. W. 813 (rapid increase in value). See, also, Franklin Co. v. Harrison, 145 U. S. 459, 36 L. Ed. 776, 12 Sup. Ct. 900; Whitted v. Fuquay, 127 N. C. 68, 72, 37 S. E. 141; Young v. Wright, 4 Wis. 163, 65 Am. Dec. 303; Clark v. Hutzler, 96 Va. 73, 30 S. E. 469; Southern R'y Co. v. Franklin etc. R. R. Co., 96 Va. 694, 32 S. E. 485; Lee v. Kirby, 104

§ 2212. (§ 790.) Inadequacy of Consideration With Other Grounds. 112—The usual statement of the modern rule is that mere inadequacy of consideration is not such hardship as will prevent specific performance, 113 unless the inadequacy is so gross as to shock the conscience of the court and amount to decisive evidence of fraud. 114 The earlier cases were inclined to make mere inadequacy

Mass. 420. See, further, Heyward v. Bradley, 179 Fed. 325, 102 C. C. A. 509; and post, § 797.

112 This paragraph is cited in Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

113 Collier v. Brown, 1 Cox, 428; White v. Damon, 7 Ves. 30; Lowther v. Lowther, 13 Ves. 95, 103; Ready v. Noakes, 29 N. J. Eq. 497, 499; Franklin Co. v. Harrison, 145 U. S. 459, 36 L. Ed. 776, 12 Sup. Ct. 900; Ayer v. Baumgarten, 15 Ill. 444; Western Co. v. Babcock, 6 Met. 346; Lee v. Kirby, 104 Mass. 420. Recent cases are: Bradley v. Hayward, 164 Fed. 107; Ullsperger v. Meyer, 217 Ill. 262, 3 Ann. Cas. 1032, 2 L. R. A. (N. S.) 221, 75 N. E. 482; Adams v. Peabody Coal Co., 230 Ill. 469, 82 N. E. 645; Zempel v. Hughes, 235 Ill. 424, 85 N. E. 641; Bear v. Fletcher, 252 Ill. 206, 96 N. E. 997 (excessive valuation); Boyce v. Holloway, 45 Ind. App. 535, 91 N. E. 34; Greenwood v. Greenwood, 96 Kan. 591, 152 Pac. 657, 155 Pac. 807; Nickerson v. Bridges, 216 Mass. 416, 103 N. E. 939; Barney v. Chamberlain, 85 Neb. 785, 124 N. W. 482; Worth v. Watts, 74 N. J. Eq. 609, 70 Atl. 357; Combes v. Adams, 150 N. C. 64, 63 S. E. 186; Sweeney v. Brow, 35 R. I. 227, Ann. Cas. 1915C, 1075, 86 Atl. 115; Garten v. Layton, 76 W. Va. 63, 84 S. E. 1058; and see cases cited in 2 Pom. Eq. Jur., § 926, notes.

114 Ready v. Noakes, 29 N. J. Eq. 497, 499; Coles v. Trecothick, 9 Ves. 246, where Lord Eldon says: "Unless the inadequacy of price is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing specific performance." For an analysis of the earlier and modern rule, see 2 Pom. Eq. Jur., §§ 926, 927, and notes, where Professor Pomeroy indicates that the gross inadequacy does not create a presumption of fraud, but may be evidence of fraud as a fact; Borell v. Dann, 2 Hare, 440, 450, where Vice-Chancellor Wigram says the only exception is "where the inadequacy is so gross as of itself to prove fraud or imposition on the part of the purchaser."

a sufficient hardship to defeat specific performance, 115 but this tendency was checked by Lord Eldon. 116 In a few modern cases equity has refused relief on the ground of mere gross inadequacy, such disproportionate advantage to the plaintiff that it "shocks the conscience of the court." But courts generally do not admit this exception, but do give much weight to inadequacy when coupled with other evidence of hardship, as, some degree of inequality, improvidence, etc. 118

115 Day v. Newman, 2 Cox, 77, 80, 81; Savile v. Savile, 1 P. Wms. 744; Underwood v. Hitchcox, 1 Ves. Sr. 279. The ancient rule was revived by statute in Californa and a few other states, and has given rise to a vast amount of litigation. See, among other cases, Prince v. Lamb, 128 Cal. 120, 60 Pac. 689; Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; White v. Sage, 149 Cal. 613, 87 Pac. 193; Stein v. Archibald, 151 Cal. 220, 90 Pac. 536; Wilson v. White, 161 Cal. 453, 119 Pac. 895; Haddock v. Knapp, 171 Cal. 59, 151 Pac. 1140; O'Hara v. Wattson (Lynch), 172 Cal. 525, 157 Pac. 608; Schader v. White, 173 Cal. 441, 160 Pac. 557; Magee v. Magee, 174 Cal. 276, 162 Pac. 1023; Porter v. Stockdale, 32 Cal. App. 792, 164 Pac. 33.

116 Coles v. Trecothick, 9 Ves. 246.

117 Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58; Thayer v. Younge, 86 Ind. 259; Higgins v. Butler, 78 Me. 520, 7 Atl. 276; Clements v. Reid, 17 Miss. (9 Smedes & M.) 535. See, also, Reich v. Reich, 83 N. J. Eq. 448, 91 Atl. 899; Pasco Fruit Lands v. Timmermann, 88 Wash. 112, 152 Pac. 675.

118 Higgins v. Butler, 78 Me. 520, 7 Atl. 276 (the defendant, a woman, agreed to sell land worth twelve hundred dollars for a horse worth one hundred dollars. The court refused to enforce it. The several elements of inequality, inadequacy of consideration, and misapprehension of rights combine to lead the court to its conclusion); Catheart v. Robinson, 5 Pet. (U. S.) 264, 8 L. Ed. 120; Gaskins v. Byrd, 66 Fla. 432, 63 South. 824 (inexperience and lack of information); Shoop v. Burnside, 78 Kan. 871, 98 Pac. 202 (inequality in the parties); Warren Mfg. Co. v. City of Baltimore, 119 Md. 188, 86 Atl. 502 (untrue representations); Worth v. Watts, 76 N. J. Eq. 299, 74 Atl. 434; Bullock v. Eldridge (R. I.), 90 Atl. 737 (unfair conduct of foreclosure sale); Griffith v. Spratley, 1 Cox C. C. 383, 389, 29 Eng. Reprint, 1213.

- § 2213. (§ 791.) Unintended Harsh Consequence.—Where the court is satisfied that the result which bears so hard upon the defendant, though legally a constituent part of the contract, was not intended by the parties at the time of the agreement,—in fact, was not in contemplation as the effect of the agreement, which was expressed in terms too unqualified,—it will not specifically enforce the agreement.<sup>119</sup> Thus, where a lease of a water-front and wharves contained a covenant to make all repairs, and a flood of the river washed away and destroyed the property to a large extent, specific performance was refused.<sup>120</sup>
- § 2214. (§ 792.) Inadvertent Covenant, or Act.—Analogous to the case of unintended consequence, is that arising from mere *inadvertence* of act or covenant, <sup>121</sup> as where a covenant bound trustees personally in a warranty of land sold under the trust. <sup>122</sup> This was consid-
- 119 The text is quoted in Edwards v. Trinity & B. V. R. Co., 54 Tex. Civ. App. 334, 118 S. W. 572. See Ferguson v. Blackwell, 8 Okl. 489, 58 Pac. 647 (here defendant agreed to give as consideration one-half of his profits in the cattle business, or of any other business he should engage in. The court refused to enforce such an unqualified and onerous term); Talbot v. Ford, 13 Sim. 173, 175 (where equity refused to enforce the covenant giving plaintiff a right to sell, at any time, the machinery by which defendant worked his mine. It would at once defeat the lease. "It was mere want of caution that this covenant was worded as it was; for I cannot suppose the parties could have intended that it should be expressed in the unqualified terms in which we find it"): Kelley v. York Cliffs Co., 94 Me. 374, 47 Atl. 898; Cathcart v. Robinson, 5 Pet. 264, 8 L. Ed. 120. See, also, Hope v. Walter, [1900] 1 Ch. 257, where defendant purchased a house of ill-fame, neither party knowing its character. 120 Waite v. O'Neil, 72 Fed. 348.
- 121 Dunne v. Light, 8 De Gex, M. & G. 774, 778, where defendant by oversight did not notice that the land he agreed to buy had no assurance of any rightful mode of access. The court said this hardship was enough "to neutralize the court"; Twining v. Morrice, 2 Bro. C. C. 326.
  - 122 Wedgwood v. Adams, 6 Beav. 600.

ered such an inadvertent assumption of a personal obligation that equity would not enforce it. Similarly in an auction sale, by an inadvertent act of a third party, there was a suppression of the bidding. Specific performance was therefore refused.<sup>123</sup>

§ 2215. (§ 793.) Greatly Oppressive Consequence.—In rare instances the mere onerousness or oppressiveness of the consequences of enforcement may be so great that although there is no other reason, equity will not grant the performance that plaintiff is otherwise entitled to; as, where, by the clause of a certain will, the sale of the land would cause the loss to defendant of one-half the purchase-money, a large sum. 124 But generally speaking, where the defendant entered upon the contract with his eyes open, the hardship arising from collateral circumstances cannot give him a defense. 125

§ 2216. (§ 794.) Injury to Third Persons.—Where the contract would be hard, unjust, and oppressive to innocent third persons, who have an interest in the subject-matter, equity will not enforce the contract; 126 as, where the third person has a vested interest in the property which would be injuriously affected or defeated, as, a remainder-man, reversioner, etc., in the English law. 127 An extreme illustration, of doubtful validity,

<sup>123</sup> Twining v. Morrice, 2 Bro. C. C. 326.

<sup>124</sup> Faine v. Brown, 2 Ves. Sr. 307, cited.

<sup>125</sup> Franklin Co. v. Harrison, 145 U. S. 459, 36 L. Ed. 776, 12 Sup. Ct. 900; Young v. Wright, 4 Wis. 163, 65 Am. Dec. 303; Adams v. Weare, 1 Bro. C. C. 567; Thompson v. Winter, 42 Minn. 121, 123, 6 L. R. A. 246, 43 N. W. 796; Prospect Park R. R. Co. v. Coney Is. R. R. Co., 144 N. Y. 152, 26 L. R. A. 610, 39 N. E. 17.

<sup>126</sup> Curran v. Holyoke Water Co., 116 Mass. 90; Hale v. Bryant, 109 Ill. 34; Carlisle v. Carlisle, 77 Ala. 339; Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710.

<sup>127</sup> Thomas v. Dering, 1 Keen, 729. The text is quoted in McGinness v. Broderick (Mo.), 192 S. W. 420.

is found in a case where an unmarried man contracted to leave by will all or the greater part of his property to the complainant, and later the promisor married, and died intestate. Equity refuses performance of the contract, as it observes that the natural right of the wife to be protected has intervened, and equity will not assist in divesting her of the property, but will leave the complainant to his legal remedy. Where a conveyance of a lot, which projected beyond the common line of the neighboring lots ten feet, would inflict unnecessary injury to the adjoining proprietors, the court refused its aid to enforce the contract as made, but gave the vendor the option to accept conveyance of a lot with boundaries conforming to those adjoining, with compensation for the deficiency. 129

§ 2217. (§ 795.) Inconvenience to the Public. 130—Where the consequence of enforcement of the contract is to inconvenience the public, the discretionary power of equity is exercised to refuse its aid. 131 This rule is 'frequently applied in contracts by which a railway has bound itself to do some act, as to build a private grade crossing, 132 or stop its trains at complainant's place. 133

128 Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710; Sargent v. Corey, 34 Cal. App. 193, 166 Pac. 1021. *Contra*, see Dillon v. Gray, 87 Kan. 129, 123 Pac. 878. See, also, Gall v. Gall, 64 Hun, 600, 611, 19 N. Y. Supp. 332.

129 Curran v. Holyoke Water Power Co., 116 Mass. 90.

130 This paragraph is quoted in full in Ford v. Oregon El. R. Co., 60 Or. 278, Ann. Cas. 1914A, 280, 36 L. R. A. (N. S.) 358, 117 Pac. 809.

131 Conger v. New York, W. S. & B. R. Co., 120 N. Y. 29, 23 N. E. 983 (agreement for stopping express trains near plaintiff's house, with no great benefit to plaintiff); Curran v. Holyoke Water Power Co., 116 Mass. 90 (to enforce conveyance would injure neighborhood). See, also, Ryan v. McLane, 91 Md. 175, 80 Am. St. Rep. 438. 50 L. R. A. 501, 46 Atl. 340. See ante, § 761, at note 81.

132 Goding v. Railroad Co., 94 Me. 542, 545, 48 Atl. 114.

133 The text is cited in Herzog v. Atchison, T. & S. F. R. Co., 153

If the public service would be endangered or inconvenienced, with no corresponding benefit to complainant, he cannot have performance. But not every slight inconvenience to the public will be a reason for refusing performance. 134

§ 2218. (§ 796.) Performance No Benefit to Plaintiff.<sup>135</sup>—Specific performance not being an absolute right, the fact that enforcement would be of little or no benefit to the complainant, and a burden upon the defendant, is sufficient to constitute performance oppressive, and it will not be given.<sup>136</sup> The disproportion be-

Cal. 496, 17 L. R. A. (N. S.) 428, 95 Pac. 898; and quoted in Ford v. Oregon El. R. Co., 60 Or. 278, Ann. Cas. 1914A, 280, 36 L. R. A. (N. S.) 358, 117 Pac. 809. See Conger v. New York, W. S. & B.R. Co., supra; Clark v. Rochester R. R. Co., 18 Barb. 350; Whalen v. Baltimore etc. R. Co., 108 Md. 11, 129 Am. St. Rep. 423, 17 L. R. A. (N. S.) 130, 69 Atl. 390; Fritts v. Delaware L. & W. R. Co., 75 N. J. Eq. 384, 73 Atl. 92. See ante, § 761.

134 Raphael v. Thames Val. R. R., L. R. 2 Ch. App. 147 (here the defendant was compelled to perform its agreement to make an approach for complainant's benefit in a particular manner); Taylor v. Florida East Coast R. Co., 54 Fla. 635, 127 Am. St. Rep. 155, 14 Ann. Cas. 472, 16 L. R. A. (N. S.) 307, 45 South. 574 (a valuable case); Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

135 This paragraph is quoted in full in Ford v. Oregon El. R. Co., 60 Or. 278, Ann. Cas. 1914A, 280, 36 L. R. A. (N. S.) 358, 117 Pac. 809.

136 The text is quoted in J. B. Brown & Sons v. Boston & M. R. R., 106 Me. 248, 76 Atl. 692 (overhead railroad crossing). See Clark v. Rochester R. R. Co., 18 Barb. 350 (one ground for refusing specific performance of covenant to build a station and stop trains at plaintiff's home, was that it would be of but little benefit to plaintiff and a great burden upon defendant, "greatly disproportioned to the value of the land"); Conger v. New York R. R., 120 N. Y. 29, 23 N. E. 983; Miles v. Dover Furnace Co., 125 N. Y. 294, 297, 26 N. E. 261 (specific performance refused of a lease of the lower levels of a mine for twelve years, the court finding that such working would

tween the burden upon the defendant and the gain to the plaintiff makes performance inequitable. Instances are found in the cases of restrictive covenants on land, where, the character of the neighborhood having changed, as, from a residence to a business neighborhood, the whole purpose of the covenant is gone, and enforcement would be of no benefit to complainant.<sup>137</sup>

§ 2219. (§ 797.) Subsequent Events, Which Should have been Contemplated, No Defense.—Courts of equity frequently state the rule to be that the hardship and unfairness must be judged of in relation to the time of making the contract, and that specific performance will not be refused because of hard conditions brought about

benefit plaintiff but little, and work almost a destruction of the mine); Murdfeldt v. New York etc. R. R., 102 N. Y. 702, 7 N. E. 404 (where defendant had agreed to construct a passageway under its road. Enforcement denied in view of inutility of such passage to complainants, and difficulty of the construction). See, also, Herzog v. Atchison, T. & S. F. R. Co., 153 Cal. 496, 17 L. R. A. (N. S.) 428, 95 Pac. 898; Chicago Sanitary Dist. v. Martin, 227 Ill. 260, 10 Ann. Cas. 227, 81 N. E. 417; Linthicum v. Washington B. & A. Electric R. Co., 124 Md. 263, 92 Atl. 917 (railroad crossing); Smith v. Myers, 130 Md. 64, 99 Atl. 938 (removal of a valuable building to release a small fraction of a lot); Speer v. Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197, reversing 64 N. J. Eq. 601, 54 Atl. 539; Penn Gas Coal Co. v. Greensboro Gas Co., 238 Pa. St. 97, 85 Atl. 1093.

For the enforcement of agreements for railroad crossings, where performance in specie is important to the plaintiff and not detrimental to the public, notwithstanding that considerable expense to the railroad company is involved, see Fox v. Spokane International R'y Co., 26 Idaho, 60, 140 Pac. 1103; Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523; Indianapolis Northern Traction Co. v. Essington, 54 Ind. App. 286, 99 N. E. 757, 100 N. E. 765; Hartshorn v. Chicago G. Western R'y Co., 137 Iowa, 324, 113 N. W. 840; and see ante, § 760, note.

137 Amerman v. Deane, 132 N. Y. 355, 28 L. R. A. 584, 30 N. E. 741 (restrictive covenant. Change in character of neighborhood). See ante, volume I, chapter on "Injunction Against Breach of Contract."

by subsequent events, or changes in circumstances. 138 A more accurate formulation of the rule is this: equity will not relieve against hardship arising from a change in circumstances or the result of subsequent events, where these should have been in contemplation of the parties as possible contingencies, 139 when they entered upon the agreement. And of such nature are the ordinary changes like a rise or fall in values, profit or loss in the undertaking, mistakes of judgment, unforeseen events, which yet were fairly possible contingencies, etc. Thus, no hardship arising from a great change in values between the time of making of the agreement and the conveyance can be a ground for any relief. 140 Nor can

138 Franklin Tel. Co. v. Harrison, 145 U. S. 459, 472, 473, 36 L. Ed. 776, 12 Sup. Ct. 900.

139 The text is quoted in Blanck v. Pioneer Mining Co., 93 Wash. 26, 159 Pac. 1077. See Marble Co. v. Ripley, 10 Wall. 339, 357, 19 L. Ed. 955; Warner v. Marshall, 166 Ind. 88, 75 N. E. 582 (agreement to support defendant's testator, who lived only a few months); Woods v. Dunn (Or.), 159 Pac. 1158 (same).

140 Young v. Wright, 4 Wis. 163, 65 Am. Dec. 303; Franklin Tel. Co. v. Harrison, 145 U. S. 459, 472, 473, 36 L. Ed. 776, 12 Sup. Ct. 900 (the court states that the want of equality and fairness must in general be judged of in relation to the time of the contract, and not by subsequent events. Mere decline in values is not enough); Meehan v. Nelson, 137 Fed. 731, 70 C. C. A. 165; Great Lakes & St. . L. T. Co. v. Scranton Coal Co., 239 Fed. 603, 152 C. C. A. 437 (great increase in value of vessels, but contract made in view of war conditions); Walton v. McKinney, 11 Ariz. 385, 94 Pac. 1122; Anderson v. Anderson, 251 Ill. 415, Ann. Cas. 1912C, 556, 96 N. E. 265; Brown v. Brown, 274 Ill. 325, 113 N. E. 634; Adams v. Larson, 279 Ill. 268, 116 N. E. 658; Burge v. Gough, 153 Iowa, 183, 133 N. W. 340; Tuttle v. King (Iowa), 164 N. W. 616; Cox v. Burgess, 29 Ky. Law Rep. 972, 96 S. W. 577; Wren v. Cooksey, 147 Ky. 825, 145 S. W. 1116; Lucas v. Long, 125 Md. 420, 94 Atl. 12; Nowicki v. Kopelczak, 195 Mich. 678, 162 N. W. 266; Ogooshevitz v. Arnold, 197 Mich. 203, 163 N. W. 946, 165 N. W. 633; Rausch v. Hanson, 26 S. D. 273, 128 N. W. 611; Dingman v. Hilberry, 159 Wis. 170, 149 N. W. 761. Contra, see Maryland Tel. & Tel. Co. v. Charles Simons Sons Co., 103 Md. 136, 115 Am. St. Rep. 346, 63 Atl. 314.

hardship arising from bad judgment, miscalculation, or changes of conditions that ought fairly to have been in contemplation of the defendant be considered by the court.<sup>141</sup> Those results of the contract are what the complainant has a clear right to receive, and defendant no equity for refusing. Thus, in a contract to lease a "feeder" line of railway for a number of years, with a covenant to keep the line in operation, the fact that the line has ceased to pay, and to operate it means a continued loss for several years, is no defense to a suit for specific performance.<sup>142</sup>

§ 2220. (§ 798.) Subsequent Events, not in Possible Contemplation, Often a Defense. 143—Illustration of such events may be found in cases where after the contract has been made, costly street improvements are ordered by the city, which enhance the value of the land, but fall as a burden upon the vendor, and equity will not give the vendee the land unless he will assume the cost of the assessments. 144 The leading case of Willard v. Tay-

141 In Franklin Tel. Co. v. Harrison, supra, by the rapid growth of population of New York and Philadelphia, the right to the exclusive use of a telegraph wire (leased for a small annual sum) became extremely valuable. Equity refused the complainant relief from the bargain which changing circumstances had made unequal: Prospect Park & R. R. Co. v. Coney Is. R. R. Co., 144 N. Y. 152, 26 L. R. A. 610, 39 N. E. 17; Marble Co. v. Ripley, 10 Wall. 339, 356, 357, 19 L. Ed. 955 (here the court observes it will not relieve from the hardship arising from the force of circumstances or changing events, when the hardship might have been contemplated, when the great loss or profit were "contingencies, the possibility of which might have been foreseen"). See, also, Ferguson v. Omaha & S. W. R. Co., 227 Fed. 513, 142 C. C. A. 145 (washout makes maintenance of road expensive).

142 Southern R'y Co. v. Franklin P. R. Co., 96 Va. 693, 44 L. R. A. 297, 32 S. E. 485.

143 This paragraph is cited in Watters v. Ryan, 31 S. D. 536, 141 N. W. 359.

144 King v. Raab, 123 Iowa, 632, 99 N. W. 306; Gotthelf v. Stranahan, 138 N. Y. 345, 352, 20 L. R. A. 455, 34 N. E. 286. (Here the

loe<sup>145</sup> refused to compel a vendor to accept greatly depreciated paper, currency, legal tender,—which by both the general terms of his contract and the general law he was bound to do. In another instance, where the vendor had remained in possession and paid the outgoings for a long time after the contract was entered upon, and the land had nearly doubled in value, performance was refused on the ground, that as vendor's expenses had been so great, equal to about one-half the contract price, he would receive practically nothing for his property, and it would be against justice and conscience to compel him to convey it.<sup>146</sup> Where there is delay on the plaintiff's part in claiming his rights, and changes of conditions may make specific performance an injustice, it will be refused.<sup>147</sup>

# § 2221. (§ 799.) Direct Act of Either Party.—Where the hardship arises from defendant's own act, after the

court said: "Where by reason of circumstances which have intervened between the making of the contract, and the bringing of the action, the enforcement of the equitable remedy would be inequitable, and produce results not within the intent or understanding of the parties when the bargain was made, and there has been no inexcusable laches, or inattention by the party resisting specific performance in not foreseeing and providing for contingencies which have subsequently arisen, the court may well refuse to specifically enforce the contract and will leave the party to his legal remedy").

145 Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501.

146 Fitzpatrick v. Dorland, 27 Hun, 291. See, also, in illustration of the principle of the text, Richardson Shoe Machinery Co. v. Essex Mach. Co., 207 Mass. 219, 93 N. E. 650; Anderson v. Steinway & Sons, 221 N. Y. 639, 117 N. E. 575 (land bought for business purposes, ordinance passed making it a residence district); Watters v. Ryan, 31 S. D. 536, 141 N. W. 359 (unexpected delay intermination of litigation; an instructive case); Tazewell Coal & Iron Co. v. Gillespie, 113 Va. 134, 75 S. E. 757.

147 The text is cited in Watters v. Ryan, 31 S. D. 536, 141 N. W. 359. See East St. Louis R'y Co. v. East St. Louis, 182 Ill. 433, 439, 55 N. E. 533; Fitzpatrick v. Dorland, 27 Hun, 291. See post, § 812.

bargain, he cannot complain of the results of his own conduct.<sup>148</sup> The defendants "cannot be permitted to avail themselves of impediments of their own creation."<sup>149</sup> On the other hand, when the plaintiff's own conduct is the cause of the hardship defendant would incur by performance, and his conduct is not equitable, he cannot ask the aid of equity; as where the plaintiff allowed the insurance to expire just before the time of conveyance, gave no notice to defendant, and the house burned. The vice-chancellor held the complainant's conduct, though unintentional, and although not in violation of any legal duty, yet operated as a trap upon the defendant, and equity would not give its aid to the vendor.<sup>150</sup>

§ 2222. (§ 800.) Forfeiture.—"When the performance of a contract will render the defendant liable to a forfeiture, the performance is a hardship, within the meaning of the general rule, and will not be decreed. If, however, such liability is not a necessary, or natural effect of the agreement when originally made, but arises from the subsequent acts or omissions of the defendant

<sup>148</sup> Helling v. Lumley, 3 De Gex & J. 493, 500 (forfeiture brought about by defendant's affirmative act. Equity will not relieve him from it); Lord Petre v. The Eastern Counties R'y Co., 1 Railway Cases, 462, 479. See, also, Fox v. Spokane International R'y Co., 26 Idaho, 60, 140 Pac. 1103 (difficulty in construction of railroad crossing owing to defendant's change of location of its road); Telegrahpone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767.

<sup>149</sup> Hawkes v. Eastern R'y Co., 1 De Gex, M. & G. 737, 755.

<sup>150</sup> Dowson v. Solomon, 1 Drew. & S. 1.

<sup>151</sup> Lasor v. Baldridge, 32 Mo. App. 362, 366; Faine v. Brown, cited, 2 Ves. Sr. 307; Peacock v. Penson, 11 Beav. 355; Henderson v. Hays, 2 Watts, 148, 151; Campbell v. Spencer, 2 Binn. 133; Nelson v. Kelly, 91 Ala. 569, 8 South. 690.

himself, 152 it will not avail to prevent a specific enforcement." 153

§ 2223. (§ 801.) A Purchaser Need not Accept a Doubtful or Unmarketable Title.—The rule is now well settled that equity will not compel an unwilling purchaser to accept a doubtful title which will expose him to the expense and hazard of litigation. 154 It will not

152 Helling v. Lumley, 3 De Gex & J. 493, 498, 499; Shade v. Oldroyd, 39 Kan. 313, 18 Pac. 198. See, also, supra, § 799.

153 Pom. Spec. Perf., § 190.

154 The rule rests upon the hardship to the vendee of forcing him to accept a title which may involve him in litigation: Shapland v. Smith, 1 Bro. Ch. 75; Stapylton v. Scott, 16 Ves. Jr. 272, by Lord Eldon; Lindsey v. Humbrecht, 162 Fed. 548; Alpha Portland Cement Co. v. Shirk, 227 Fed. 966, 142 C. C. A. 424; Hess v. Bowen, 237 Fed. 510 (court cannot pass on rights of unborn children); Shelton v. Ratterree, 121 Ark. 482, 181 S. W. 288; Maltby v. Thews, 171 Ill. 264, 49 N. E. 486; Smith v. Hunter, 241 Ill. 514, 132 Am. St. Rep. 231, 89 N. E. 686; Billick v. Davenport, 164 Iowa, 105, 145 N. W. 470; McNutt v. Nellans, 82 Kan. 424, 108 Pac. 834; Beeler v. Sims, 91 Kan. 757, 139 Pac. 371; Shea v. Evans, 109 Md. 229, 72 Atl. 600; Arey v. Baer, 112 Md. 541, 76 Atl. 843; Newburyport Sav. Inst. v. Puffer, 201 Mass. 41, 87 N. E. 562; Costello v. Tasker, 227 Mass. 220, 116 N. E. 573; Lake Erie Land Co. v. Chilinski, 197 Mich. 214, 163 N. W. 929; Howe v. Coates, 97 Minn. 385, 114 Am. St. Rep. 723, 4 L. R. A. (N. S.) 1170, 107 N. W. 397; Hubachek v. Maxbass Security Bank, 117 Minn. 163, Ann. Cas. 1913D, 187, 134 N. W. 640; Justice v. Button, 89 Neb. 367, 38 L. R. A. (N. S.) 1, 131 N. W. 736; Richards v. Knight, 64 N. J. Eq. 196, 53 Atl. 452; Montrose Realty & Imp. Co. v. Zimmerman (N. J. Eq.) 73 Atl. 846; Van Riper v. Wickersham, 77 N. J. Eq. 232, Ann. Cas. 1912A, 319, 30 L. R. A. (N. S.) 25, 76 Atl. 1020; Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905; Cerf v. Diener, 210 N. Y. 156, 104 N. E. 126; Triplett v. Williams, 149 N. C. 394, 24 L. R. A. (N. S.) 514, 63 S. E. 79; Bruegger v. Cartier, 29 N. D. 575, 151 N. W. 34; Lockhart v. Ferrey, 59 Or. 179, 115 Pac. 431; Herman v. Somers, 158 Pa. St. 424, 38 Am. St. Rep. 851, 27 Atl. 1050; Butler v. O'Hear, 1 Desaus, Eq. (S. C.) 382, 1 Am. Dec. 671; Sherman v. Beam, 27 S. D. 218, 130 N. W. 442; Greer v. International Stockyards Co., 43 Tex. Civ. App. 370, 96 S. W. 79; Alling v. Vanderstucken (Tex. Civ. App.), 194 S. W. 443; Watson

force him to buy a lawsuit. He need not take the title unless it is marketable—i. e., merchantable—free from any defect that will affect its value in the eye of subsequent purchasers from the vendee. 155 "That may be a good title in law which a court of equity in the exercise of its discretionary power will not force on an unwilling purchaser.''156 "Every purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaws or doubt will come up to disturb its marketable value." 157 "But a threat or even the possibility of a contest will not be sufficient. doubt must be considerable and rational, such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous, and astute niceties, but such as to produce real bona fide hesitation in the mind of the chancellor."158

v. Boyle, 55 Wash. 141, 104 Pac. 147; Wingard v. Copeland, 64 Wash. 214, 116 Pac. 670; Milton v. Crawford, 65 Wash. 145, 118 Pac. 32; Moore v. Elliott, 76 Wash. 520, 136 Pac. 849; Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 129 Am. St. Rep. 1068, 118 N. W. 853; Stack v. Hickey, 151 Wis. 347, 138 N. W. 1011.

- 155 Lippincott v. Wikoff, 54 N. J. Eq. 107, 33 Atl. 305, 308.
- 156 Dobbs v. Norcross, 24 N. J. Eq. 327, 331.
- 157 Ibid.

158 Gill v. Wells, 59 Md. 492, 495. Also, see Hayes v. Harmony Grove Cemetery, 108 Mass. 400, 402, where the court says the mere possibility of a defect, as that debts may be later discovered to be a charge upon the land, is not such a defect as to throw a doubt on the title, where there is no affirmative evidence of the existence of such debts. See, also, Lamotte v. Steidinger, 266 Ill. 600, 107 N. E. 850; Herbold v. Montebello Building & Loan Ass'n, 113 Md. 156, 77 Atl. 122; Potomac Lodge No. 31, I. O. O. F., v. Miller, 118 Md. 405, 84 Atl. 554; Cityco Realty Co. v. Friedenwald, 130 Md. 329, 100 Atl. 374; Conley v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460; Close v. Martin, 208 Mass. 236, 94 N. E. 388; Foster, Hall & Adams Co. v. Sayles, 213 Mass. 319, 100 N. E. 644; Cambrelleng v. Purton, 125 N. Y. 610, 26 N. E. 907; Minister, etc., Reformed Protestant Dutch Church v. Madison Ave. Building Co., 214

(§ 802.) The Standard for Determining a "Doubtful" Title.—While the general rule that equity will use its discretionary power and decline to force a doubtful title on a purchaser is everywhere recognized, there has been a considerable conflict of decision as to what principles should determine the "doubtfulness" of the title. It was early recognized that the title might be doubtful (1) because of doubt as to the general law or the construction of a statute, on which the title depended, or (2) because of doubt as to extrinsic facts or the construction of an instrument which affected title. The leading case of Pyrke v. Waddingham<sup>159</sup> held that as to matters of general law, the court was to judge whether the general law upon the point was or was not settled, and to refuse specific performance where it was in doubt as to the law, on the matter of construction, or in doubt as to extrinsic facts affecting the title. that even where the court thought the title was good. yet if it thought that other competent persons might well entertain a contrary view, it should hold it doubtful and refuse to force it on the purchaser. 160

§ 2225. (§ 803.) (1) Where the Doubt Arises from an Unsettled Question of Law.—The later case of Alex-

N. Y. 268, L. R. A. 1915F, 651, 108 N. E. 444; Spencer v. Lyman, 27
S. D. 471, 131 N. W. 802.

159 Pyrke v. Waddingham, [1850] 10 Hare, 1.

160 That the court may properly hold the title doubtful, even though its own opinion is favorable, see Williams v. Bricker, 83 Kan. 53, 30 L. R. A. (N. S.) 343, 109 Pac. 998; Townshend v. Goodfellow, 40 Minn. 312, 12 Am. St. Rep. 736, 3 L. R. A. 739, 41 N. W. 1056; Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. 925; and see, further, Hess v. Bowen, 237 Fed. 510 (adverse opinion of state court); Doutney v. Lambie, 78 N. J. Eq. 277, 78 Atl. 746 (doubt as to law of another state). On the other hand, the opinion of the trial court (Alexander v. Mills, L. R. 6 Ch. 124), or of eminent attorneys (Hamilton v. Buckmaster, L. R. 8 Eq. 323), adverse to the title, does not necessarily render it doubtful.

ander v. Mills<sup>161</sup> seemed to limit this broad view somewhat by making the court decide the doubt as to the law, not only where the general law was settled, but "to ascertain and determine as best it may what the law is, and to take that to be the law which it has so ascertained and determined." This course obviously compelled a buyer to take a title that might not be marketable if another court took a different view upon the disputed point of the general law. It was natural for the courts to reach ultimately a sounder conclusion, which was soon done. The true modern rule was worked out in In re Thackwray, 163 that "the court does decide on general matters of law [including the construction of Acts of Parliament | about which there cannot be fairly said to be any judicial doubt." But in order for it to be right for the court to adopt its own view of the law in resolving the doubt "it must appear to the judge who decides it that there are no decisions or dicta of weight which show that another judge or another court having the question before it might come to a different conclusion."164 Many American cases follow this later rule of In re Thackwray. 165

§ 2226. (§ 804.) (2) Where the Doubt Arises from an Extrinsic Fact or the Construction of a Document. Where the question is one of the doubtful construction of an instrument in the chain of title, also, the court

<sup>161</sup> Alexander v. Mills, L. R. 6 Ch. App. 124.

<sup>162</sup> Ibid., at p. 131.

<sup>163</sup> In re Thackwray, L. R. 40 Ch. D. 34, 38.

<sup>164</sup> Ibid.

<sup>165</sup> See the excellent opinion in Lippincott v. Wikoff, 54 N. J. Eq. 107, 33 Atl. 305, 308, 309, and 310, which reviews the development of the doctrine in the English cases. See, also, Richards v. Knight, 64 N. J. Eq. 196, 53 Atl. 452; Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527, 528; Gill v. Wells, 59 Md. 492, 495; Kohlrepp v. Ram, 79 N. J. Eq. 386, 81 Atl. 1103; Wilson v. Vogel, 87 N. J. Eq. 584, 101 Atl. 173.

should not impose its opinion upon the purchaser, since its decision would not be res adjudicata; 166 and the court should be even more cautious where the title depends upon the existence of a doubtful fact, resting for its proof upon parol evidence. 167 questionable documentary conwhat facts orstructions render a title unmarketable only an examination of many instances can be of utility, having in mind the test stated above—such defect in title that an ordinary subsequent buyer in the market would be unwilling to accept it at full value. For this reason, a number of cases with the particular defect found by the court are collected in the note below. 168

166 Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Cornell v. Andrews, 35 N. J. Eq. 7. See post, n. 168.

167 Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483 (instructive statement of the rule by Stevenson, V. C.); Deseumeur v. Rondel, 76 N. J. Eq. 394, 74 Atl. 703; Sulk v. Tumulty, 77 N. J. Eq. 97, 75 Atl. 757; Doutney v. Lambie, 78 N. J. Eq. 277, 78 Atl. 746; Moore v. Williams, 115 N. Y. 586, 12 Am. St. Rep. 844, 5 L. R. A. 654, 22 N. E. 233; Vought v. Williams, 120 N. Y. 253, 17 Am. St. Rep. 634, 8 L. R. A. 591, 24 N. E. 195; Cerf v. Diener, 210 N. Y. 156, 104 N. E. 126; Campbell v. Harsh, 31 Okl. 436, 122 Pac. 127; Coonrod v. Studebaker, 53 Wash. 32, 101 Pac. 489.

168 The most frequently occurring instances of doubtful and defective titles may be classified as follows:

- (1) Defective conveyance in the chain of title: Geithman v. Eichler, 265 Ill. 579, 107 N. E. 180 (misnomer); Billick v. Davenport, 164 Iowa, 105, 145 N. W. 470 (same); Irving v. Campbell, 121 N. Y. 353, 8 L. R. A. 620, 24 N. E. 821 (insufficient acknowledgment). Compare Conley v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460 (doubt whether deed was delivered in grantee's lifetime does not arise from fact that it was not acknowledged or recorded until after his death).
- (2) Doubtful construction of will: See Pyrke v. Waddingham, 10 Hare, 1, 68 Eng. Reprint, 813 (no specific performance, though court's opinion favorable); Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Fisher v. Eggert (N. J. Eq.), 64 Atl. 957; Wilson v. Vogel, 87 N. J. Eq. 584, 101 Atl. 173. Compare, where there was no

doubt sufficient to reject the title, Cushing v. Spalding, 164 Mass. 287, 41 N. E. 297; Viele v. Keeler, 129 N. Y. 190, 29 N. E. 78.

- (3) Doubt arising from executor's or trustee's sale: Townshend v. Goodfellow, 40 Minn. 312, 12 Am. St. Rep. 736, 3 L. R. A. 739, 41 N. W. 1056 (whether conditions existed for exercise of the power); Montrose Realty & Imp. Co. v. Zimmerman' (N. J. Eq.), 73 Atl. 846 (sale not in accordance with power); Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905 (defective execution of power). No sufficient doubt: Hamilton v. Buckmaster, L. R. 3 Eq. 323; Lippincott v. Wikoff, 54 N. J. Eq. 107, 33 Atl. 305; Cruikshank v. Parker, 52 N. J. Eq. 310, 29 Atl. 682. Doubt arising from judicial sale: Martin v. Hamlin, 176 Mass. 180, 57 N. E. 381; Young's Adm'r v. Rathbone, 16 N. J. Eq. 224, 84 Am. Dec. 151. No sufficient doubt: Huber v. Johnson, 174 Ky. 697, 192 S. W. 821; Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. 99; Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966.
- (4) Possibility that a conveyance in the chain of title may be impeached for fraud or breach of trust: Title doubtful, Close v. Stuyvesant, 132 Ill. 607, 3 L. R. A. 161, 24 N. E. 868; Gosman v. Pfistner, 80 N. J. Eq. 432, 83 Atl. 781; People v. Open Board of Stock Brokers Building Co., 92 N. Y. 98. Compare First African M. E. Soc. v. Brown, 147 Mass. 296, 17 N. E. 549.
- (5) Title defective because of valid encumbrances, or clouded by encumbrances of doubtful validity: Wesley v. Eells, 177 U. S. 370, 44 L. Ed. 810, 20 Sup. Ct. 661 (mortgage); Beavers v. Baucum, 33 Ark. 722 (inchoate dower); Attebery v. Blair, 244 Ill. 363, 135 Am. St. Rep. 342, 91 N. E. 475; Loring v. Whitney, 167 Mass. 550, 46 N. E. 57 (deed of trust); Peabody Heights Co. v. Willson, 82 Md. 186, 36 L. R. A. 393, 32 Atl. 386, 1077 (building restrictions); Shea v. Evans, 109 Md. 229, 72 Atl. 600 (same); Dyker Meadow Land & Imp. Co. v. Cook, 159 N. Y. 6, 53 N. E. 690 (local assessment); Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303 (building restrictions); Batley v. Foerderer, 162 Pa. St. 460, 29 Atl. 868 (building restrictions); Roos v. Thigpen (Tex. Civ. App.), 140 S. W. 1180 (vendor's lien notes); Alling v. Vanderstucken (Tex. Civ. App.), 194 S. W. 443; Newberry v. French, 98 Va. 479, 36 S. E. 519 (judgment liens). But specific performance is not defeated by invalid or dormant liens: Young v. Collier, 31 N. J. Eq. 444; Espy v. Anderson, 14 Pa. St. 308; nor by encumbrances which may be discharged by application of the purchase money: Megibben's Adm'rs v. Perin. 49 Fed. 183; Guild v. Atchison, T. & S. F. R. Co., 57 Kan. 70, 57 Am. St. Rep. 312, 33 L. R. A. 77, 45 Pac. 82.
- (6) A title by adverse possession is often so clear that the vendee may be compelled to accept it, unless he has expressly contracted

for a good title of record; In re Atkinson & Hersall's Contract, [1912] 1 Ch. 2, [1912] 2 Ch. 1; Gibson v. Brown, 214 III. 330, 73 N. E. 578 (adverse claim barred by laches); Bear v. Fletcher, 252 Ill. 206, 96 N. E. 997; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; Jackson v. Creek, 47 Ind. App. 541, 94 N. E. 416; Keepers v. Yocum, 84 Kan. 554, Ann. Cas. 1912A, 748, 114 Pac. 1063; Van Gundy v. Shewey, 90 Kan. 253, 47 L. R. A. (N. S.) 645, 133 Pac. 720; Huber v. Johnson, 174 Ky. 697, 192 S. W. 821; Erdman v. Corse, 87 Md. 506, 40 Atl. 107; Herbold v. Montebello Bldg. & L. Ass'n, 113 Md. 156, 77 Atl. 122; Potomac Lodge No. 31, I. O. O. F. v. Miller, 118 Md. 405, 84 Atl. 554; Conley v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460; Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483; Warne v. Greenbaum (N. J. Eq.), 101 Atl. 568; Kahn v. Chapin, 152 N. Y. 305, 46 N. E. 489; Freedman v. Oppenheim, 187 N. Y. 101, 116 Am. St. Rep. 595, 79 N. E. 841; Miller v. Cramer, 48 S. C. 282, 26 S. E. 657. Contra, Shelton v. Ratterree, 121 Ark. 482, 181 S. W. 288. But such a title was held insufficient in Attebery v. Blair, 244 Ill. 263, 135 Am. St. Rep. 342, 91 N. E. 475 (record title contracted for); Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767 (record title contracted for); Ogooshevitz v. Arnold, 197 Mich. 203, 163 N. W. 946, 165 N. W. 633 (contract to furnish abstract showing clear title); Sulk v. Tumulty, 77 N. J. Eq. 97, 75 Atl. 757 (evidence of adverse possession not surely available in the future); Kohlrepp v. Ram, 79 N. J. Eq. 386, 81 Atl. 1103; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527 (possession not adverse); McLane v. Petty (Tex. Civ. App.), 159 S. W. 891.

(7) Miscellaneous doubts and defects: Smith v. Hunter, 241 Ill. 514, 132 Am. St. Rep. 231, 89 N. E. 686 (abstract shows that a third person may claim an interest in the land by reason of not having been made a party to a suit to reform a deed); Van Gundy v. Shewey, 90 Kan. 253, 47 L. R. A. (N. S.) 645, 133 Pac. 720 (break in the record occasioned by death of owner intestate and devolution to his heirs, not a defect); Hewitt v. Parsley, 101 Md. 206, 60 Atl. 619 (tax title); Van Bibber v. Reese, 71 Md. 608, 6 L. R. A. 332, 18 Atl. 892 (bare possibility of claims of creditors did not render title doubtful); Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. 99 (doubt as to existence of other heirs resolved in favor of title); McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527 (the building encroaches on adjoining land); Acme Realty Co. v. Schinasi, 215 N. Y. 495, L. R. A. 1916A, 1176, 109 N. E. 577 (encroachment); Simon v. Vanderveer, 155 N. Y. 377, 63 Am. St. Rep. 683, 49 N. E. 1043 (suit pending against vendor).

In the following unclassified cases the title was held to be unmarketable, and for that reason specific performance was refused the vendor: Potter v. Ogden, 68 N. J. Eq. 409, 59 Atl. 673 (vendor's title depended upon a rebuttable presumption of fact, that vendor's husband had not been heard from for over seven years); Lamprey v. Whitehead, 64 N. J. Eq. 408, 54 Atl, 803 (vendor's life interest was subject to be divested by death of third person leaving issue); Meyer v. Madreperla, 68 N. J. L. 258, 9 Am. St. Rep. 536, 53 Atl. 477 (title depended on fact of death of a sailor who had not been heard from for more than the statutory period of seven years. The title was held good in law, but the question whether equity would force it upon a purchaser); Methodist Episcopal Church v. Roberson, 68 N. J. Eq. 431, 58 Atl. 1056 (doubt of fact whether vendor had capacity as corporation to receive title); McAllister v. Harmon, 101 Va. 17, 42 S. E. 920 (dependent upon fact of adverse possession of vendor's grantor); Richards v. Knight, 64 N. J. Eq. 196, 53 Atl. 452 (vendor's title depends on construction of clause of will upon which the law is doubtful); Zane v. Weintz, 65 N. J. Eq. 214, 55 Atl. 641 (title depended on doubtful clause of will. Court held that the vendor's rights under the will were "so fairly debatable" that it would not force the vendee to accept the title which might be taken from her in a subsequent suit); Baumeister v. Silver, 98 Md. 418, 56 Atl. 825 (doubt as to vendor having a right to sue for possession); Wesley v. Eells, 177 U. S. 370, 44 L. Ed. 810, 20 Sup. Ct. 661 (title finally depended on question whether certain state scrip was valid currency. A former decision of the state court held it invalid. The United States supreme court held this excused defendant from specific performance); In re Handman and Wilcox's Contract, [1902] 1 Ch. D. 599 (doubtful question of fact, whether vendor purchased from his grantor without notice of a prior contract).

But specific performance was given in the following cases, although there was some doubt as to the title, it not being sufficient to render it unmarketable: Hayes v. Nourse, 114 N. Y. 607, 11 Am. St. Rep. 700, 22 N. E. 40 (a lis pendens, having no validity, does not make a title doubtful); Levy v. Iroquois Bldg. Co., 80 Md. 300, 30 Atl. 707 (the mere possibility of a subsequent suit to set aside conveyance to vendor on ground of undue influence does not make title doubtful); Sloan v. Rose, 101 Va. 151, 43 S. E. 329 (a lien on the land for grading, vendor having paid into court funds to satisfy the lien); Montgomery v. Pac. Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640 (erroneous advice of learned counsel that title was defective does not protect vendee from specific performance); Jones v. Rose, 96 Md. 483, 54 Atl. 69 (an appar-

ent encumbrance of a ground rent had been so provided for as to exonerate the property); Nicholson v. Condon, 71 Md. 620, 18 Atl. 812 (valid defense of vendor of being bona fide purchaser removes doubt); Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483 (a possible outstanding interest in a third party arising from an old mortgage assignment, dating back twenty-three years, presumed to offer no reasonable basis of apprehension, as court considers third party would be estopped from asserting his right, if any). For further illustrations, see 4 Pom. Eq. Jur., § 1405.

### CHAPTER XXXIX.

### SPECIFIC PERFORMANCE: DEFAULT AND DE-LAY BY PLAINTIFF.

#### ANALYSIS.

- § 805. Plaintiff's performance, or offer to perform, a condition of relief.
- § 806. Failure to perform conditions precedent.
- § 807. Default in option to purchase—No relief.
- § 808. Vendor as plaintiff; at what time must be furnish a good title.
- § 809. Tender before suit, when necessary.
- §§ 810-816. Time as affecting the right to a specific performance.
  - § 810. Generally not essential.
  - § 811. When time is of the essence.
  - § 812. Time material.
  - § 813. Time not essential when waiver by defendant.
  - § 814. What degree of laches will defeat relief.
  - § 815. Right after default to name reasonable time for performance.
  - § 816. Effect of forfeiture clause in the contract.
- § 2227. (§ 805.) Plaintiff's Performance, or Offer to Perform, a Condition of Relief.—"The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms." In the language often

<sup>1 4</sup> Pom. Eq. Jur., § 1407. The text is quoted in Delaware Securities Co. v. Metropolitan Trust Co., 146 Fed. 600; Bateman v. Hop-

used, he must show himself 'ready, willing, desirous, prompt, and eager.' There are two apparent exceptions, depending upon strictly equitable considerations:

1. A strict performance at the very stipulated time is not always essential; and 2. Partial and immaterial failures of title or defects of the subject-matter, if admitting of compensation, may not prevent the vendor from enforcing the remainder of the agreement."

## § 2228. (§ 806.) Failure to Perform Conditions Precedent.—In pursuance of this principle equity will

kins, 157 N. C. 470, Ann. Cas. 1913C, 642, 73 S. E. 133; McRae v. Smart, 120 Tenn. 413, 114 S. W. 729. This paragraph is cited in Henley v. Engler, 118 Ark. 283, 176 S. W. 330; Garrick v. Garrick, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104 (plaintiff must plead readiness and willingness); Mundy v. Irwin, 29 N. M. 43, 145 Pac. 1080; Durham v. Breathwit, 57 Tex. Civ. App. 38, 121 S. W. 890; Grubb Bros. v. Moore, Clemens & Co., 108 Va. 72, 60 S. E. 157. See, also, Slaughter v. La Compagnie Française des Cables Telegraphiques, 113 Fed. 21, 119 Fed. 588, 57 C. C. A. 19; Cronen v. Moore, 210 Fed. 239, 127 C. C. A. 57; Ellis v. Treat, 236 Fed. 120, 149 C. C. A. 330; Olympia Mining Co. v. Kerns, 13 Idaho, 514, 91 Pac. 92; Lyman v. Gedney, 114 Ill. 388, 55 Am. Rep. 871, 29 N. E. 282; Bennett v. Burkhalter, 257 Ill. 572, 44 L. R. A. (N. S.) 733, 101 N. E. 189 (conditional willingness is repudiation); Hambleton v. Jameson, 162 Iowa, 186, 143 N. W. 1010; Dow v. McVey, 174 Iowa, 533, 156 N. W. 706; Rice v. D'Arville, 162 Mass. 559, 39 N. E. 180; Bradford E. & C. R. Co. v. New York etc. R. Co., 123 N. Y. 316, 11 L. R. A. 116, 25 N. E. 499 (plaintiff's insolvency); Chandler v. Chandler, 220 Pa. St. 311, 69 Atl. 806; Constantine v. Caswell, 46 Wash. 651, 91 Pac. 7; Coonrod v. Studebaker, 53 Wash. 32, 101 Pac. 489.

<sup>2</sup> See post, §§ 810, 811, 813, 815.

<sup>3 4</sup> Pom. Eq. Jur., § 1407, note 1; see post, chapter XLI, where this exception is treated at length. The text is quoted in Delaware Securities Co. v. Metropolitan Trust Co., 146 Fed. 600. As to substantial performance in other matters, see Howe v. Howe & Owen Ball Bearing Co., 154 Fed. 820, 83 C. C. A. 536; Sims v. Knight, 71 Ala. 197; Adams v. Thompson, 28 Neb. 53, 44 N. W. 74; Torgerson v. Hauge, 34 N. D. 646, 159 N. W. 6 (substantial performance of promise to support for life); Campbell v. McFadin, 71 Tex. 28, 9 S. W. 138.

not relieve against a failure to perform a condition precedent in a contract, however slight the failure.<sup>4</sup> The right to specific performance has never vested for the party in default. The contract cannot be said to be of equitable cognizance until the condition is performed. The contractual liabilities are incomplete before that time. Thus, "Equity will not enforce a contract of sale where the price is to be fixed by the parties or by arbitrators to be chosen by the parties; and for the plain reason that the contract sought to be enforced is incom-

4 This paragraph is cited in Delaware Securities Co. v. Metropolitan Trust Co., 146 Fed. 600. The rule is stated in Earl of Feversham v. Watson, Freem. Ch. 35: "What was to be done by the plaintiff was in the nature of a condition precedent, and ought to have been done wholly, before the defendant was obliged to do what was to be done on his part; . . . [and as at law] so neither shall he in equity have an execution of the estate, without doing that which by the agreement of the parties ought first to be done, and the plaintiff ought at his peril to have performed what he was to do in the lifetime of his wife": Finch v. Underwood, 2 Ch. D. 310, 314; Potter v. Couch, 141 U. S. 296, 35 L. Ed. 721, 11 Sup. Ct. 1005; Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509; Eastern Oregon Land Co. v. Moody, 198 Fed. 7, 119 C. C. A. 135; Florence Gas etc. Co. v. Hanby, 101 Ala. 15, 13 South. 343 (paying mortgage); Black v. Hill, 117 Ark. 228, 174 S. W. 526 (plaintiff's agreement to support); Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305 (delivery of notes); Moore v. Tuohy, 142 Cal. 342, 75 Pac. 896 (services); Olympia Mining Co. v. Kerns, 13 Idaho, 514, 91 Pac. 92; Hamilton v. Harvey, 121 Ill. 469, 2 Am. St. Rep. 118, 13 N. E. 210 (services); Robinson v. Yetter, 238 Ill. 320, 87 N. E. 363; Schenck v. Ballou, 253 Ill. 415, Ann. Cas. 1913A, 251, 97 N. E. 704 (vendor plaintiff agreed to obtain an extension of encumbrances, which he wholly failed to do); Lillienthal v. Bierkamp, 133 Iowa, 42, 110 N. W. 152 (as to abstract of title); Irving v. Wagner, 175 Iowa, 198, 157 N. W. 134; Holland v. Holland, 97 Kan, 169, 155 Pac. 5 (plaintiff's agreement to support); Joffrion v. Gumbel, 123 La. 391, 48 South. 1007; Putnam v. Grace, 161 Mass. 237, 37 N. E. 166 (failure to obtain consent of lessor to assignment of lease); Hobart v. Kehoe, 110 Minn. 490, 136 Am. St. Rep. 524, 126 N. W. 66 (condition impossible of performance); Ackerson v. Fly, 99 Mo. App. 116, 72 S. W. 706 (services prevented by death of recipient); Hug v.

plete in an essential particular." Of course a waiver of the condition makes the contract operative against the waivor and equity will then treat it as any other contract.

### § 2229. (§ 807.) Default in Option to Purchase—No Relief.6—It has at times been suggested that relief for

Van Burkleo, 58 Mo. 203; Lighton v. Syracuse, 188 N. Y. 499, 81 N. E. 464 (condition was act of legislature); Eastman v. Horne, 205 N. Y. 486, 98 N. E. 758 (what is not a condition precedent); Nelson v. McCue, 37 N. D. 183, 163 N. W. 724; George Wiedemann Brewing Co. v. Maxwell, 78 Ohio St. 54, 84 N. E. 595; Naftzinger v. Roth, 93 Pa. St. 443 (support); Chandler v. Chandler, 220 Pa. St. 311, 69 Atl. 806; Prater v. Prater, 94 S. C. 267, 77 S. E. 936 (promise to support, death of promisor); City of Providence v. St. Johns Lodge, 2 R. I. 46; McRae v. Smart, 120 Tenn. 413, 114 S. W. 729; Page v. Carmine, 29 Wash. 387, 69 Pac. 1093 (drawing up lease and paying rental); Frame v. Frame, 32 W. Va. 463, 5 L. R. A. 323, 9 S. E. 901; Frank v. Stratford-Handcock, 13 Wyo. 37, 110 Am. St. Rep. 963, 67 L. R. A. 571, 77 Pac. 134. That failure to perform may be excused where it was rendered impossible by the act of the other party, see Zempel v. Hughes, 235 Ill. 424, 85 N. E. 641; but see Moore v. Tuohy, 142 Cal. 342, 75 Pac. 896.

The plaintiff's willful breach of an essential covenant may also be a defense, on the ground that his hands are not clean; Lamare v. Dixon, L. R. 6 H. L. 414 (breach by lessor); Montana Water Co. v. City of Billings, 214 Fed. 121; Keener v. Moslander, 171 Ala. 533, 54 South. 881; Barth v. Pittsburg C. C. & St. L. R'y Co. (Ind. App.), 90 N. E. 488; Gannett v. Albree, 103 Mass. 372 (breach by lessee); Ackerman v. Maddux, 26 N. D. 50, 143 N. W. 147; Datz v. Phillips, 137 Pa. St. 203, 21 Am. St. Rep. 864, 20 Atl. 426; Grubb Bros. v. Moore, Clemens & Co., 108 Va. 72, 60 S. E. 757.

<sup>5</sup> City of Providence v. St. Johns Lodge, 2 R. I. 46, 56; Milnes v. Gery, 14 Ves. 400, 407; Blundell v. Brettargh, 17 Ves. 232, 240. But in Johnson v. Conger, 14 Abb. Pr. 95, the court gave specific performance by appointing the arbitrators, the contract not having named the mode of their appointment. In general, and that the value may be fixed by the court where the means designated in the contract are not of its essence, see ante, § 758.

6 This paragraph is quoted in full in Neeson v. Smith, 57 Wash. 386, 92 Pac. 131.

slight failure where there was substantial compliance should be applied to options to purchase land,<sup>7</sup> as where the holder of the option was a day late in exercising the option. But it is clear the rule followed generally by equity is the true one,—that there can be no relief against a failure to exercise an option after the day named for its expiration,<sup>8</sup> for an option is no more than an offer to sell which the offerer is bound to keep open during the time set, but which expires with that time, leaving nothing for equity to operate upon.<sup>9</sup> The courts very frequently refuse to give specific performance of an option sought to be exercised after the time has expired on the ground of time being of the essence.<sup>10</sup>

<sup>7</sup> See Pom. Spec. Perf., §§ 373, 387, 388, pointing out the suggestions, but showing it is not the true rule.

<sup>8</sup> Lord Ranelagh v. Melton, 2 Drew. & S. 278; Waterman v. Banks, 144 U. S. 394, 36 L. Ed. 479, 12 Sup. Ct. 646.

<sup>9</sup> Waterman v. Banks, 144 U. S. 394, 403, 36 L. Ed. 479, 12 Sup. Ct. 646; Potts v. Whitehead, 20 N. J. Eq. 55, 57, 59.

<sup>10</sup> Standiford v. Thompson, 135 Fed. 991; Woods v. McGraw (C. C. A.), 127 Fed. 914, 63 C. C. A. 556; Indiana & Arkansas Lumber & Mfg. Co. v. Pharr, 82 Ark. 573, 102 S. W. 686; Coyle v. Kierski, 10 Del. Ch. 229, 89 Atl. 598; L'Engle v. Overstreet, 61 Fla. 653, 55 South. 381; Finn v. Bowden, 66 Fla. 41, 63 South. 139; Jarman v. Westbrook, 134 Ga. 19, 67 S. E. 403; Frey v. Camp, 131 Iowa, 109, 107 N. W. 1106; Brock v. Tennis Coal Co., 29 Ky. Law Rep. 1283, 97 S. W. 46, 30 Ky. Law Rep. 1370, 101 S. W. 300; Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; Cantwell v. Johnson, 236 Mo. 575, 139 S. W. 365; Snider v. Yarbrough, 43 Mont. 203, 115 Pac. 411; Trogden v. Williams, 144 N. C. 192, 10 L. R. A. (N. S.) 867, 56 S. E. 865; Winders v. Kenan, 161 N. C. 628, 77 S. E. 687; Gaylord v. McCov. 161 N. C. 685, 77 S. E. 959; Longworth v. Mitchell, 26 Ohio St. 334; Davis v. Brigham, 56 Or. 41, Ann. Cas. 1912B, 1340, 107 Pac. 961; Hanschka v. Vodopich, 20 S. D. 551, 108 N. W. 28; Grier v. Stewart (Tex. Civ. App.), 136 S. W. 1176; Spokane, P. & S. R'y Co. v. Ballinger, 50 Wash. 547, 97 Pac. 739; Pollock v. Brookover, 60 W. Va. 75, 6 L. R. A. (N. S.) 403, 53 S. E. 795. After the plaintiff, within the time limited, has accepted the defendant's offer, and thus rendered the unilateral engagement a bilateral one, the

Strictly speaking, there is no contract if the election is not made before the expiration of the time, and equity finding no contract to use its discretion upon, cannot be concerned with the element of time, which presupposes an existing contract.

§ 2230. (§ 808.) Vendor as Plaintiff; at What Time He must Furnish a Good Title. 11—It is a familiar application of the principle as to performance by the plaintiff, that the vendor or lessor cannot force performance upon the purchaser, unless he is able to give a good title to the subject-matter. 12 Where, however,

performance of the contract thus resulting is governed by the ordinary rules as to time not being of the essence: See Pom. Spec. Perf., § 387; Cates v. McNeil, 169 Cal. 697, 147 Pac. 944; Breen v. Mayne, 141 Iowa, 399, 118 N. W. 441; Boston & Worcester Street R'y Co. v. Rose, 194 Mass. 142, 80 N. E. 498; Horgan v. Russell, 24 N. D. 490, 43 L. R. A. (N. S.) 1150, 140 N. W. 99; Houghton v. Cook, 91 Vt. 197, 100 Atl. 115; Barrett v. McAllister, 33 W. Va. 738, 11 S. E. 220. But in the great majority of these cases payment is a condition precedent which must be performed within the time limited.

11 Section 808 et seq., and Pom. Eq. Jur., § 1407, are cited in McKinnon v. Johnson, 54 Fla. 538, 45 South. 451.

12 Lindsey v. Humbrecht, 162 Fed. 548; Farrington v. Tourtelott, 39 Fed. 738 (though vendee when contracting knew of defects); McKinnon v. Johnson, 54 Fla. 538, 45 South. 451; Horne v. Rodgers, 113 Ga. 224, 38 S. E. 768; Barthel v. Engle, 261 Mo. 307, 168 S. W. 1154; Ten Eyck v. Manning, 52 N. J. Eq. 47, 27 Atl. 900; Triplett v. Williams, 149 N. C. 394, 24 L. R. A. (N. S.) 514, 63 S. E. 79; Clifton v. Charles, 53 Tex. Civ. App. 448, 116 S. W. 120; Coonrod v. Studebaker, 53 Wash. 32, 101 Pac. 489. The title must be such as the vendor contracted to convey: Page v. Greeley, 75 Ill. 400 (where record title contracted for, title by adverse possession insufficient); Morgan v. Eaton, 59 Fla. 562, 138 Am. St. Rep. 167, 52 South. 305 (where such title as vendor has is called for by the contract. may force a defective title). A "good title" means a legal fee simple: Thompson v. Shoemaker, 68 Ill. 256; Murray v. Ellis, 112 Pa. St. 485, 3 Atl. 845 (legal title is in a bare trustee); Van Zandt v. Garretson, 21 R. I. 418, 44 Atl. 221 (equitable title under doctrine of reconversion); Newberry v. French, 98 Va. 479, 36 S. E. 519

the vendor gets in the title before the decree, "the doctrine of equity is, when time is not of the essence, a decree will be made against the purchaser, if the seller can make a good title at the time of decree, unless there has been bad faith, or an improper speculation attempted." The weight of authority supports this rule, although there are several jurisdictions which hold that if the plaintiff could not make a good title at the time of the agreement, specific performance will be denied him on the ground of lack of mutuality. These latter cases are inconsistent with the view of the mutu-

(equitable title). A partial failure of title defeats the vendor's suit, unless it is immaterial and admits of compensation: See post, §§ 829, 830; Freetly v. Barnhart, 51 Pa. St. 279. The burden of proof as to title is on the vendor plaintiff: Pfaff v. Cilsdorf, 173 Ill. 86, 50 N. E. 670; Cornell v. Andrus, 36 N. J. Eq. 321; Sherman v. Beam, 27 S. D. 218, 130 N. W. 442; Maurice v. Upton (Tex. Civ. App.), 41 S. W. 504.

- 13 Mussleman's Appeal, 65 Pa. 480, 488.
- 14 Jenkins v. Hiles, 6 Ves. 646, 655; Wynn v. Morgan, 7 Ves. 203; Mortlock v. Buller, 10 Ves. 291, 315; Coffin v. Cooper, 14 Ves. 205; Langford v. Pitt, 2 P. Wms. 629; Pincke v. Curtis, 4 Bro. C. C. 329, 331; Murrell v. Goodyear, 1 De Gex, F. & J. 432; Hepburn v. Dunlop, 1 Wheat, 179, 4 L. Ed. 65; Tison v. Smith, 8 Tex. 147; Dresel v. Jordan, 104 Mass. 407, 416 ("It is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of his agreement, or by the equities of the particular case, he is required to make the conveyance in order to entitle himself to the consideration.") See, further, Dore v. Southern Pac. Co., 163 Cal. 182, 124 Pac. 817; Keepers v. Yocum, 84 Kan. 554, Ann. Cas. 1912A, 748, 114 Pac. 1063; Agens v. Koch, 74 N. J. Eq. 528, 70 Atl. 348; Van Riper v. Wickersham, 77 N. J. Eq. 232, Ann. Cas. 1912A, 319, 30 L. R. A. (N. S.) 25, 76 Atl. 1020 (time to perfect title even after entry of decree, under special circumstances); Martinson v. Regan, 18 N. D. 467, 123 N. W. 285; Broemsen v. Agnic, 70 W. Va. 106, 73 S. E. 253. See, also, ante, § 772.
- 15 Norris v. Fox, 45 Fed. 406; Luse v. Deitz, 46 Iowa, 205; Ten Eyck v. Manning, 52 N. J. Eq. 47, 27 Atl. 900; Chilhowie Iron Co. v. Gardiner, 79 Va. 305.

ality rule that is best supported by authority and on principle; since at the time of the decree the defendant is not left in any inequitable position.<sup>16</sup>

If the vendee knew that the vendor had no title, or a defective title, at the time of the agreement, he has no ground for refusing to perform so long as the title is made good by the time of the decree.<sup>17</sup> If, however, the vendee had no knowledge of the vendor's inability to convey at the time of the agreement, he may, at his election, repudiate the agreement upon ascertaining the lack of, or defect in, the title. 18 But, should he not then repudiate the agreement, he is bound to perform if the title can be made by the time of the decree, unless there was some concealment19 or bad faith20 on the vendor's part in knowingly keeping his defect in title from the vendee when the agreement was made. Any acquiescence of the vendee in the vendor's steps to get in his title prevents his repudiation.<sup>21</sup> Where the vendor has not the legal title, but has a good equitable title, he may have specific performance if he gets in the

<sup>16</sup> See ante, § 769.

<sup>17</sup> Brashier v. Gratz, 6 Wheat. 528, 537, 538, 5 L. Ed. 322; Old Colony R. R. Corp. v. Evans, 6 Gray, 25, 66 Am. Dec. 394; Canton Co. v. Baltimore & O. R'y Co., 79 Md. 424, 29 Atl. 821. See, also, Allen v. Treat, 48 Wash. 552, 94 Pac. 102.

<sup>18</sup> Farrer v. Nash, 35 Beav. 171 ("where a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it'"; Brewer v. Broadworth, 22 Ch. D. 105.

<sup>19</sup> Dalby v. Pullen, 3 Sim. 29, 39 ("I cannot think this was fair dealing, . . . and the parties have precluded themselves from the benefit of the rule which prevails in this court as to the time allowed to vendors to remove objections to title").

<sup>&</sup>lt;sup>20</sup> Dresel v. Jordan (supra, note 14), 104 Mass., at p. 416; Mussleman's Appeal (supra, note 13), 65 Pa., at p. 488.

<sup>21</sup> Canton Co. v. Baltimore & O. R'y Co., 79 Md. 424, 29 Atl. 821-823; Parr v. Lovegrove, 4 Drew. 176. As to attempted repudiation after the decree, see Halkett v. Earl of Dudley, [1907] 1 Ch. 590.

legal title before the decree,<sup>22</sup> and there would be no ground for repudiation, as he has power to get in the title.<sup>23</sup>

§ 2231. (§ 809.) Tender Before Suit, When Necessary.—"With respect to the necessity of an actual tender and a demand of performance before suit brought, the American decisions are somewhat conflicting, and different rules seem to prevail in different states."<sup>24</sup> "In general, the rules of equity concerning the necessity of an actual tender are not so stringent as those of the law. The following special rules seem to be settled: 1. An actual tender by the plaintiff is unnecessary when, from the acts of the defendant or from the situation of the property it would be wholly nugatory. Thus if the defendant has openly refused to perform, the plaintiff need not make a tender or demand; it is enough that he is ready and willing, and offers to perform in his pleading.<sup>25</sup> Also, if at the time fixed the vendor is unable

<sup>22</sup> Ley v. Huber, 3 Watts, 367; Tiernan v. Roland, 3 Harr. (15-Pa. St.) 429.

<sup>23</sup> Farrar v. Nash, 35 Beav. 171.

<sup>24 4</sup> Pom. Eq. Jur., § 1407.

<sup>25 4</sup> Pom. Eq. Jur., § 1407, note, citing, among other cases, Hunter v. Daniel, 4 Hare, 420, 433; Mattocks v. Young, 66 Me. 459, 467; Crary v. Smith, 2 N. Y. 60, 65; Kerr v. Purdy, 50 Barb. 24; Maxwell v. Pittenger, 3 N. J. Eq. 156. The text is quoted in Bateman v. Hopkins, 157 N. C. 470, Ann. Cas. 1913C, 642, 73 S. E. 133; and cited in Hoffman v. Buchanan, 57 Tex. Civ. App. 368, 123 S. W. 168 (but plaintiff must allege willingness and ability to perform). See, also, Donahoe v. Franks, 199 Fed. 262; Saunders v. McDonough, 191 Ala. 119, 67 South. 591; Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305 (vendor estopped to object to sufficiency of tender); Sausalito Bay Land Co. v. Sausalito Imp. Co., 166 Cal. 302, 136 Pac. 57; Ehrhart v. Mahony, 170 Cal. 148, 148 Pac. 934; Miller v. Watson, 139 Ga. 29, 76 S. E. 585; Jordan v. Johnson, 50 Ind. App. 213, 98 N. E. 143; Malloy v. Foley, 155 Iowa, 447, 133 N. W. 778, 136 N. W. 131; Western Securities Co. v. Atlee, 168-Iowa, 650, 151 N. W. 56; Niquette v. Green, 81 Kan. 569, 106 Pac-

to convey, by reason of a defect in his title, etc.,<sup>26</sup> unless time was made essential.<sup>27</sup> 2. Where the stipulations are mutual and dependent,—that is where the deed is to be delivered upon payment of the price,—an actual tender and demand by one party is necessary to put the other in default, and to cut off his right to treat the contract as still subsisting.<sup>28</sup> Time essential: Where the

270; Bolen v. Jenkins, 167 Ky. 295, 180 S. W. 351; Noyes v. Bragg, 220 Mass. 106, 107 N. E. 669; Hedrick v. Firke, 169 Mich. 549, 135 N. W. 319; Ogooshevitz v. Arnold, 197 Mich. 203, 163 N. W. 946, 165 N. W. 633; Long v. Needham, 37 Mont. 408, 96 Pac. 731; Harper v. Runner, 85 Neb. 343, 123 N. W. 313; Ward v. Albertson, 165 N. C. 218, 81 S. E. 168; Gaylord v. McCoy, 161 N. C. 685, 77 S. E. 959; George Wiedemann Brewing Co. v. Maxwell, 78 Ohio St. 54, 84 N. E. 595; Whitney Co. v. Smith, 63 Or. 187, 126 Pac. 1000; Guillaume v. K. S. D. Fruit Land Co., 48 Or. 400, 86 Pac. 883, 88 Pac. 586; Wallows Lake Amusement Co. v. Hamilton, 70 Or. 433, 142 Pac. 321; McCarty v. Helbling, 73 Or. 356, 144 Pac. 499; Van Dyke v. Cole, 81 Vt. 379, 70 Atl. 593, 1103; Bruggemann v. Converse, 47 Wash. 581, 92 Pac. 429.

26 Karker v. Haverly, 50 Barb. 79; Delevan v. Duncan, 49 N. Y. 485, 487; Gray v. Dougherty, 25 Cal. 266, 280. See, also, English v. Mound House Plaster Co., 192 Fed. 717; Zempel v. Hughes, 235 Ill. 424, 85 N. E. 641; Roche v. Osborne (N. J. Eq.), 69 Atl. 176; Fergen v. Lyons, 162 Wis. 131, 155 N. W. 935. See, also, the last section of the text, and cases cited.

27 Kimball v. Tooke, 70 Ill. 553.

28 The text is quoted in Bateman v. Hopkins, 157 N. C. 470, Ann. Cas. 1913C, 642, 73 S. E. 133; Thompson v. Robinson, 65 W. Va. 506, 17 Ann. Cas. 1109, 64 S. E. 718; Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789 (dissenting opinion). See, also, Hubbell v. Van Schoening, 49 N. Y. 326, 331; Leaird v. Smith, 44 N. Y. 618; Van Campen v. Knight, 63 Barb. 205; Irvin v. Bleakley, 67 Pa. St. 24, 28; Crabtree v. Levings, 53 Ill. 526; Melick v. Cross, 62 N. J. Eq. 545, 51 Atl. 16, 23; Hoagland v. Murray, 53 Colo. 50, 123 Pac. 664; Kessler v. Pruitt, 14 Idaho, 175, 93 Pac. 965; Davis v. Wilson, 55 Or. 403, 106 Pac. 795; McHenry v. Mitchell, 219 Pa. 297, 68 Atl. 729; Bright v. James, 35 R. I. 128, Ann. Cas. 1915B, 1099, 85 Atl. 545; Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789; Lewis v. Wellard, 62 Wash. 590, 114 Pac. 455; Wright v. Suydam, 72 Wash. 587, 131 Pac. 239.

time of payment by the vendee is made essential, and a fortiori where, if his payments are not made on the exact day named, the vendor may treat the contract as at an end, the vendee must make an actual tender of the price and a demand of the deed at a specified time. The same is true of the vendor where the time of conveying is made essential. This is the very meaning of time being of the essence of the contract.29 But the necessity may be waived by conduct of the other party.<sup>30</sup> Time not essential: Concerning the necessity of actual tender in contracts in which time is not essential, the American decisions are directly conflicting. According to one group of cases, the strict legal rule is enforced. Where the stipulations are mutually dependent, the plaintiff must make an actual tender, and must demand performance before bringing his suit. Some of these cases, however, dispense with the demand, and only require a tender.31 Another group of decisions adopts a rule more in accord-

S. W. 1176 (option). See, also, Duffy v. O'Donovan, 46 N. Y. 223; Gale v. Archer, 42 Barb. 320; Kimball v. Tooke, 70 Ill. 553; also, Machold v. Farnan, 14 Idaho, 258, 94 Pac. 170; Papesh v. Wagnon, 29 Idaho, 93, 157 Pac. 775; Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789; and see § 811, post.

30 Kimball v. Tooke, supra; Tobey v. Foreman, 79 Ill. 489. See Emerson v. Fleming, 246 Ill. 353, 92 N. E. 890 (vendee made every reasonable effort to tender); Hill v. Alber, 261 Ill. 124, 103 N. E. 612 (where accounting was necessary to determine amount, sufficient if vendee was then able and willing to pay amount found due); Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 469, Ann. Cas. 1913B, 62, L. R. A. 1916F, 352, 97 N. E. 43 (tender impossible); Schaeffer v. Coldren, 237 Pa. St. 77, Ann. Cas. 1914B, 175, 85 Atl. 98 (same); J. I. Case Threshing Mach. Co. v. Farnsworth, 28 S. D. 432, 134 N. W. 819; Cummings v. Nielson, 42 Utah, 157, 129 Pac. 619. See § 813, post.

31 Suits by the vendee.—The text is cited in Henley v. Engler, 118 Ark. 283, 176 S. W. 330. See, also, Mather v. Scoles, 35 Ind. 1; Klyce v. Brayles, 37 Miss. 524; Brock v. Hidy, 13 Ohio St. 306 (but

ance with the principles of equity, viz., that in such contracts an actual tender or demand by the plaintiff prior to the suit is not essential. It is enough that he was ready and willing, and offered, at the time specified, and even that he is ready and willing at the time of bringing the suit, unless his rights have been lost by laches, and that he offers to perform in his pleading. The plaintiff's performance will be provided for in the decree, and his previous neglect will only affect his right to costs.<sup>32</sup> This is unquestionably the true equitable doctrine.''<sup>33</sup>

§ 2232. (§ 810.) Time as Affecting the Right to a Specific Performance—Generally not Essential.—"The stipulations concerning time of performance in a con-

tender excused by vendor's conduct); Hall v. Whittier, 10 R. I. 530. .. See, also, Wilson v. Seybold, 216 Fed. 975.

Suits by the vendor.—Klyce v. Brayles, 37 Miss. 524; Corbas v. Teed, 69 Ill. 205.

32 Suits by vendee.—The text is quoted in Le Vine v. Whitehouse, 37 Utah, 260, Ann. Cas. 1912C, 407, 109 Pac. 2; and cited in Schreiber v. Menningham, 73 N. J. Eq. 134, 75 Atl. 818; Boston & Maine R. R. v. Union Mut. Fire Ins. Co. (Vt.), 101 Atl. 1012. See, also, Ashurst v. Peck, 101 Ala. 499, 14 South. 541; Watson v. White, 152 Ill. 364, 38 N. E. 902; Smoot v. Rea, 19 Md. 398, 410; Maughlin v. Perry, 35 Md. 352; Irvin v. Gregory, 13 Gray, 215; Morris v. Hoyt, 11 Mich. 9, 18; Minneapolis, St. P. & S. S. M. R'y Co. v. Chisholm, 55 Minn. 374, 57 N. W. 63; Worch v. Woodruff, 61 N. J. Eq. 78, 47 Atl. 725; Stevenson v. Maxwell, 2 N. Y. 408, 415; Bruce v. Tilson, 25 N. Y. 194, 197, 203; Wells v. Smith, 2 Edw. Ch. 78, 7 Paige, 22, 31 Am. Dec. 274; Freeson v. Bissell, 63 N. Y. 168, 170; Seeley v. Howard, 13 Wis. 336. See, also, Ames v. Ames, 46 Ind. App. 597, 91 N. E. 509.

Suits by vendor.—Stevenson v. Maxwell, Bruce v. Tilson, and Freeson v. Bissell, supra; Hawk v. Greensweig, 2 Pa. St. 295; Winton v. Sherman, 20 Iowa, 295; Rutherford v. Haven, 11 Iowa, 587; Mullens v. Big Creek etc. Co. (Tenn. Ch. App.), 35 S. W. 439; Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 210. See, also, Vance v. Blakeley, 62 Or. 326, 123 Pac. 390.

33 Pom. Eq. Jur., § 1407, note.

tract are regarded by equity either as immaterial, or as essential, or as material. In all ordinary cases of contract, equity does not regard time as of the essence of the agreement. In all ordinary cases of contract for the sale of land, if there is nothing special in its objects, subjectmatter, or terms, although a certain period of time is stipulated for its completion, or for the execution of any of its terms, equity treats the provision as formal rather than essential, and permits a party who has suffered the period to elapse to perform such acts after the prescribed date, and to compel a performance by the other party notwithstanding his own delay."<sup>34</sup>

34 Pom. Eq. Jur., § 1408. The text is quoted in McLean v. Windham Light & Power Co., 85 Vt. 167, 81 Atl. 613; and cited in Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817; Lese v. Lamprecht, 196 N. Y. 32, 89 N. E. 365.

Delay by vendor plaintiff: Seton v. Slade, 7 Ves. Jr. 265, 271; Parkin v. Thorold, 16 Beav. 59; Raymond v. San Gabriel Valley Land etc. Co., 53 Fed. 883, 4 C. C. A. 89; Dresel v. Jordan, 104 Mass. 407; Sharp v. Trimmer, 24 N. J. Eq. 422; Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623; Mays v. Swope, 8 Gratt. (Va.) 46.

Delay by the purchaser plaintiff: Taylor v. Longworth, 14 Pet. 172, 10 L. Ed. 405; Walton v. McKinney, 11 Ariz. 385, 94 Pac. 1122; Carr v. Howell, 154 Cal. 372, 97 Pac. 885; Gumaer v. Draper, 33 Colo. 122, 79 Pac. 1040; Quinn v. Roath, 37 Conn. 16; Miller v. Watson, 139 Ga. 29, 76 S. E. 585; University of Des Moines v. Polk County etc. Trust Co., 87 Iowa, 36, 53 N. W. 1080; Young v. Daniels, 2 Iowa, 126, 63 Am. Dec. 477; Diamond v. Shriver, 114 Md. 643, 80 Atl. 217; Barnard v. Lee, 97 Mass. 92; King v. Connors, 222 Mass. 261, 110 N. E. 289; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Libby v. Parry, 98 Minn. 366, 108 N. W. 299; Robberson v. Clark, 173 Mo. App. 301, 158 S. W. 854 (provision for interest on deferred payments); Stevens v. Trafton, 36 Mont. 520, 93 Pac. 810; Jeffries v. Charlton, 74 N. J. Eq. 430, 70 Atl. 145; Day v. Hunt, 112 N. Y. 191, 19 N. E. 414; Leaird v. Smith, 44 N. Y. 618; Falls v. Carpenter, 21 N. C. 237, 28 Am. Dec. 592; Dillon v. Ringleman, 55 Okl. 331, 155 Pac. 563; Wright v. Astoria Co., 45 Or. 224, 77 Pac. 599; Hobart v. Fredericksen, 20 S. D. 248, 105 N. W. 168; Phillis v. Gross, 32 S. D. 438, 143 N. W. 373 (provision for interest); Walker v. Emerson, 20 Tex. 706, 73 Am. Dec. 207; Robinson v. Col§ 2233. (§ 811.) When Time is of the Essence.—
"Time may be essential. It is so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day. The intention must then govern. A delay cannot be excused. A performance at the time is essential; any default will defeat the right to a specific performance." "Time may be made essential by express stipulation. No particular form is necessary, but any clause will have the effect which clearly provides that the contract is to be null, if the fulfillment is not within the prescribed time." "Time may become essential from the subject-

lier, 53 Tex. Civ. App. 285, 115 S. W. 915; East v. Atkinson, 117 Va. 490, 85 S. E. 468; Cosby v. Honaker, 57 W. Va. 512, 50 S. E. 610; Hall v. Delaplaine, 5 Wis. 206, 68 Am. Dec. 57.

For the grounds of the rule, see Parkin v. Thorold, 16 Beav. 59; Barnard v. Lee, 97 Mass. 92.

35 4 Pom. Eq. Jur., § 1408. The text is quoted in Rexford v. Southern Woodland Co., 208 Fed. 295; Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789; and cited in Souter v. Witt, 87 Ark. 593, 128 Am. St. Rep. 40, 113 S. W. 800; Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767. See, among many cases, Zeimantz v. Blake, 39 Wash. 6, 80 Pac. 822, 823; Eaton v. Schneider, 185 Ill. 508, 57 N. E. 421; Monarch v. Owensboro City R. R. Co., 119 Ky. 939, 85 S. W. 193; Woods v. McGraw, 127 Fed. 914, 63 C. C. A. 556; Rickard v. Taylor, 122 Fed. 931, 59 C. C. A. 455; Standiford v. Thompson, 135 Fed. 991. These last three cases were cases of options which were not exercised before the specified time expired; as to such cases, see ante, § 807.

The court of chancery, for a time, under Lord Thurlow, attempted to set up the rule that time was never of the essence in equity: Greyson v. Riddle, cited in 7 Ves. 273; but this doctrine was soon rejected: Seton v. Slade, 7 Ves. 265, 271, 273.

36 4 Pom. Eq. Jur., § 1408, note 2; Seton v. Slade, 7 Ves. Jr. 265, 271, 273; Sowles v. Hall, 62 Vt. 247, 22 Am. St. Rep. 101, 20 Atl. 810; Bullock v. Adams, 20 N. J. Eq. 367; Kentucky Distilleries & W. Co. v. Warwick Co., 109 Fed. 280, 48 C. C. A. 368; Cleary v. Folger, 84 Cal. 316, 320, 18 Am. St. Rep. 187, 24 Pac. 280; Hogan v. Kyle, 7 Wash. 595, 38 Am. St. Rep. 910, 35 Pac. 399; Raymond v. San Gabriel Val. Water Co., 53 Fed. 883, 4 C. C. A. 89; Ellis v. Bryant,

matter, or object of the contract; e. g., where the value of the subject-matter necessarily fluctuates and changes with the mere lapse of time."<sup>37</sup>

120 Ga. 890, 48 S. E. 352. See, also, Lloyd v. Rippingdale, 1 Y. & C. Ex. 410; Cheney v. Libby, 134 U. S. 68, 33 L. Ed. 818, 10 Sup. Ct. 498; Martin v. Morgan, 87 Cal. 203, 22 Am. St. Rep. 240, 25 Pac. 350; Watkins v. Hendricks, 137 Ga. 330, 73 S. E. 581; Heckard v. Sayre, 34 Ill. 142; Ewing v. Crouse, 6 Ind. 312; Auxier v. Taylor, 102 Iowa, 673, 72 N. W. 291; Garcin v. Pennsylvania Furnace Co., 186 Mass. 405, 71 N. E. 793; Bradley & Co. v. Union Pac. R. Co., 76 Neb. 172, 107 N. W. 238; Cadwell v. Smith, 83 Neb. 567, 120 N. W. 130; Collins v. Delaney Co., 71 N. J. Eq. 320, 64 Atl. 107; Wells v. Smith, 7 Paige (N. Y.), 22, 31 Am. Dec. 274 (reasons for the rule well stated); Axford v. Thomas, 160 Pa. St. 8, 28 Atl. 443; Chambers v. Roseland, 21 S. D. 298, 112 N. W. 148; Voight v. Fidelity Inv. Co., 49 Wash. 612, 96 Pac. 162; Thompson v. Robinson, 65 W. Va. 506, 17 Ann. Cas. 1109, 64 S. E. 718.

37 4 Pom. Eq. Jur., § 1408, note 2. By necessary implication from nature of the subject-matter; as Myers v. League, 62 Fed. 654, 659, 10 C. C. A. 571; nature of the property, as of mines, likely to change rapidly in value; as in Taylor v. Longworth, 14 Pet. 172, 174, 10 L. Ed. 405; Mackey Wall Plaster Co. v. United States Gypsum Co., 244 Fed. 275 (mining lease); Bennie v. Becker-Franz Co., 14 Ariz. 580, 134 Pac. 280; Gamble v. Hanchett, 34 Nev. 351, 126 Pac. 111; Hardy v. Ward, 150 N. C. 385, 64 S. E. 171; the situation of the parties in relation to subject-matter; as King v. Ruckman, 24 N. J. Eq. 316, 351; the particular object of vendee; as in Tilley v. Thomas, L. R. 3 Ch. App. 61; Agens v. Koch, 74 N. J. Eq. 528, 70 Atl. 348 (purchaser intended to build, and early possession important); Acme Bldg. Co. v. Mitchell, 129 Md. 406, 99 Atl. 545; situation of vendor, an ecclesiastical corporation: Carter v. Dean and Chapter of Ely, 7 Sim. 211; necessity of immediate enjoyment, instance of a reversionary interest, where a life may drop; as in Spurier v. Hancock, 4 Ves. Jr. 662; Newman v. Rogers, 4 Bro. C. C. 391, 393; character of property and state of the market: Ky. Distilleries & W. Co. v. Warwick Co., 109 Fed. 280, 48 C. C. A. 368; nature of property,a lease of mines: MacBryde v. Weekes, 22 Beav. 533. See, also, Schimpf v. Dime Deposit and Discount Bank, 208 Pa. St. 380, 57 Atl. 767 (corporate stock—it had quadrupled in value when bill filed, three years late). This presumption or implication may be rebutted

§ 2234. (§ 812.) Time Material.—"Although time is not ordinarily essential, yet it is, as a general rule, material. In order that a default may not defeat a party's remedy, the delay which occasioned it must be explained and accounted for. The doctrine is fundamental that a party seeking the remedy of specific performance, and also the party who desires to maintain an objection founded upon the other's laches, must show himself to have been 'ready, desirous, prompt, and eager.'"38

But in some cases time almost ceases to be material, as where the vendee has paid the purchase-money, or is in possession of the land,<sup>39</sup> it is then said that time does

by other facts showing the intention of the parties to accept substantial and not literal performance as to time: Hosmer v. Wyoming R'y & Iron Co., 129 Fed. 883, 65 C. C. A. 81.

38 4 Pom. Eq. Jur., § 1408. The text is quoted in McQuary v. Missouri Land Co., 230 Mo. 342, 130 S. W. 335; Pennsylvania Min. Co. v. Martin, 210 Pa. St. 53, 59 Atl. 436; Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789; and cited in Enkema v. McIntyre, 136 Minn. 293, 161 N. W. 587. See, also, Hubbell v. Von Schoening, 49 N. Y. 326; Day v. Cohn, 65 Cal. 508, 4 Pac. 511; Gill v. Bradley, 21 Minn. 15; Hertford v. Boore, 5 Ves. Jr. 719. See, generally, on the subject of laches, ante, volume I, chapter I.

39 The text is quoted in St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701. See, also, Mullens v. Big Creek Gap Coal & Iron Co. (Tenn. Ch. App.), 35 S. W. 439; Green v. Finin, 35 Conn. 178; Stretch v. Schenck, 23 Ind. 77; Miller v. Bear, 3 Paige, 466; Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172; Mudgett v. Clay, 5 Wash. 103, 31 Pac. 424. See, further, Shepheard v. Walker, L. R. 20 Eq. 659 (lessee in possession, paying rent); Taylor v. Longworth, 14 Pet. 172, 10 L. Ed. 405 (possession and improvements); Clinchfield Coal Corp. v. Steinman, 217 Fed. 875, 133 C. C. A. 585; Jones v. Gainer, 157 Ala. 218, 131 Am. St. Rep. 52, 47 South. 142; Day v. Cohn, 65 Cal. 508, 4 Pac. 511; Boone v. Templeman, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947; Hall v. Peoria & E. Ry. Co., 143 Ill. 163, 32 N. E. 598; Low v. Low, 173 Mass. 580, 54 N. E. 257; Detroit United R'y v. Smith, 144 Mich. 235, 107 N. W. 922; Rodgers v. Beckel, 172 Mich. 544, 138 N. W. 202; Hunkins v. Hunkins, 65 N. H. 95, 18 Atl. 655 (full performance by plaintiff);

not run against him. But if the vendee abandons possession, *laches* may again be set up against him.<sup>40</sup>

§ 2235. (§ 813.) Time not Essential When Waiver by Defendant.—If the court finds that although time was of the essence of the contract, yet the defendant has waived his right to insist upon strict performance either expressly or by acquiescence in plaintiff's laches, as where his conduct after the failure to perform on the day indicated that he would accept a delayed performance, a decree for specific performance will be granted the plaintiff as if time had not been of the essence.<sup>41</sup>

Bruce v. Tilson, 25 N. Y. 194; Van Dyke v. Cole, 81 Vt. 379, 70 Atl. 593, 1103; Nuttall v. McVey, 63 W. Va. 380, 60 S. E. 251.

40 Southeastern Co. v. Knott, 10 Hare, 122, 126.

41 The text is quoted in Livengood v. Ball (Okl.), 162 Pac. 766; Berry v. Second Baptist Church of Stillwater, 37 Okl. 117, 130 Pac. 585; and cited in Knipe v. Troika, 92 Kan. 549, 141 Pac. 557. See King v. Wilson, 6 Beav. 124, 126; Webb v. Hughes, 10 Eq. Cas. 281; Raymond v. San Gabriel Val. Water Co., 53 Fed. 883, 4 C. C. A. 89; Thayer v. Wilmington Star Min. Co., 105 Ill. 540, 547; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088.

Express waiver: See, also, Parkin v. Thorold, 16 Beav. 59; Souter v. Witt, 87 Ark. 593, 128 Am. St. Rep. 40, 113 S. W. 800; Peck v. Coyle, 19 Cal. App. 390, 125 Pac. 1073; Machold v. Farnan, 14 Idaho, 258, 94 Pac. 170 (extension may make time essential); Carroll v. Tomlinson, 192 Ill. 398, 85 Am. St. Rep. 344, 61 N. E. 484; Bourke v. Kissack, 242 Ill. 233, 89 N. E. 990; Staples v. Mullen, 196 Mass. 132, 81 N. E. 877; Kingston v. Walters, 14 N. M. 368, 93 Pac. 700; Spolek v. Hatch, 21 S. D. 386, 113 N. W. 75.

Waiver by conduct: See, also, Seton v. Slade, 7 Ves. Jr. 264; Moody v. Eastern Oregon Land Co., 180 Fed. 532; Eason v. Roe, 185 Ala. 71, 64 South. 55; Turpin v. Beach, 88 Ark. 604, 115 S. W. 404; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27; Hill v. Alber, 261 Ill. 124, 103 N. E. 612; Suburban Homes Co. v. North, 50 Mont. 108, Ann. Cas. 1917C, 81, 145 Pac. 2; Pierce v. Morse, 65 N. H. 196, 18 Atl. 792; Gray v. Pelton, 67 Or. 239, 135 Pac. 755; McCarty v. Helbling, 73 Or. 356, 144 Pac. 499; Douglas v. Hanbury, 56 Wash. 63, 134 Am. St. Rep. 1096, 104 Pac. 1110; Shorett v. Knudsen, 74 Wash. 448, 133 Pac. 1029; Phillips v. Carver, 99 Wis. 561, 75 N. W. 432.

§ 2236. (§ 814.) What Degree of Laches will Defeat Relief.—Resung upon the doctrine that the court in a suit for specific performance has at all times a discretionary power upon equitable principles either to grant or refuse relief, each case is determined from its own circumstances, as to what delay by the plaintiff is material, or what excuse is insufficient. In general, the plaintiff must not have been grossly negligent, 42 the delay must not have been too great, 43 nor must it have seri-

Excuses for default by plaintiff: See Cheney v. Libby, 134 U. S. 68, 33 L. Ed. 818, 10 Sup. Ct. 498; Kelsey v. Crowther, 162 U. S. 404, 40 L. Ed. 1017, 16 Sup. Ct. 808; Walton v. McKinney, 11 Ariz. 385, 94 Pac. 1122 (defendant caused the delay; unable to convey good title); Machold v. Farnan, 14 Idaho, 258, 94 Pac. 170 (poverty not an excuse); Haas v. Coburn, 22 Idaho, 47, 124 Pac. 476 (mistake); Ebert v. Arends, 190 Ill. 221, 60 N. E. 211 (mistake); Hickman v. Chaney, 155 Mich. 217, 118 N. W. 993 (defendant caused the delay); McCarty v. Helbling, 73 Or. 356, 144 Pac. 499; Hobart v. Frederiksen, 20 S. D. 248, 105 N. W. 168 (good objection to title); Houghton v. Cook, 91 Vt. 197, 100 Atl. 115 (conduct of defendant); Lathrop v. Columbia Collieries Co., 70 W. Va. 58, 73 S. E. 299 (vendor unable to make title).

42 Hubbell v. Von Schoening, 49 N. Y. 326; Fordyce v. Ford, 4 Bro. C. C. 494, 498 ("where either party has been guilty of gross negligence, the court will not lend its assistance to the completion of the contract").

43 Hertford v. Boore, 5 Ves. Jr. 719 (the bill was delayed seven years because of differences between the parties); Millwood v. Earl Thanet, cited in 5 Ves. Jr. 720; Bauer v. Lumaghi Coal Co., 209 Ill. 316, 70 N. E. 634 (delay of five years); Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433 (delay of nine years); Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97, 100; Findley v. Koch, 126 Iowa, 131, 101 N. W. 766 (three years of delay); Block v. Donovan, 13 N. D. 1, 99 N. W. 72; Hatch v. Lucky Bill Min. Co., 25 Utah, 405, 71 Pac. 865 (delay of ten years); Combes v. Scott, 76 Wis. 662, 45 N. W. 532 (delay of six years).

That plaintiff may be chargeable with laches, though no time was fixed in the contract, see Lawson v. Mullinix, 104 Md. 156, 64 Atl. 938.

ously injured defendant's interests;<sup>44</sup> the conduct or delay of the plaintiff must not indicate an intention to abandon the contract;<sup>45</sup> and the plaintiff must show a reasonable excuse for the default,<sup>46</sup> and show that he

The delay may be in the prosecution of the suit: See Hatch v. Kizer, 140 Ill. 583, 33 Am. St. Rep. 258, 30 N. E. 605.

Laches in contracts other than for the purchase and sale of land: See Davison v. Davis, 125 U. S. 90, 31 L. Ed. 635, 8 Sup. Ct. 825 (stock); Thurmond v. Chesapeake etc. R. Co., 140 Fed. 697, 72 C. C. A. 191 (contract to build a railroad station); Cohn v. Mitchell, 115 Ill. 124, 3 N. E. 420 (contract to renew notes); Williams v. Hart, 116 Mass. 513 (contract to build a bridge); Harris v. Wallace Mfg. Co., 84 Ohio St. 104, 95 N. E. 559 (assignment of patent); Rogers v. Van Northwick, 87 Wis. 414, 58 N. W. 757 (stock).

44 Taylor v. Longworth, 14 Pet. 172, 174, 10 L. Ed. 405; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Pincke v. Curtis, 4 Bro. C. C. 329, 331; Farley v. Vaughn, 11 Cal. 235, 238. See, also, Brashier v. Gratz, 6 Wheat. (U. S.) 528, 5 L. Ed. 322; Stevens v. McChrystal, 150 Fed. 85, 80 C. C. A. 39 (mines); Hurd v. Hotchkiss, 72 Conn. 472, 45 Atl. 11 (loss of evidence); Gamble v. Hanchett, 34 Nev. 351, 126 Pac. 111 (mines); Powell v. Berry, 91 Va. 568, 22 S. E. 365 (delay of a year and a half during real estate "boom"; Frame v. Frame, 32 W. Va. 463, 5 L. R. A. 323, 9 S. E. 901 (loss of evidence by death of parties).

45 Baldwin v. Salter, 8 Paige Ch. 473, 475.

46 Brown v. Guarantee Trust Co., 128 U. S. 403, 32 L. Ed. 468, 9 Sup. Ct. 127; Hubbell v. Von Schoening, 49 N. Y. 326.

See, also, the following cases where plaintiff's delay was excused: Coulson v. Walton, 9 Pet. 62, 9 L. Ed. 51 (delay of forty-eight years excused); Brown v. Sutton, 129 U. S. 238, 32 L. Ed. 664, 9 Sup. Ct. 273 (ignorance of rights); Townsend v. Vanderwerker, 160 U. S. 171, 40 L. Ed. 383, 16 Sup. Ct. 258 (parties in confidential relation); Nowell v. McBride, 162 Fed. 432, 89 C. C. A. 318; Price v. Immel, 48 Colo. 163, 109 Pac. 941; Tate v. Pensacola Gulf Land etc. Co., 37 Fla. 439, 53 Am. St. Rep. 251, 20 South. 542 (defendant not ready and willing to perform); Brown v. Brown, 274 Ill. 325, 113 N. E. 634 (delay due to probate proceedings of vendor's estate); Niquette v. Green, 81 Kan. 569, 106 Pac. 270 (though increase in value); Brown v. Reichling, 86 Kan. 640, 121 Pac. 1127 (defective title); Lawson v. Mullinix, 104 Md. 156, 64 Atl. 938 (delay caused by other party); Putnam v. Tinkler, 83 Mich. 628, 47 N. W. 687 (infancy);

came into equity promptly when he was in a position to perform.<sup>47</sup> The same rule applies whether the plaintiff in default is vendor, failing to convey at the day set by the contract,<sup>48</sup> or the vendee, failing to complete the payment of the purchase-money at the time agreed upon.<sup>49</sup>

Harrison v. Rice, 78 Neb. 659, 114 N. W. 151 (delay caused by litigation); Livesley v. Johnston, 48 Or. 40, 84 Pac. 1044 (personal property); Craig v. Leiper, 2 Yerg. (Tenn.) 193, 24 Am. Dec. 479 (thirty years); Campbell v. Bartlett, 122 Tenn. 208, 25 L. R. A. (N. S.) 639, 122 S. W. 250 (coverture does not excuse fifty years' delay); McAllen v. Raphael (Tex. Civ. App.), 96 S. W. 760 (mistake as to rights); Gove v. Gove's Adm'r (Armstrong), 88 Vt. 115, 92 Atl. 10 (family relationship); Dingman v. Hilberry, 159 Wis. 170, 149 N. W. 761 (request of defendant).

47 Watts v. Waddle, 6 Pet. 388, 393, 8 L. Ed. 437.

48 In the following cases, the delay not being material, the vendor in default was given specific performance, time not being of the essence of the contract: Pincke v. Curtis, 4 Bro. C. C. 329, 331 (no damage to vendee and good title could be made in reasonable time); Hertford v. Boore, 5 Ves. Jr. 719 (delay of seven months); Wynn v. Morgan, 7 Ves. 203, 205; Pierce v. Nichols, 1 Paige Ch. 244 (on ground that vendor could compensate vendee for the delay); Sharp v. Trimmer, 24 N. J. Eq. 422; Radcliffe v. Warrington, 12 Ves. Jr. 326, 333. See, also, Woodson's Adm'rs v. Scott, 1 Dana (Ky.), 470 (unprejudicial delay); Law v. Smith, 68 N. J. Eq. 81, 59 Atl. 327 (four years, unprejudicial delay).

But the default of the vendor being serious, or without good excuse, specific performance was denied in these cases: Fordyce v. Ford, 4 Bro. C. C. 494, 498; Harrington v. Wheeler, 4 Ves. Jr. 686 (seven years' delay); Watson v. Reid, 1 Russ. & M. 236 (delay of one year after notice of abandonment by vendee); Lloyd v. Collett, 4 Bro. C. C. 469 (conduct of vendor evidence of abandonment of contract). See, also, Craig v. Martin, 3 J. J. Marsh. (Ky.) 50, 19 Am. Dec. 157; Richmond v. Gray, 3 Allen (Mass.), 25 (six months); Ripley v. Miller, 165 Mich. 47, Ann. Cas. 1912C, 952, 130 N. W. 345; Young's Adm'r v. Rathbone, 16 N. J. Eq. 224, 84 Am. Dec. 151; Miller v. Bronson, 26 R. I. 62, 58 Atl. 257 (six months); Moore's Adm'rs v. Randolph, 6 Leigh (Va.), 175, 29 Am. Dec. 208; Bryan v. Lofftus Adm'rs, 1 Rob. (Va.) 12, 39 Am. Dec. 242; Hogan v. Kyle, 7 Wash. 595, 38 Am. St. Rep. 910, 35 Pac. 399 (two years).

49 The vendee in default was given specific performance in the following cases, the delay not being considered material, and time

Any indication of intention of abandonment of the contract by either party defeats his right to specific per-

not being of the essence of the contract: Farley v. Vaughn, 11 Cal. 235, 238 (several months' delay); Hearne v. Smart, 13 Ves. 287 (injunction granted to restrain ejectment of vendee two weeks in default); Edgerton v. Peckham, 11 Paige Ch. 351, 356, 357; Richmond v. Robinson, 12 Mich. 193, 201 (delay in last payment); Knott v. Stephens, 5 Or. 235, 241; Day v. Hunt, 112 N. Y. 191, 19 N. E. 414; Brown v. Guarantee Trust Co., 128 U. S. 403, 32 L. Ed. 468, 9 Sup. Ct. 127; Hubbell v. Von Schoening, 49 N. Y. 326 (slight delay); Barnard v. Lee, 97 Mass. 92; Grigg v. Landes, 21 N. J. Eq. 494, 502, 503 (vendee did not complete certain improvements until after the day set); Hearne v. Tenant, 13 Ves. 287; Bank of Columbia v. Hagner, 1 Pet. 454, 464, 7 L. Ed. 219. See, also, the following cases: Nowell v. McBride, 162 Fed. 432, 89 C. C. A. 318 (ten years); Broatch v. Boysen, 175 Fed. 702, 99 C. C. A. 278; Walton v. McKinney, 11 Ariz. 385, 94 Pac. 1122 (delay caused by defective title); Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 Pac. 21 (delay not prejudicial); McGibbon v. Schmidt, 172 Cal. 70, 155 Pac. 460 (though plaintiff had previously sued to recover purchase money); Snyder v. Spaulding, 57 Ill. 480 (title suspicious); Young v. Daniels, 2 Iowa, 126, 63 Am. Dec. 477; Cohen v. Segal, 253 Ill. 34, 97 N. E. 222; White v. Poole, 74 N. H. 71, 65 Atl. 255; Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966 (delay caused by defective title); Pennsylvania Min. Co. v. Martin, 210 Pa. St: 53, 59 Atl. 436; Campbell v. McFadin, 71 Tex. 28, 9 S. W. 138 (forty-four years); Johnson v. Mansfield (Tex. Civ. App.), 166 S. W. 927 (six years); Tacoma Water Supply Co. v. Dumermuth, 51 Wash. 609, 99 Pac. 741; Katz v. Hathaway, 66 Wash. 355, 119 Pac. 804.

But where the vendee's default was serious he was denied relief: Earl v. Halsey, 14 N. J. Eq. 332 (no attempt by vendee to perform); Mackreth v. Marlar, 1 Cox, 260 (delay of five years); Marshall v. Perry, 90 Ill. 289, 294 (delay entirely unexplainable by any equitable circumstance. It was for speculation); Guest v. Homfray, 5 Ves. Jr. 820 (vendee had not done all he could to hasten performance); Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725 (two years' delay without excuse); McCabe v. Mathews, 155 U. S. 550, 556, 39 L. Ed. 257, 15 Sup. Ct. 190 (delay of nine years, land having increased in value from one hundred and fifty dollars to seven thousand five hundred dollars. A delay for speculative purpose); Shortall v. Mitchell, 57 Ill. 161; Walker v. Jeffreys, 1 Hare, 341, 349 (delay of two years); Benedict v. Lynch, 1 Johns. Ch. 370 (no sufficient excuse for the delay).

formance.<sup>50</sup> A fortiori any active prevention of defendant's performance by plaintiff, or any evidence of bad

See, also, the following cases: Stevens v. McChrystal, 150 Fed. 85, 80 C. C. A. 39; Ryder v. Johnson, 153 Ala. 482, 45 South. 181; Requa v. Snow, 76 Cal. 590, 18 Pac. 862 (three years); Seculovich v. Morton, 101 Cal. 673, 40 Am. St. Rep. 106, 36 Pac. 387; Grotefend v. May, 33 Cal. App. 321, 165 Pac. 27 (eight years); Chabot v. Winter Park Co., 34 Fla. 258, 43 Am. St. Rep. 192, 15 South. 756; Nobles v. L'Engle, 61 Fla. 696, 55 South. 839; Iglehart v. Vail, 73 Ill. 63; Hoyt v. Tuxbury, 70 Ill. 331; Mason v. Owens, 56 Ill. 259 (two months); Hatch v. Kizer, 140 Ill. 583, 33 Am. St. Rep. 258, 30 N. E. 605; Henderson v. Beatty, 124 Iowa, 163, 99 N. W. 716 (two years); Meaux v. Helm's Heirs, Ky. Dec. 252, 2 Am. Dec. 716; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Ely v. McKay, 12 Allen, 323; Cathro v. Gray, 108 Mich. 429, 66 N. W. 346; Hobbs v. Henley (Mo.), 186 S. W. 981 (oral gift); Bradley & Co. v. Union Pacific R. Co., 76 Neb. 172, 107 N. W. 238; Haughwout v. Murphy, 21 N. J. Eq. 118 (two and a half years); Penrose v. Leeds, 46 N. J. Eq. 294, 19 Atl. 134; Lozier v. Hill, 68 N. J. Eq. 300, 59 Atl. 234; Delaware v. Duncan, 49 N. Y. 485; Boyd v. Schlesinger, 59 N. Y. 301; Holden v. Purefoy, 108 N. C. 163, 12 S. E. 848; Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Campbell v. Hicks, 19 Ohio St. 433; Patterson v. Martz, 8 Watts (Pa.), 374, 34 Am. Dec. 474; Rennyson v. Rozell, 106 Pa. St. 407 (three years); Davenport v. Latimer, 53 S. C. 563, 31 S. E. 630 (two years); Smith's Heirs v. Christmas, 7 Yerg. (Tenn.) 565 (eight months); De Cordova v. Smith's Adm'x, 9 Tex. 129, 58 Am. Dec. 136; Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789 (two and a half years); Clinchfield Coal Co. v. Clintwood Coal etc. Co., 108 Va. 433, 62 S. E. 329; Frame v. Frame, 32 W. Va. 463, 5 L. R. A. 323, 9 S. E. 901; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433.

If time is of the essence, the slightest delay defeats the vendee's right to specific performance: Spurier v. Hancock, 4 Ves. Jr. 667 (reversionary interest); Carter v. Dean and Chapter of Ely, 7 Sim. 211; King v. Ruckman, 24 N. J. Eq. 316, 351; Tilley v. Thomas, L. R. 3 Ch. App. 61; Myer v. League, 62 Fed. 654, 10 C. C. A. 571; Bank of Columbia v. Hagner, 1 Pet. 454, 7 L. Ed. 219 (lapse of time indicated abandonment).

50 Bank of Columbia v. Hagner, 1 Pet. 454, 7 L. Ed. 219; Benedict
v. Lynch, 1 Johns. Ch. 370; Shortall v. Mitchell, 57 Ill. 161; Wadge
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faith in withholding performance, will always defeat plaintiff's bill for specific performance.<sup>51</sup> Mere lapse of time may amount to evidence of such an intention,<sup>52</sup> unless there is acquiescence in the long delay.<sup>53</sup> A con-

v. Kittleson, 12 N. D. 452, 97 N. W. 856. See, also, Hargis v. Edrington, 113 Ark. 433, 168 S. W. 1095; Findley v. Koch, 126 Iowa, 131, 101 N. W. 766 (eleven months' delay, and expenditures by vendor in reliance on abandonment); Warder v. Cornell, 105 Ill. 169 (improvements by third person in reliance on vendee's abandonment); Cathro v. Gray, 108 Mich. 429, 66 N. W. 346 (same); Mathwig v. Ostrand, 132 Minn. 346, 157 N. W. 589; Schultz v. Hastings Lodge, 90 Neb. 454, 133 N. W. 846; Haugwout v. Murphy, 22 N. J. Eq. 531 (equities of subsequent vendee); Strater v. Flynn (N. J. Eq.), 91 Atl. 591; Groves v. Whittenberg (Tex. Civ. App.), 165 S. W. 889.

· A comparatively slight delay, after notice of repudiation of the contract by the other party, is evidence of an abandonment: McCabe v. Matthews, 155 U. S. 550, 39 L. Ed. 253, 15 Sup. Ct. 190; Marsh v. Lott, 156 Cal. 643, 105 Pac. 968; Hathcock v. Société Anonyme la Floridienne, 54 Fla. 631, 45 South. 481; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Richmond v. Gray, 3 Allen (Mass.), 25 (six months' delay by vendor); Bullock v. Adams's Ex'rs, 20 N. J. Eq. 367; Agens v. Koch, 74 N. J. Eq. 528, 70 Atl. 348 (delay by vendor); Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Johnson v. Lara, 50 Wash. 368, 97 Pac. 231; Combs v. Scott, 76 Wis. 662, 45 N. W. 532.

·51 Connelly v. Haggerty, 65 N. J. Eq. 596, 56 Atl. 371; Williamson v. Dils, 24 Ky. Law Rep. 292, 72 S. W. 292 (vendor threatened to kill plaintiff if he went on the land to make surveys necessary to fix the price); Engberry v. Rousseau, 117 Wis. 52, 93 N. W. 824 (bad faith of vendor); Harris v. Greenleaf, 25 Ky. Law Rep. 1940, 79 S. W. 267 (must be good faith).

52 Lloyd v. Collett, 4 Bro. C. C. 469; Bank of Columbia v. Hagner, supra; Benedict v. Lynch, supra; Baldwin v. Salter, 8 Paige Ch. 473.

53 Benedict v. Lynch, supra. As to waiver of laches, by accepting payment, etc.: Brown v. Guarantee Trust etc. Co., 128 U. S. 403, 32 L. Ed. 468, 9 Sup. Ct. 127; Bennett v. Welch, 25 Ind. 140, 87 Am. Dec. 354 (fifteen years); Potter v. Jacobs, 111 Mass. 32; Welch v. Whelpley, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744; Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686; Grigg v. Landis, 21 N. J. Eq. 494.

tract once abandoned by the party in default cannot afterwards be revived.<sup>54</sup>

Where the delay of the vendor or vendee in seeking performance is for a speculative purpose, to await until time shall determine whether or not it is to his advantage to have the benefit of the contract, it is held by a considerable group of cases that equity will not aid him by any relief against his failure to perform, whatever the situation otherwise.<sup>55</sup>

§ 2237. (§ 815.) Right After Default to Name Reasonable Time for Performance.—Where time is not of the essence, the time in which the party in default may have a further right to receive performance may be limited by

54 Baldwin v. Salter, 8 Paige Ch. 473, 475.

55 The text is quoted in Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789; Crawford v. Workman, 64 W. Va. 10, 61 S. E. 319. See, also, McCabe v. Matthews, 155 U. S. 550, 556, 39 L. Ed. 257, 15 Sup. Ct. 190; Marshal v. Perry, 90 Ill. 289, 294; Pickering v. Pickering, 438 N. H. 400; Jeffrion v. Gumbel, 123 La. 391, 48 South. 1007.

A great increase in the value of the property before the vendee's suit is often treated as material in charging him with laches: Brashier v. Gratz, 6 Wheat. 528, 5 L. Ed. 322; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Boldt v. Early, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 271; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Peters v. Delaplaine, 49 N. Y. 362 (great increase); Collins v. Keller, 62 Or. 169, 124 Pac. 681 (two years' delay); Patterson v. Martz, 8 Watts (Pa.), 374, 34 Am. Dec. 474; Stewart v. Yesler Estate, Inc., 46 Wash. 256, 89 Pac. 705. And the same is true of a great decrease in value before the vendor's suit: Holgate v. Eaton, 116 U. S. 33, 29 L. Ed. 538, 6 Sup. Ct. 224; Brown v. Massey, 138 Mo. 519, 38 S. W. 939; Young's Adm'r v. Rathbone, 16 N. J. Eq. 224, 84 Am. Dec. 151; Bryan v. Lofftus's Adm'rs, 1 Rob. (Va.) 12, 39 Am. Dec. 242. These holdings, however, seem indefensible on principle: See ante, § 21 et seq.; and have been rejected in other cases: Walton v. Mc-Kinney, 11 Ariz. 385, 94 Pac. 1122; Wolf v. Great Falls Water Power & T. Co., 15 Mont. 49, 38 Pac. 115 (able dissenting opinion); Falls v. Carpenter, 21 N. C. 237, 28 Am. Dec. 592. That change in value, independent of delay, is no defense to specific performance, see ante. § 797.

the party not in default giving reasonable notice that performance must be made by a certain day.<sup>56</sup> If a reasonable time after receipt of the notice is thus given the party in default, equity will not enforce specific performance in his behalf after the day named.<sup>57</sup> But if the time named is not reasonable, equity will not give any regard to it.<sup>58</sup> Thus a notice to perform immedi-

56 The text is quoted in Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789. See, also, Parkin v. Thorold, 16 Beav. 59; Macbryde v. Weekes, 22 Beav. 533; Webb v. Hughes, L. R. 10 Eq. 281; Benson v. Lamb, 9 Beav. 502, 507 ("notice was lawfully given to the defendant, and the time having expired, the contract is at an end"); Taylor v. Brown, 2 Beav. 149; King v. Wilson, 6 Beav. 124, 126; Boldt v. Early, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 271. See, also, 4 Pom. Eq. Jur., § 1408, end of note 2, and cases; cited in Coyle v. Kierski, 10 Del. Ch. 229, 89 Atl. 598.

57 The notice being reasonable, equity would not give the defaulting party relief after the expiration of the time in these cases: Macbryde v. Weekes, 22 Beav. 533 (notice of one month); Benson v. Lamb, 9 Beav. 502, 507; Walter v. Jeffreys, 1 Hare, 341, 349 ("if the other party makes no prompt assertion of his right, equity-will consider him as acquiescing in the notice"); Watson v. Reid, 1 Russ. & M. 236. See, also, Stickney v. Keeble, [1915] App. Cas. 386; Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789.

58 The text is cited in Nason v. Patten, 88 Kan. 472, 129 Pac. 138 (reasonableness of time to be determined on facts of each case); Knipe v. Troika, 92 Kan. 549, 141 Pac. 557. Where the notice was considered as being unreasonably short to complete the bargain, the court disregarded the notice and gave specific performance to the party in default: Parkin v. Thorold, 16 Beav. 59 (two weeks); Webb v. Hughes, L. R. 10 Eq. Cas. 281 ("He is bound not to give immediate notice of abandonment"); King v. Wilson, 6 Beav. 124, 126 (a week held to be too short a time); Taylor v. Brown, 2 Beav. 149 (immediate notice not effective); Green v. Levin, L. R. 13 Ch. D. 589, 599 (three weeks too short a notice); Crawford v. Toogood, L. R. 13 Ch. D. 143, 158 (five weeks not reasonable notice); Vance v. Newman, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574. See, also, Higinbotham v. Frock, 48 Or. 129, 120 Am. St. Rep. 796, 83 Pac. 536. But that such notice renders fatal a degree of laches which otherwise might be excused, see Parkin v. Thorold, 16 Beav. 59; Fuller v. Hovey, 2 Allen (Mass.), 324, 79 Am. Dec. 782.

ately or abandon the contract has no effect,<sup>59</sup> and a notice of some weeks may be too short if the party in default cannot by reasonable activity be ready to perform in that time.<sup>60</sup> "Some latitude in respect to time is reasonable, and I think such notice ought to fix the longest time that could be reasonably required for the performance of the acts which remained to be done."

§ 2238. (§ 816.) Effect of Forfeiture Clause in the Contract.—Contracts often contain a clause that if payment is not made at the day, the defaulting vendee shall forfeit all payments previously made and lose his right to the land. The courts of equity, in England and most American jurisdictions, deal with such a forfeiture clause on the principle that equity abhors a forfeiture and will relieve from it.<sup>62</sup> It will if possible consider the clause

- 59 Taylor v. Brown, 2 Beav. 149. The text is cited to this effect in St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701. See, also, Fox v. Grange, 261 Ill. 116, 103 N. E. 576; Mansfield v. Wiles, 221 Mass. 75, 108 N. E. 901; Tucker v. Thraves, 50 Okl. 691, 151 Pac. 598; Banning v. Commercial Orchards Co., 90 Wash. 554, 156 Pac. 547.
- 60 Crawford v. Toogood, L. R. 13 Ch. D. 143 (five weeks too short).
  - 61 Crawford v. Toogood, L. R. 13 Ch. D. 143, 158.
- 62 The text is quoted in Mound Mines Co. v. Hawthorne, 173 Fed. 882, 97 C. C. A. 394. See, also, Harris v. Greenleaf, 25 Ky. Law Rep. 1940, 79 S. W. 267; Zeimantz v. Blake, 39 Wash. 6, 80 Pac. 822, 823 (holds that vendor must do some affirmative act to create a forfeiture on vendee's default); Edgerton v. Peckham, 11 Paige Ch. 351, 356, 357 (the court said it would not enforce the forfeiture clause as time was not of the essence. The vice-chancellor said the forfeiture cases were those where the contract is executory, and that the authorities generally in equity in England and the United States would not allow a forfeiture where the contract was executed in part. A forfeiture in such cases as these, said the vice-chancellor, is "too monstrous a proposition to be maintained in the nineteenth century.") The same rule is found in many cases. See, for instance, Davis v. Thomas, 1 Russ. & M. 506; Vernon v. Stephens, 2

as a stipulation for security of performance and not as intending a great loss to one party by a slight failure to perform, and will decree a performance against the vendor with compensation for delay by interest on the purchase-money, thus relieving against the forfeiture.<sup>63</sup>

Equity in relieving against a forfeiture in a contract of sale, and thus declining to acknowledge the express terms of a contract, points to the analogy of the mortgage.<sup>64</sup> Here, it says, equity refuses to carry out the

P. Wms. 66; In re Dagenbaum, [1873] L. R. 8 Ch. 1022; Cornwall v. Henson, [1900] 2 Ch. 298; Richmond v. Robinson, 12 Mich. 193, 201; Barnard v. Lee, 97 Mass. 92; Wells v. Smith, 7 Paige Ch. 22; Grigg v. Landis, 21 N. J. Eq. 499, 502, 503; Cheney v. Libby, 134 U. S. 68, 33 L. Ed. 818, 19 Sup. Ct. 498; Jones v. Robbins, 29 Me. 351, 1 Am. Rep. 593; Richmond v. Robinson, 12 Mich. 193; Ewins v. Gordon, 49 N. H. 444; Hall v. Delaplaine, 5 Wis. 206, 68 Am. Dec. 57; Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207. See, further, 1 Pom. Eq. Jur., § 455, on this subject.

63 Davis v. Thomas, 1 Russ. & M. 506 ("a court of equity will relieve against the penalty of a forfeiture upon the ground of full compensation by giving interest"). The text is quoted in Mound Mines Co. v. Hawthorne, 173 Fed. 882, 97 C. C. A. 394. In the case of In re Dagenbaum, [1873] L. R. 8 Ch. 1022, time was of the essence, and by forfeiture clause, if the final payment of two thousand pounds was not paid on the day, the buyer was to lose his bargain and forfeit two thousand pounds already paid. The court refused to enforce this forfeiture, and held it to be a penalty, to be relieved from, and decreed that the buyer in default could pay up in full and receive the lands. The court suggested that if it were not a penalty it would be void as ultra vires. Also see Richmond v. Robinson, 12 Mich. 193, 201; Barnard v. Lee, 97 Mass. 92; Vernon v. Stephens, 2 P. Wms. 66. The more logical course, when time is of the essence, would seem to be, to decree a return of the purchase money already paid, but to refuse specific enforcement of the contract: See Steedman v. Drinkle, [1916] 1 App. Cas. 275.

64 Parkin v. Thorold, 16 Beav. 59. Here the Master of the Rolls says: "It [the court of chancery] treats the substance of the contract [of mortgage] to be a security for the repayment of money advanced, and that portion of the contract which gives the estate to the mortgagee as mere form. . . . It is on a similar principle.

contract with forfeiture for breach in performance. It does not regard the forfeiture clause as of the substance of the contract. Neither will it in a contract for the sale of land. It assumes that the real intention of the parties was to create a security and not a forfeiture, and equity "relieves against any forfeiture or penalty inserted for the purpose of enforcing the contract."

In a few American jurisdictions, on the other hand, it is held, that since the parties have deliberately stipulated for a clause of forfeiture, equity has no power to make a new contract for them, and cannot relieve the party in default however severe the forfeiture may be. Illinois, 65 Iowa, 66 Oregon, 67 Indiana 68 and California 69 are among this minority, which compel the vendee in default to lose his bargain and all his payments previously paid, in strict accordance with the agreement. But California enforces a forfeiture only where time is of the essence of the contract. The New Jersey court

that the whole doctrine relating to equities of redemption, as administered by this court is founded."

- 65 Heckard v. Sayre, 34 Ill. 142, where the court said: "A court of equity has no more right than a court of law to dispense with an express stipulation of the parties in regard to time in contracts of this nature"; Stow v. Russell, 36 Ill. 18; Steele v. Biggs, 22 Ill. 643 (vendee in default forfeited the half of purchase-money paid); Eaton v. Schneider, 185 Ill. 508, 57 N. E. 421.
- 66 Prince v. Griffin, 27 Iowa, 514, 521 (vendee forfeited previous payment of nine hundred dollars by court's refusal to relieve).
  - 67 Snider v. Lehnherr, 5 Or. 385.
- 68 Ewing v. Crouse, 6 Ind. 312 (one hundred dollars out of four thousand dollars).
- 69 Glock v. Howard Colony Co., 123 Cal. 1, 10, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713. But the California court did not go so far as the most extreme, saying equity should relieve against a forfeiture clause where time was not of the essence, and the clause was one of stipulated penalty. But in the case before it, time being of the essence, it enforced the forfeiture clause. See, also, Steele v. Branch, 40 Cal. 1, 11; Cleary v. Folger, 84 Cal. 316, 320, 18 Am. St. Rep. 187, 24 Pac. 280.

will at times enforce the forfeiture.<sup>70</sup> Forfeiture will be enforced generally where the default is intentional and continued. One cannot ask equity to relieve him against his own wrong.<sup>71</sup>

The clause of forfeiture, like other defenses in equity, may be waived by words or conduct.<sup>72</sup> Thus, where the vendor acquiesces in the *laches* of the vendee he cannot afterwards set up his right to assert the forfeiture, having waived such right.<sup>73</sup> Such waiver is of importance only in those jurisdictions which usually refuse to relieve against the forfeiture.

70 In Grigg v. Landis, 21 N. J. Eq. 494, 503, the court, though relieving against a forfeiture, said: "But such contracts will be enforced... unless it can be shown that thereby some hardship or wrong not within the presumed contemplation of the parties at the time will result."

71 Howe v. Smith, L. R. 27 Ch. D. 89, 98.

72 Coughran v. Bigelow, 164 U. S. 301, 310, 41 L. Ed. 443, 17 Sup. Ct. 117; Eaton v. Schneider, 185 Ill. 508, 57 N. E. 421; Three States Lumber Co. v. Bowen, 95 Ark. 529, 129 S. W. 799; Boone v. Templeman, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947; Boyd v. Warden, 163 Cal. 155, 124 Pac. 841; Fox v. Grange, 261 Ill. 116, 103 N. E. 576; Maday v. Roth, 160 Mich. 289, 136 Am. St. Rep. 441, 125 N. W. 13; Robberson v. Clark, 173 Mo. App. 301, 158 S. W. 854; Baerenklau v. Peerless Realty Co., 80 N. J. Eq. 26, 83 Atl. 375. In Zeimantz v. Blake, 39 Wash. 6, 80 Pac. 822, 823, it was held that the vendor must do some affirmative act to create a forfeiture on vendee's default; to the same effect, Forssell v. Carter, 65 Fla. 512, 62 South. 926; Cue v. Johnson, 73 Kan. 558, 85 Pac. 598; Weaver v. Griffith, 210 Pa. St. 13, 105 Am. St. Rep. 783, 59 Atl. 315.

73 Thayer v. Star Min. Co., 105 Ill. 540, 547.

## CHAPTER XL.

## SPECIFIC PERFORMANCE OF PAROL CONTRACTS, PART PERFORMED.

## ANALYSIS.

- § 817. Rationale of the doctrine.
- § 818. Doctrine does not apply at law.
- § 819. Possession, alone, sufficient.
- § 820. What possession not sufficient.
- § 821. Possession coupled with payment or improvements.
- § 822. Suit by vendor.
- § 823. Modifications and rejection of the doctrine.
- § 824. Payment not sufficient.
- § 825. Conveyance by plaintiff not sufficient—Exchange of lands.
- § 826. Whether personal services are a sufficient act of part performance.
- § 827. Miscellaneous acts of part performance.
- § 828. Oral promise to give.
- § 829. Marriage not part performance.
- § 829a. Evidence in part performance cases.
- § 830. Specific performance because of fraud, independent of the doctrine of part performance.

§ 2239. (§ 817.) Rationale of the Doctrine.—"The doctrine was settled at an early day in England, and has been fully adopted in nearly all the American states, that a verbal contract for the sale or leasing of land, or for a settlement made upon consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds." "The contract must possess all the elements and features necessary to the

<sup>1 4</sup> Pom. Eq. Jur., § 1409. The text is quoted in Stenson v. Ellmann, 26 S. D. 134, 128 N. W. 588, and cited, generally, in Sanguinetti v. Rossen, 12 Cal. App. 623, 107 Pac. 560.

specific enforcement of any agreement, except the written memorandum required by the statutes." Two theories are in vogue, by which this doctrine is sought to be supported; the first of these can, perhaps, be best explained by means of a summary of a judgment in a leading English case, in which it was most fully and ably, if not convincingly, expounded.

It is established, both in law and equity, that the fourth section of the statute of frauds does not avoid parol contracts, but establishes a rule of evidence.4 "From the law thus stated the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. . . . When the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only and not that in which there are equities resulting from res gestæ subsequent to and arising out of the contract. So long as the connection of those res gestæ with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the res gestæ themselves. justice seems to require some such limitation of the scope of the statute."5 Where, for example, the vendee has

<sup>2 4</sup> Pom. Eq. Jur., § 1409, note 1. Cited to this effect in Wood v. Lett, 195 Ala. 601, 71 South. 177 (contract of married woman). To the same effect, see Heran v. Elmore, 37 S. D. 223, 157 N. W. 820.

<sup>3</sup> Maddison v. Alderson, [1883] L. R. 8 App. Cas. (H. of L.) 467, by Earl of Selborne, L. C.; reviewing the prior cases.

<sup>4</sup> The text is cited to this effect in Wood v Lett, 195 Ala. 601, 71 South. 177; and quoted in Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638 (affirmed by Tex. Sup. Ct.).

<sup>5</sup> The text is quoted in Wallis v. Turner (Tex. Civ. App.), 95 S. W. 61; Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638 (affirmed by Tex. Sup. Ct.).

entered into possession, parol evidence of the contract is necessary to explain and excuse that possession; but the vendor is "charged," not upon the contract, but upon the equity arising from the receipt and delivery of the possession. "The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress." "It is in general of the essence of such an act [viz., an act of part performance], that the courts shall by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . But an act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the statute of frauds; as, for example, the payment of a sum of money alleged to be purchase money."6 "The payment of a sum of money is an equivocal act, not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land." Similarly, continuance in possession by a lessee after the end of his term is not in itself evidence of an agreement to renew the lease, since the act may point to a tenancy at will equally as well as to an express agreement.7

<sup>6</sup> That the alleged act of part performance must be unequivocable, referable, in its own nature, to a contract such as that which is sought to be established, see, also, Dale v. Hamilton, 5 Hare, 369, 381, per Wigram, V. C.; McNeil v. Corbett, 39 Can. Sup. Ct. 608; Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461; Boeck v. Milke, 141 Iowa, 713, 118 N. W. 874, 120 N. W. 120; Emmel v. Hayes, 102 Mo. 186, 22 Am. St. Rep. 769, 11 L. R. A. 323, 14 S. W. 209; Collins v. Harrell, 219 Mo. 279, 118 S. W. 432; Shahan v. Swan, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222.

<sup>7</sup> The text is quoted in Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638 (affirmed by Sup. Ct. of Tex.).

Such being the theory of part performance, consistent with and explaining all of the adjudged English and a majority of the American decisions, it is confessedly artificial; dicta in many of the English, and in nearly all the American, cases, place the doctrine, wholly or in part, on a broader ground. "The ground is equitable fraud; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense. If the defendant knowingly permits the plaintiff to do acts in part performance of the verbal agreement, acts done in reliance on the agreement, which change the relations of the parties and prevent a restoration to their former condition, it would be a virtual fraud for the defendant to interpose the statute as a defense, and thus to secure for himself the benefit of the acts of part performance, while the plaintiff would be left not only without adequate remedy at law, but also liable for damages as a trespasser."8

8 4 Pom. Eq. Jur., § 1409, note. This portion of section 1409 is quoted in Stenson v. Elfmann, 26 S. D. 134, 128 N. W. 588; McGuire v. Murray, 107 Me. 108, 77 Atl. 692; and cited in Willis v. Zorger, 258 Ill. 574, 101 N. E. 963; Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754; Erb v. McMaster, 88 Neb. 817, 130 N. W. 576; Price v. Lloyd, 31 Utah, 86, 8 L. R. A. (N. S.) 870, 86 Pac. 767. Among innumerable dicta to the effect that fraud, in the equitable sense, or estoppel, is the foundation of the doctrine, see those in the following, chiefly recent, cases: Mundy v. Joliffe, 5 Mylne & C. 167; Sears v. Redick, 211 Fed. 856, 128 C. C. A. 234; Price v. Wallace, 224 Fed. 576; Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190; Kinsell v. Thomas, 18 Cal. App. 683, 124 Pac. 220; Kinderland v. Kirk, 131 Ga. 454, 62 S. E. 582; Black v. Hoopeston Gas & El. Co., 250 Ill. 68, 95 N. E. 51; Moore v. Pierson, 6 Iowa, 279, 71 Am. Dec. 409; Baldwin v. Baldwin, 73 Kan. 39, 4 L. R. A. (N. S.) 957, 84 Pac. 568; Baldridge v. Centgraf, 82 Kan. 240, 108 Pac. 83; Green v. Jones, 76 Me. 563; Chapel v. Chapel, 132 Minn. 86, 155 N. W. 1054; Oliver v. Johnson, 238 Mo. 359, 142 S. W. 274; Sursa v. Cash, 171 Mo. App. 396, 156 S. W. 779; Muir v. Bartlett (N. H.), 99 Atl. 553; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Wheeler v. Reynolds, 66 N. Y. 227; Harris v. Arthur, 36 Okl. 33, 127 Pac. 695; Heran v.

in money is not a part performance, because the remedy at law is adequate for its recovery; there has been no irrevocable change of position. Payment in services, on the other hand, at least in services of such a character as not to permit a pecuniary estimate of their value, is an act of part performance; this result logically flows from the theory in question, and in this respect only, in most of the jurisdictions, do the two theories of part performance differ in their practical results. Delivery and receipt of possession under the contract is deemed an irrevocable change of position which it would be a fraud on the vendor's part to disturb; in several jurisdictions, however, this reason, as applied to mere possession, is rejected as artificial and untrue to fact.9

§ 2240. (§ 818.) Doctrine does not Apply at Law.—
The doctrine of part performance is purely a creation of equity and is not recognized at law. Hence it follows that no distinctively legal action can be maintained upon an oral contract within the statute of frauds. When the vendor disposes of the property to a bona fide purchaser for value, without notice, the vendee may maintain a bill in equity to recover damages from the vendor. The jurisdiction rests upon the ground that equity alone can grant relief.

Elmore, 37 S. D. 223, 157 N. W. 820; Price v. Lloyd, 31 Utah, 86, 8 L. R. A. (N. S.) 870, 86 Pac 767; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297 (a good statement of the principle).

9 See post, § 823. The text is cited in Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638 (affirmed by Sup. Ct. of Tex.).

10 O'Herlihy v. Hedges, 1 Schoales & L. 123; Leavitt v. Stern, 159 Ill. 526, 42 N. E. 869 (not a defense to a legal action); Chicago Attachment Co. v. Davis S. M. Co., 142 Ill. 171, 15 L. R. A. 754, 31 N. E. 438; Bartlett v. Bartlett, 103 Mich. 293, 61 N. W. 500 (same); Nally v. Reading, 107 Mo. 350, 17 S. W. 978; Brown v. Pollard, 89 Va. 696, 17 S. E. 6.

11 Jervis v. Smith, Hoff. Ch. 470. See, also, Townsend v. Vanderwerker, 160 U. S. 171, 40 L. Ed. 383, 16 Sup. Ct. 258.

§ 2241. (§ 819.) Possession, Alone, Sufficient.—The mere delivery and taking of possession in pursuance of the agreement is, by the rule of the English cases, sufficient part performance to warrant equity in granting relief.<sup>12</sup> This is rested upon the ground that "the acknowledged possession of a stranger on the land of another is not explicable, except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into its terms; the court regarding what has been done as a consequence of contract or tenure." The possession must be actual; notorious

12 Butcher v. Stapely, 1 Vern. 363; Clinan v. Cooke, 2 Schoales & L. 22, 41 (dictum). The text is cited in Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638 (affirmed by Tex. Sup. Ct.). While the English rule is adopted by the text-books, American cases strictly in point are extremely few. See Pindall v. Trevor, 30 Ark 249; Phillips v. Jones, 79 Ark. 100, 9 Ann. Cas. 131, 95 S. W. 164 (dictum); Eaton v. Whitaker, 18 Conn. 222, 44 Am. Dec. 586 (dictum); Pleasanton v. Raughley, 3 Del. Ch. 124 (dictum); Johnston v. Glancy, 4 Blackf. (Ind.) 94, 28 Am. Dec. 45 (dictum); Wharton v. Stoutenburgh, 35 N. J. Eq. 266; Collins v. Lackey, 31 Okl. 776, Ann. Cas. 1913E, 507, 40 L. R. A. (N. S.) 883, 123 Pac. 1118 (dictum); Sprague v. Jessup, 48 Or. 211, 4 L. R. A. (N. S.) 410, 83 Pac. 145, 84 Pac. 802 (dictum); Jomsland v. Wallace, 39 Wash. 487, 81 Pac. 1094 (dictum). See cases collected by the present writer in 36 Cyc. 653, 654, notes 53, 54. In nearly all the American cases other acts of part performance, such as payment or making of improvements, are found to have existed; and in about a dozen jurisdictions such further acts, in addition to possession, are distinctly required by the decisions: See post, § 823; and Howes v. Barmon, 11 Idaho, 64, 114 Am. St. Rep. 255, 69 L. R. A. 568, 81 Pac. 48; Baldridge v. Centgraf, 82 Kan. 240, 108 Pac. 83; Wisconsin & M. R'y Co. v. McKenna, 139 Mich. 43, 102 N. W. 281; Miller v. Ball, 64 N. Y. 286; Henley v. Cottrell Real Estate etc. Co., 101 Va. 70, 43 S. E. 191.

13 Morphett v. Jones, 1 Swanst. 172. Another reason assigned is, that evidence of the possession being admissible to shield the vendee from liability as a trespasser, may be used to establish the contract with a view to its enforcement: Clinan v. Cooke, 1 Shoales & L. 22.

and exclusive, not shared with the vendor;<sup>14</sup> and must be taken with the consent or acquiescence of the vendor.<sup>15</sup> Because of the requirement of exclusive posses-

Other reasons are stated in Lamb v. Hinman, 46 Mich. 112, 6 N. W. 675, 8 N. W. 709; Pugh v. Good, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534, per Gibson, C. J. See Miller v. Lorentz, 39 W. Va. 160, 19 S. E. 391, for a statement of the effect of the ancient common-law doctrine of livery of seizin as an historical ground for the rule that mere possession is sufficient.

14 Cooley v. Lobdell, 153 N. Y. 596, 47 N. E. 783; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297; Miller v. Lorentz, 39 W. Va. 160, 19'S. E. 391; Woods v. Stevenson, 43 W. Va. 149, 27 S. E. 309. Recent cases to the same effect are: Davis v. Judson, 159 Cal. 121, 113 Pac. 147; Williams v. Bailey, 69 Fla. 225, 67 South. 877; Kinderland v. Kirk, 131 Ga. 454, 62 S. E. 582; Baldwin v. Baldwin, 73 Kan. 39, 4 L. R. A. (N. S.) 957, 84 Pac. 568; Poland v. O'Connor, 1 Neb. 50, 93 Am. Dec. 327 (storage in vacant lot, insufficient); Wright v. Nulton, 219 Pa. 253, 68 Atl. 707; Lincoln v. Africa, 228 Pa. 546, 77 Atl. 918; Purington v. Brown (Tex. Civ. App.), 133 S. W. 1080; Price v. Lloyd, 31 Utah, 86, 8 L. R. A. (N. S.) 870, 86 Pac. 767; Blakely v. Sumner, 62 Wash. 206, 113 Pac. 257; McLain v. Healy, 98 Wash. 489, L. R. A. 1918A, 1161, 168 Pac. 1; Huntington & K. Land Dev. Co. v. Thornburg, 46 W. Va. 99, 33 S. E. 108 (possession not actual and notorious). Compare McGinn v. Willey, 24 Cal. App. 303, 141 Pac. 49 (possession of a purchaser from a tenant in common need not be exclusive as against the other tenants in common); Emery v. Dana, 76 N. H. 483, 84 Atl. 976 (possession sufficiently exclusive and notorious to be adverse is effectual); Houston Oil Co. of Texas v. Payne (Tex. Civ. App.), 164 S. W. 886 (permitting vendor to cut timber does not affect vendee's possession); Ayres v. Short, 142 Mich. 501, 105 N. W. 1115; Bryson v. McShane, 48 W. Va. 126, 49 L. R. A. 527, 35 S. E. 848 (possession of one parcel of the land sufficient).

15 Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435 (this requirement not satisfied by proof of a scrambling and litigious possession); Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Lord v. Underdunk, 1 Sand. Ch. 46 (it must clearly appear to have been taken with the known permission of the vendor). To the effect that vendor's acquiescence in the possession is sufficient, see Gregory v. Mighell, 18 Ves. 328. The general rationale of the doctrine that possession is part performance, is, that the vendee, unless permitted

sion, it follows that one tenant in common cannot claim a right to specific performance against his co-tenant by reason of his possession merely. <sup>16</sup> Such possession is explicable upon the supposition of a continuance of the co-tenancy. Where a contract provides for the sale of several distinct lots for one price, probably possession of one lot is sufficient to warrant relief as to all; <sup>17</sup> but this principle cannot apply, of course, when the lots are sold under separate agreements. <sup>18</sup> It is to be noted that possession must be taken in pursuance of contract. <sup>19</sup>

to introduce parol evidence, will be liable as a trespasser. Manifestly one who is in fact a trespasser is not entitled to come within its operation. Other cases in support of the text are: Eshleman v. Henrietta Vineyard Co., 102 Cal. 199, 36 Pac. 579; Kinderland v. Kirk, 131 Ga. 454, 62 S. E. 582; Halsell v. Renfrow, 14 Okl. 674, 2 Ann. Cas. 286, 78 Pac. 118; Steensland v. Noel, 28 S. D. 522, 134 N. W. 207 (no estoppel against defendant, or fraud on plaintiff, if possession taken without consent); Wallis v. Turner (Tex. Civ. App.), 95 S. W. 61, citing this paragraph of the text; Openshaw v. Dean, 59 Tex. Civ. App. 498, 125 S. W. 989; Blakely v. Sumner, 62 Wash. 206, 113 Pac. 257; Miller v. Lorentz, 39 W. Va. 160, 19 S. E. 391. Compare Starrett v. Boynton, 73 N. J. Eq. 669, 70 Atl. 183 (protests made by vendor after vendee's entry, when that was made with consent, afford no reason for refusal of specific performance).

16 Workman v. Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Wainman v. Hampton, 110 N. Y. 429, 18 N. E. 234; Lincoln v. Africa, 228 Pa. 546, 77 Atl. 918. But payment and valuable improvements may aid his case; Peck v. Stanfield, 12 Wash. 101, 40 Pac. 635; Emery v. Dana, 76 N. H. 483, 84 Atl. 976. See, also, Roberts v. Templeton, 48 Or. 65, 3 L. R. A. (N. S.) 790, 80 Pac. 481.

17 Smith v. Underdunck, 1 Sand. Ch. 579; Jones v. Pease, 21 Wis. 644. In these cases, however, there were other acts of part performance in addition to possession of part of the property.

18 Buckmaster v. Harrop, 7 Ves. 341.

19 See cases cited in preceding notes. See, also, Purcell v. Coleman (Miner), 4 Wall. 513, 18 L. Ed. 435; Northwestern Lumber Co. v. Grays Harbor & P. S. R'y Co., 208 Fed. 624; Clinchfield Coal Corporation v. Steinman, 217 Fed. 875, 133 C. C. A. 585; Lay v. Lay, 75 Ark. 526, 87 S. W. 1026; Von Trotha v. Bamberger, 15 Colo.

Therefore, possession taken prior to the contract or possession preparatory to the contract is not sufficient.<sup>20</sup>

- § 2242. (§ 820.) What Possession not Sufficient.—As possession must be taken in pursuance of a contract, a mere holding over by a tenant after the expiration of his lease is not sufficient part performance to take the case out of the statute.<sup>21</sup> Where, however, there is a change
- 1, 24 Pac. 883; Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133 (possession under another's title); Williams v. Bailey, 69 Fla. 225, 67 South. 877; Ranson v. Ranson, 233 Ill. 369, 84 N. E. 210; Waymire v. Waymire, 141 Ind. 164, 40 N. E. 523; Garrick v. Garrick, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104; Hartshorn v. Smart, 67 Kan. 543, 73 Pac. 73 (possession taken under tax deed); Gibbs v. Whitwell, 164 Mo. 387, 64 S. W. 110; Kille v. Gooch (Mo.), 184 S. W. 1158; Muir v. Bartlett (N. H.), 99 Atl. 553; Van Horn v. Demarest, 76 N. J. Eq. 386, 77 N. J. Eq. 264, 77 Atl. 354; Vogt v. Mullin, 82 N. J. Eq. 452, 89 Atl. 533; Collins v. Lackey, 31 Okl. 776, Ann. Cas. 1913E, 507, 40 L. R. A. (N. S.) 883, 123 Pac. 1118; Henry Jenning & Sons v. Miller, 48 Or. 201, 85 Pac. 517; Tonseth v. Larsen, 69 Or. 387, 138 Pac. 1080; Goff v. Kelsey, 78 Or. 337, 153 Pac. 103; Stalker v. Stalker, 78 Or. 291, 153 Pac. 52; Wright v. Nulton, 219 Pa. 253, 68 Atl. 707; Peckham v. Barker, 8 R. I. 17 (tenancy from year to year); Crawford v. Crawford, 77 S. C. 205, 57 S. E. 837; Reed v. Reed, 108 Va. 790, 62 S. E. 792; Carter v. Jeffries, 110 Va. 735, 67 S. E. 284; McLin v. Richmond, 114 Va. 244, 76 S. E. 301 (possession referable to tenancy by curtesy); Broadway Hospital etc. v. Decker, 47 Wash. 586, 92 Pac. 445; Blakely v. Sumner, 62 Wash. 206, 113 Pac. 257 (not necessary that contract stipulate for possession); Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458.
- 20 For examples of acts of preparation held insufficient, see Clerk v. Wright, 1 Atk. 12; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; also, the recent cases: Sursa v. Cash, 171 Mo. App. 396, 156 S. W. 779; Price v. Lloyd, 31 Utah, 86, 8 L. R. A. (N. S.) 870, 86 Pac. 767; McLain v. Healy, 98 Wash. 489, L. R. A. 1918A, 1161, 168 Pac. 1; Pence v. Life, 104 Va. 518, 52 S. E. 257 (possession taken prior to the parol agreement); J. L. Gates Land Co. v. Ostrander, 124 Wis. 287, 102 N. W. 558. Sec, to the effect that mere continued possession of tenant is not sufficient, cases cited in note to § 820.
- 21 The text is quoted in Phillips v. Jones, 79 Ark. 100, 9 Ann. Cas. 131, 95 S. W. 164. See Smith v. Turner, Prec. Ch. 561; Wills V-314

in the terms of the tenancy, as, for instance, in the amount of rent paid,<sup>22</sup> or where the tenant makes substantial repairs or improvements, such as could not be accounted for by the original tenancy, such circumstance

v. Stradling, 3 Ves. 378; Maddison v. Alderson, L. R. 8 App. Cas. 295 (dictum); Harman v. Harman, 70 Fed. 894, 935, 17 C. C. A. 479; Koch v. National Union B. & L. Ass'n, 137 Ill. 497, 27 N. E. 530. See, also, Green v. Groves, 109 Ind. 519, 10 N. E. 401; Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 L. Ed. 635, 23 Sup. Ct. 443; Emmel v. Hayes, 102 Mo. 186, 22 Am. St. Rep. 769, 11 L. R. A. 323, 14 S. W. 209; and the following recent cases: Bruns v. Huseman, 266 Ill. 212, 107 N. E. 462; Shacklett v. Cummins, 270 Mo. 496, 193 S. W. 562; Tonseth v. Larsen, 69 Or. 387, 138 Pac. 1080; Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638 (affirmed Tex. Sup. Ct.; no specific performance on ground that tenant lost opportunity of lease of another building). Neither is a possession begun as former owner sufficient: Swales v. Jackson, 126 Ind. 282, 26 N. E. 62. In general, that continuance in possession, alone, is not a sufficient part performance, see Frame v. Dawson, 14 Ves. Jr. 386; Ducie v. Ford, 138 U. S. 587, 34 L. Ed. 1091, 11 Sup. Ct. 417; Wright v. Raftree, 181 Ill. 464, 54 N. E. 998; Christensen v. Christensen, 265 Ill. 170, 106 N. E. 627; Swales v. Jackson, 126 Md. 282, 26 N. E. 62; Recknagle v. Schmaltz, 72 Iowa, 63, 33 N. W. 365; Billingslea v. Ward, 33 Md. 48; Barnes v. Boston etc. R., 130 Mass. 388; Snow v. Snow, 98 Minn. 348, 108 N. W. 295; Swearingen v. Stafford (Mo.), 188 S. W. 97 (life tenant purchasing from remainder-man); Bigler v. Baker, 40 Neb. 325, 24 L. R. A. 255, 58 N. W. 1026; Crawford v. Wick, 18 Ohio St. 190, 98 Am. Dec. 103; Henry Jenning & Sons v. Miller, 48 Or. 201, 85 Pac. 517; Tonseth v. Larsen, 69 Or. 387, 138 Pac. 1080; Christy v. Barnhart, 14 Pa. St. 260, 52 Am. Dec. 538; Wright v. Nulton, 219 Pa. 253, 68 Atl. 707; McMillan v. McMillan, 77 S. C. 511, 58 S. E. 431; Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458.

22 Increased rent.—Wills v. Stradling, 3 Ves. 378; Nunn v. Fabian, L. R. 1 Ch. 35. But this rule is subject to the criticism that payment of the increased rent is not, of itself, an unequivocal act; and appears to have had little following in this country. Payment of the purchase price by a vendee who took possession before the contract has usually been considered insufficient, in this country: Emmel v. Hayes, 102 Mo. 186, 22 Am. St. Rep. 769, 11 L. R. A. 323, 14 S. W. 209; McMillan v. McMillan, 77 S. C. 511, 58 S. E. 431.

in connection with the possession is sufficient to warrant relief.<sup>23</sup> Possession obtained wrongfully is, of course, no ground for relief, for it does not refer to any contract whatever.<sup>24</sup>

§ 2243. (§ 821.) Possession Coupled With Payment or Improvements.—While the authority of the English and many American cases undoubtedly supports the view that possession alone is sufficient to take a case out of the operation of the statute of frauds, it will be found that in a large majority of the cases other circumstances have been present. Under the theory of the English courts, these additional circumstances are immaterial. Even in states where possession alone is sufficient, however, a common statement of the rule is that possession coupled with payment of the whole or a part of the pur-

<sup>23</sup> Repairs and improvements.—The text is quoted in Phillips v. Jones, 79 Ark. 100, 9 Ann. Cas. 131, 95 S. W. 164. See Mundy v. Jolliffe, 5 Mylne & C. 167; Morrison v. Herrick, 130 Ill. 631, 20 N. E. 537; Rhea v. Jordan, 28 Gratt. 678 (cotenants). See, also, Wills v. Stradling, 3 Ves. 378. Recent cases are: Eason v. Roe, 185 Ala. 71, 64 South. 55 (citing Pom. Eq. Jur., § 1409); Black v. Hoopeston Gas & Electric Co., 250 III. 68, 95 N. E. 51; Read Drug & Chemical Co. v. Nattans., 129 Md. 67, 98 Atl. 158; Cobb v. MacFarland, 87 Neb. 408, 127 N. W. 377. In Allen v. Bemis, 120 Iowa, 172, 94 N. W. 560, it was held that mere making improvements is not sufficient to warrant the court in enforcing a contract of sale in favor of the tenant. That the improvements must be such that they cannot be accounted for by a continuance of the old relation, see Barrett v. Geisinger, 148 Ill. 98, 35 N. E. 354 (less than the annual rental); Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638 (affirmed by Tex. Sup. Ct.); McMillan v. McMillan, 77 S. C. 511, 58 S. E. 431; Frame v. Dawson, 14 Ves. Jr. 386. Compare Biddle v. Whitmore, 134 Minn. 68, 158 N. W. 808.

<sup>24</sup> Cole v. White, 1 Bro. C. C. 409; Purcell v. Miner, 4 Wall. 513, 18 L. Ed. 435; Lord v. Underdunk, 1 Sand. Ch. 46; Kinderland v. Kirk, 131 Ga. 454, 62 S. E. 582; Gault Lumber Co. v. Pyles, 19 Okl. 445, 92 Pac. 175. See, also, note 15, supra.

chase price will remove the case from the operation of the statute; and this is the rule in most of the other states as well.<sup>25</sup> It is also the nearly universal holding that

25 In the following cases possession coupled with payment of the whole or a part of the purchase price was held sufficient: Merrell v. Witherby, 120 Ala. 418, 74 Am. St. Rep. 39, 20 South. 994, 26 South. 974; Holmes v. Holmes, 44 Ill. 168; Ferbrache v. Ferbrache, 110 Ill. 210; Pond v. Sheean, 132 Ill. 312, 8 L. R. A. 414, 23 N. E. 1018; Wright v. Raftree, 181 Ill. 464, 54 N. E. 998; Green v. Jones, 76 Me. 563; Adair v. Adair, 78 Mo. 630; Dunckel v. Dunckel, 141 N. Y. 427, 36 N. E. 405; Peay v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885; Stark v. Wilder, 36 Vt. 752; Holmes v. Caden, 57 Vt. 111; Neel v. Neel, 80 Va. 584; Lee v. Wrixon, 37 Wash. 47, 79 Pac. 489; O'Connor v. Jackson, 33 Wash. 219, 74 Pac. 372; Frede w. Pflugradt, 85 Wis. 119, 55 N. W. 159. Additional cases, chiefly recent, are: Brown v. Sutton, 129 U. S. 238, 32 L. Ed. 664, 9 Sup. Ct. 273; Powell v. Higley, 90 Ala. 103, 7 South. 440 (payment in chattels); Nelson v. Hammonds, 173 Ala. 14, 55 South. 301; Sherman v. Sherman, 190 Ala. 446, 67 South. 255; Davis v. Martin Stave Co., 113 Ark. 325, 168 S. W. 553; Bonner v. Kimball-Lacy Lumber Co., 114 Ark. 42, 169 S. W. 242; Branstetter v. Branstetter, 115 Ark. 154, 170 S. W. 989; McCarger v. Rood, 47 Cal. 138; Brown v. Town of Sebastopol, 153 Cal. 704, 19 L. R. A. (N. S.) 178, 96 Pac. 363; Demps v. Hogan, 57 Fla. 60, 48 South. 998; Pasquay v. Pasquay, 235 Ill. 48, 85 N. E. 316; Timmonds v. Taylor, 48 Ind. App. 531, 96 N. E. 331; Halligan v. Frey, 161 Iowa, 185, 49 L. R. A. (N. S.) 112, 141 N. W. 944 (oral lease); Caplan v. Buckner, 123 Md. 590, 91 Atl. 481; Ayres v. Short, 142 Mich. 501, 105 N. W. 1115; Lambert v. St. Louis & G. R'y Co., 212 Mo. 692, 111 S. W. 550; Morrison v. Gosnell, 76 Neb. 539, 107 N. W. 753; Collins v. Leary (N. J. Eq.), 74 Atl. 42; Brown v. Pinniger, 81 N. J. Eq. 229, 86 Atl. 541; Krah v. Wassmer, 75 N. J. Eq. 109, 71 Atl. 404; Starrett v. Boynton, 73 N. J. Eq. 669, 70 Atl. 183; Grant v. Ramsey, 7 Ohio St. 157; Jerman v. Misner, 56 Or. 390, 108 Pac. 179; Sprague v. Jessup, 48 Or. 211, 4 L. R. A. (N. S.) 410, 83 Pac. 145, 84 Pac. 802; Bryson v. McShane, 48 W. Va. 126, 49 L. R. A. 527, 35 S. E. 848. Payment may take the form of rendering of services: Brown v. Sutton, 129 U. S. 238, 32 L. Ed. 664, 9 Sup. Ct. 273; Blankenship v. Whaley, 124 Cal. 300, 57 Pac. 79; Vail v. Rynearson, 249 Ill. 501, 94 N. E. 942; Willis v. Zorger, 258 Ill. 574, 101 N. E. 963; Cutsinger v. Ballard, 115 Ind. 93, 17 N. E. 206; Soper v. Galloway, 129 Iowa, 145, 105 N. W. 399; Hurst v.

possession coupled with the making of valuable improvements is sufficient part performance.<sup>26</sup> It is to be noted

Jenkins, 161 Iowa, 414, 143 N. W. 401; Woodbury v. Gardner, 77 Me. 68; Ayres v. Short, 142 Mich. 501, 105 N. W. 1115; Winfield v. Bowen, 65 N. J. Eq. 636, 56 Atl. 728; Fishburne v. Ferguson, 85 Va. 321, 7 S. E. 361. The text is cited in Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638 (affirmed, Tex. Sup. Ct.). 26 In the following cases possession coupled with the making of improvements was held sufficient: Moulton v. Harris, 94 Cal. 420, 29 Pac. 706; Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537; Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805; Pugh v. Spicknall, 43 Or. 489, 73 Pac. 1020, 74 Pac. 485; Piatt v. Seif, 207 Pa. St. 614, 57 Atl. 68; Peery v. Elliott, 100 Va. 264, 40 S. E. 919. See, also, for statements of the rule, Bartlett v. Bartlett, 103 Mich. 293, 61 N. W. 500; Cooper v. Thomason, 30 Or. 161, 45 Pac. 296; McKay v. Calderwood, 37 Wash. 194, 79 Pac. 629. The following cases are chiefly recent: Norris v. Jackson, 3 Giff. 396; Moore v. Gordon, 44 Ark. 334; Williams v. Neighbors, 107 Ark. 473, 155 S. W. 917; Adcock v. Lieber, 51 Colo. 373, 117 Pac. 993 (oral lease); White v. Mitchell, 69 Ga. 759; Fleming v. Baker, 12 Idaho, 346, 85 Pac. 1092; Starkey v. Starkey, 136 Ind. 349, 36 N. E. 287; Boeck v. Milke, 141 Iowa, 713, 118 N. W. 874, 120 N. W. 120; Burnell v. Bradbury, 67 Kan. 782, 74 Pac. 279; Abrams v. Abrams, 74 Kan. 888, 88 Pac. 70; Baldridge v. Centgraf, 82 Kan. 240, 108 Pac. 83 (reasons for rule stated); Harrell v. Sonnabend, 191 Mass. 310, 77 N. E. 764 (oral lease); Charlet v. Teakle, 197 Mich. 426, 163 N. W. 923 (oral lease); Atkinson v. Akin, 197 Mich. 289, 163 N. W. 1024; Lewis v. Patton, 42 Mont. 528, 113 Pac. 745 (right of way); Wright v. Brooks, 47 Mont. 99, 130 Pac. 968; McFadden v. Allen, 134 N. Y. 489, 19 L. R. A. 446, 32 N. E. 21; Ready v. Schmith, 52 Or. 196, 95 Pac. 817; Dwight v. Giebisch, 77 Or. 254, 150 Pac. 749; Goff v. Kelsey, 78 Or. 337, 153 Pac. 103; Parry v. Miller, 247 Pa. 45, 93 Atl. 30; Wright v. Isaacks (Tex. Civ. App.), 95 S. W. 55; Dixon v. McNeese (Tex. Civ. App.), 152 S. W. 675; Gove v. Gove's Adm'r (Armstrong), 88 Vt. 115, 92 Atl. 10; Tidewater R'y Co. v. Hurt, 109 Va. 204, 63 S. E. 421; East v. Atkinson, 117 Va. 490, 85 S. E. 468; Kennedy v. Anderson, 49 Wash. 14, 94 Pac. 661; Bendon v. Parfit, 74 Wash. 645, 134 Pac. 185.

For an instance where improvements without possession constituted a sufficient part performance, see Henrikson v. Henrikson, 143 Wis. 314, 33 L. R. A. (N. S.) 534, 127 N. W. 962 (one remainderman builds home for life tenant on the land in pursuance of the

that in a considerable group of states neither payment nor the making of improvements in addition is neces-

contract of the other remainder-man to convey the latter's interest). As to the nature of the improvements, see Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297, where the court, per Snyder, J., said: "But the improvements relied upon must be of a character permanently beneficial to the land, and involving a sacrifice to the purchaser who made them. Although the improvements are required to be beneficial to the land, a court of equity will not inquire whether the improvements have been judiciously or injudiciously made, or whether the money has been well or ill laid out. It must appear, however, that the loss of his improvements would be a sacrifice to the purchaser. If, therefore, he had gained more by the possession and use of the land than he had lost by his improvements, or if he has been in fact fully compensated for the improvements, they will not be available to him as a ground for specific execution." See, further, as to the nature of the improvements, when relied upon as an act of part performance: Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133 (must be referable to the contract); Ranson v. Ranson, 233 Ill. 369, 84 N. E. 210 (must be referable to the contract); Wood v. Thornly, 58 Ill. 464 (improvements made after defendant's repudiation of the contract, insufficient); Low v. Low, 173 Mass. 580, 54 N. E. 257 (improvements exceeding value of the land); Boulder Valley Ditch Min. etc. Co. v. Farnham, 12 Mont. 1, 29 Pac. 277 (improvements made after defendant's repudiation of the contract, insufficient); Miller v. Ball, 64 N. Y. 286 (what are sufficient improvements on wild land); Cobb v. Johnson, 101 Tex. 440, 108 S. W. 811, reversing (Tex. Civ. App.), 105 S. W. 847 (trifling value); Babcock v. Lewis, 52 Tex. Civ. App. 8, 113 S. W. 584 (sufficient, though not equaling value of land); Plunkett v. Bryant, 101 Va. 814, 45 S. E. 742 (improvements do not point to an agreement such as is alleged); Hoover v. Baugh, 108 Va. 695, 128 Am. St. Rep. 985, 62 S. E. 968 (improvements on vendee's adjoining land, not an act of part performance); Moore v. Moore, 72 W. Va. 260, 78 S. E. 99.

Where the contract cannot be specifically enforced, compensation may be made for improvements, deducting rents and profits: Schneider v. Reed, 123 Wis. 488, 101 N. W. 682.

Possession coupled with both the making of improvements and the payment of part of the purchase price is, of course, sufficient: Day v. Cohn, 65 Cal. 508, 4 Pac. 511; Cutsinger v. Ballard, 115 Ind. 93, 17 N. E. 206; Miller v. Ball, 64 N. Y. 286; Bowman v. Wolford, 80 Va. 213; Borrow v. Borrow, 34 Wash. 684, 76 Pac. 305; Ratliff v.

sarily sufficient, for even in such cases there may be no irrevocable change of position.<sup>27</sup>

§ 2244. (§ 822.) Suit by Vendor.—The doctrine of part performance is applicable not only to suits by a

Sommers, 55 W. Va. 30, 1 Ann. Cas. 970, 46 S. E. 712; Butler v. Thompson, 45 W. Va. 660, 72 Am. St. Rep. 838, 31 S. E. 960. Other cases, chiefly recent, are: Union Pac. R. Co. v. McAlpine, 129 U. S. 305, 32 L. Ed. 673, 9 Sup. Ct. 286; Lee v. Foushee, 91 Ark. 468, 120 S. W. 160; Phillips v. Grubbs, 112 Ark. 562, 167 S. W. 101 (oral lease); Taylor v. Mathews, 53 Fla. 776, 44 South. 146; Harlan v. Harlan, 273 Ill. 155, 112 N. E. 452 (possession, improvements and services); Corbly v. Corbly, 280 Ill. 278, 117 N. E. 393; Baker v. Allison, 186 Ill. 613, 58 N. E. 233; McDowell v. Lucas, 97 Ill. 489; De Wolf v. Pratt, 42 Ill. 198; O'Brien v. Knotts, 165 Ind. 308, 75 N. E. 594; Bastian v. Crawford, 180 Ind. 697, 103 N. E. 792; Puterbaugh v. Puterbaugh, 131 Ind. 288, 15 L. R. A. 341, 30 N. E. 519; Swales v. Jackson, 126 Ind. 282, 26 N. E. 62; Taylor v. Taylor, 79 Kan. 161, 99 Pac. 814; Stewart v. Gilbert, 115 Me. 262, 98 Atl. 752; Low v. Low, 173 Mass. 580, 54 N. E. 257; Beemer v. Hughes, 179 Mich. 110, 146 N. W. 198; Friend v. Smith, 191 Mich. 99, 157 N. W. 347 (payment in services); Veum v. Sheeran, 95 Minn. 315, 104 N. W. 135; Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754; Johnson v. Hurley, 115 Mo. 513, 22 S. W. 492; Stevens v. Trafton, 36 Mont. 520, 93 Pac. 810; Milwankee Land Co. v. Ruesink, 50 Mont. 489, 148 Pac. 396; Dutertre v. Shallenberger, 21 Nev. 507, 34 Pac. 449; Stillings v. Stillings, 67 N. H. 584, 42 Atl. 271; D'Elissa v. " D'Amato, 85 N. J. Eg. 466, 97 Atl. 41; Winchell v. Winchell, 100 N. Y. 159, 2 N. E. 897; Sutherland v. Taintor, 17 Okl. 427, 87 Pac. 900; Zeuske v. Zeuske, 62 Or. 46, 124 Pac. 203; Cantwell v. Barker, 62 Or. 12, 124 Pac. 264; Anderson v. Brinser (Brinser v. Anderson), 129 Pa. St. 376, 6 L. R. A. 205, 11 Atl. 809, 18 Atl. 520; Martin v. Patterson, 27 S. C. 621, 2 S. E. 859; Stenson v. Elfmann, 26 S. D. 134, 128 N. W. 588; Hickman v. Withers, 83 Tex. 575, 19 S. W. 138; Babcock v. Lewis, 52 Tex. Civ. App. 8, 113 S. W. 584; Houston Oil Co. of Texas v. Payne (Tex. Civ. App.), 164 S. W. 886; Edwards v. Old Settlers' Ass'n (Tex. Civ. App.), 166 S. W. 423; Morgan v. Morgan, 54 Wash. 406, 103 Pac. 478; Matzger v. Arcade Building & Realty Co., 80 Wash. 401, L. R. A. 1915A, 288, 141 Pac. 900; Worden v. Worden, 96 Wash. 592, 165 Pac. 501 (services); Preston v. West, 69 W. Va. 24, 70 S. E. 853.

27 See cases cited under § 823.

vendee, but has been applied to suits by a vendor as well. We have seen that a vendor is entitled to specific performance in many instances where his only claim is for money—the purchase price. It has been said that delivery of possession by the vendor and acceptance thereof by the vendee will be sufficient part performance to entitle a vendor to sue;<sup>28</sup> and the case is still clearer when possession is accompanied by other acts.<sup>29</sup>

§ 2245. (§ 823.) Modifications and Rejection of the Doctrine.—The rule that delivery and acceptance of possession alone are sufficient to take a case out of the statute is rejected in certain states. In Massachusetts and Texas, fraud is the rationale of the remedy; and consequently it is held that the acts must be such that adequate compensation cannot be made except by a conveyance, so that it would be fraudulent for the vendor to refuse to execute a deed.<sup>30</sup> It is clear that mere posses-

- 28 "Possession . . . is an act of part performance as to both parties to the agreement, in that the owner has allowed the other party to do an act on the faith of the contract, namely, to take and hold possession of the land, which would otherwise be wrongful, and would render him a trespasser, and he, on his part, has withdrawn from the land, and acquiesced in the possession of the other party as rightful": Cutler v. Babcock, 81 Wis. 195, 29 Am. St. Rep. 882, 51 N. W. 420. See, also, Bowers v. Cator, 4 Ves. Jr. 91; Stewart v. Smith, 6 Cal. App. 152, 91 Pac. 667; Witt v. Boothe, 98 Kan. 554, 158 Pac. 851; Wharton v. Stoutenburgh, 35 N. J. Eq. 266. Contra, Bennett v. Dyer, 89 Me. 17, 35 Atl. 1004.
- 29 Possession and payment: Tatum v. Brooker, 51 Mo. 148. Possession and improvements: Cooper v. Thomason, 30 Or. 161, 45 Pac. 296. Possession by vendee, with alterations in premises made by vendor: Andrew v. Babcock, 63 Conn. 109, 26 Atl. 715. In Cooper v. Thomason, 30 Or. 161, 45 Pac. 296, relief was given on the ground that the remedy must be mutual.
- 30 Burns v. Daggett, 141 Mass. 368, 6 N. E. 727; Low v. Low, 173 Mass. 580, 54 N. E. 257 (relief granted); Harrell v. Sonnabend, 191 Mass. 310, 77 N. E. 764 (sufficient part performance); Williams v. Carty, 205 Mass. 396, 91 N. E. 392; Traveler Shoe Co. v. Koch,

sion does not answer this requirement; and even possession coupled with payment or the making of improvements does not necessarily suffice. In Illinois, and now as a result of statute in Alabama, relief will not be given unless possession is coupled with payment of the whole or a portion of the purchase price.<sup>31</sup> In Kentucky,

216 Mass. 412, 103 N. E. 931 (agreement to lease); Bradley v. Owsley, 74 Tex. 69, 11 S. W. 1052; Weatherford, M. W. & N. W. R'y Co. v. Wood, 88 Tex. 191, 28 L. R. A. 526, 30 S. W. 859 (dictum); Cobb v. Johnson, 101 Tex. 440, 108 S. W. 811; Ryan v. Lofton (Tex. Civ. App.), 190 S. W. 752; Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638 (citing the text; an instructive case, affirmed by Tex. Sup. Ct.). This is probably the rule in Washington, also: Johnson v. Upper, 38 Wash. 693, 80 Pac. 801. In West v. Webster, 39 Tex. Civ. 272, 87 S. W. 196, it is said that "possession and the making of permanent and valuable improvements are required." The varying course of the decisions in Pennsylvania is illustrated by the following cases: Pugh v. Good, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534 (possession, alone, sufficient); Poorman v. Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524 (additional acts required). The more recent rule in that state is that the evidence "must show performance or part-performance by the vendee which could not be compensated in damages, and such as would make rescission inequitable and unjust": Hart v. Carroll, 85 Pa. St. 508 (improvements must exceed the value of the rents and profits); Sample v. Horlacher, 177 Pa. St. 247, 35 Atl. 615; Piatt v. Seif, 207 Pa. St. 614, 57 Atl. 68. But that full payment with possession is sufficient, see Graft v. Loucks, 138 Pa. St. 453, 21 Atl. 203.

31 It is held in Illinois that a case may be taken out of the statute "by a payment of the purchase money, being let into possession, and the making of lasting and valuable improvements. . . While the cases may not all go to the length of requiring all of these acts to constitute such a part performance of the contract as to require a decree for the specific execution of the contract, still we are aware of no well-considered case which has dispensed with the payment of the purchase money": Holmes v. Holmes, 44 Ill. 168. See, also, Ferbrache v. Ferbrache, 110 Ill. 210; Pond v. Sheean, 132 Ill. 312, 8 L. R. A. 414, 23 N. E. 1018; Wright v. Raftree, 181 Ill. 464, 54 N. E. 998. As to the statutory rule in Alabama, see Nelson v. Shelby Mfg. & Imp. Co., 96 Ala. 515, 38 Am. St. Rep. 116, 11 South.

Mississippi, North Carolina, and Tennessee, the whole doctrine of part performance has been rejected;<sup>32</sup> but in several of these states, in order to prevent too great an injustice, a party who goes into possession and makes improvements upon faith of an oral contract is allowed a lien for the value of such improvements.<sup>33</sup>

§ 2246. (§ 824.) Payment not Sufficient.—It is the generally accepted doctrine that payment of the whole or a part of the purchase price is not sufficient in itself to take a case out of the operation of the statute of frauds.<sup>34</sup> Several reasons are given by the courts for

695; City Loan & Banking Co. v. Poole, 149 Ala. 164, 43 South. 13; Bentley v. Barnes, 162 Ala. 524, 50 South. 361.

There is a dictum in New York to the effect that mere possession, without any other circumstance of hardship or fraud, is not sufficient: Miller v. Ball, 64 N. Y. 286. For a dictum to the effect that possession alone is sufficient, see Harris v. Knickerbacker, 5 Wend. 638. It is believed that in all cases in which relief has been granted in this state, additional facts have been present.

32 Bullitt v. Eastern Kentucky Land Co., 99 Ky. 324, 36 S. W. 16; Doty's Adm'rs v. Doty's Guardian, 26 Ky. Law Rep. 63, 80 S. W. 803; McGuire v. Stevens, 42 Miss. 724, 2 Am. Rep. 649; Washington v. Soria, 73 Miss. 665, 55 Am. St. Rep. 555, 19 South. 485; Albea v. Griffin, 2 Dev. & B. Eq. 9; Barnes v. Teague, 1 Jones Eq. 277, 62 Am. Dec. 200; Gulley v. Macy, 84 N. C. 434; Patton v. McClure, Mart. & Y. 333; Goodloe v. Goodloe, 116 Tenn. 252, 8 Ann. Cas. 112, 6 L. R. A. (N. S.) 703, 92 S. W. 767.

33 Bullitt v. Eastern Kentucky Land Co., 99 Ky. 324, 36 S. W. 16; Turner v. Browning's Adm'r, 128 Ky. 79, 107 S. W. 318; Rhinehart v. Kelley, 145 Ky. 470, 140 S. W. 653; Grace v. Gholson, 159 Ky. 359, 167 S. W. 420; Albea v. Griffin, 2 Dev. & B. Eq. 9; Luton v. Badham, 127 N. C. 96, 80 Am. St. Rep. 783, 53 L. R. A. 337, 37 S. E. 143; Ballard v. Boyette, 171 N. C. 24, 86 S. E. 175. In Ridley v. McNairy, 2 Humph. 174, it is held that the owner can set off the value of the rents and profits against the claim for improvements.

34 The text is cited in Swearengin v. Stafford (Mo.), 188 S. W. 97 (payment and continuance of possession). See Clinan v. Cooke, 1 Schoales & L. 22; Maddison v. Alderson, L. R. 8 App. Cas. 467; Lord Pengall v. Ross, 2 Eq. Abr. 46; Townsend v. Vanderwerker,

this rule. In the first place, it is said that only evidence which a party might use in defense to an action of trespass is admissible to show part performance, and that payment does not come within this principle. In the second place, it is said that in another clause of the statute, with respect to goods, it is provided that payment shall operate to take the case out of the statute; "and the courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, t'ey meant that it should not bind in the case of lands." Again, "payment of money is not part performance, for it may be repaid; and then the parties will be just as they were

160 U. S. 171, 40 L. Ed. 383, 16 Sup. Ct. 258; Duff v. Hopkins, 33 Fed. 599, 607 (because it admits of direct compensation); Thompson v. New South Coal Co., 135 Ala. 630, 93 Am. St. Rep. 49, 34 South. 31; Forrester v. Flores, 64 Cal. 24, 28 Pac. 107; Neal v. Gregory, 19 Fla. 356; Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061; Riley v. Haworth, 30 Ind. App. 377, 64 N. E. 928; Guthrie v. Anderson, 47 Kan. 383, 28 Pac. 164; Ross v. Cook, 71 Kan. 117, 80 Pac. 38; Washington Brewery Co. v. Carry (Md.), 24 Atl. 151; Boulder Val. Ditch Min. & M. Co. v. Farnham, 12 Mont. 1, 29 Pac. 277; Peters v. Dickinson, 67 N. H. 389, 32 Atl. 154; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Charlton v. Columbia R. E. Co., 64 N. J. Eq. 631, 54 Atl. 444; Russell v. Briggs, 165 N. Y. 500, 53 L. R. A. 556, 59 N. E. 303; Miller v. Ball, 64 N. Y. 286; Cooper v. Thomason, 30 Or. 161, 45 Pac. 296; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297; Harney v. Burhans, 91 Wis. 348, 64 N. W. 1031. Recent cases are: Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981; Davis v. Judson, 159 Cal. 121, 113 Pac. 147; Cordano v. Ferretti, 15 Cal. App. 670, 115 Pac. 657; Hines v. Copeland, 23 Cal. App. 36, 136 Pac. 728; Woerner v. Woerner, 171 Cal. 298, 152 Pac. 919; Hall v. Edwards, 140 Ga. 765, 79 S. E. 852; Kelly v. Fischer, 263 Ill. 184, 105 N. E. 21; Baxter v. Baxter, 46 Ind. App. 514, 92 N. E. 881, 1039; Baldwin v. Baldwin, 73 Kan. 39, 4 L. R. A. (N. S.) 957, 84 Pac. 568; Baldridge v. Centgraf, 82 Kan. 240, 108 Pac. 83; Titus v. Taylor (N. J. Eq.), 65 Atl. 1003; Clegg v. Brannan (Tex. Civ. App.), 190 S. W. 812; Cooley v. Hatch, 91 Vt. 128, 99 Atl. 784; Thill v. Johnbefore, especially if repaid with interest." Insolvency of the vendor and his consequent inability to respond in damages do not alter the rule; and it is immaterial

ston, 60 Wash. 393, 111 Pac. 225; Trimble v. Donahey, 96 Wash. 677, 165 Pac. 1051. The same rule applies where payment is in the form of rendering ordinary services: Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120; Renz v. Drury, 57 Kan. 84, 45 Pac. 71; Stellmacher v. Bruder, 89 Minn. 507, 99 Am. St. Rep. 609, 95 N. W. 324 (board and nursing); Muir v. Bartlett (N. H.) 99 Atl. 553; Cooper v. Colson, 66 N. J. Eq. 328, 105 Am. St. Rep. 660, 1 Ann. Cas. 997, 58 Atl. 337; Van Horn v. Demarest, 76 N. J. Eq. 386, 77 N. J. Eq. 264, 77 Atl. 354; Russell v. Briggs, 165 N. Y. 500, 53 L. R. A. 556, 59 N. E. 303 (broker); Farrin v. Matthews, 62 Or. 517, 41 L. R. A. (N. S.) 184, 124 Pac. 675 (legal services); Roadman v. Harding, 63 Or. 122, 126 Pac. 993; Henderson v. Davis (Tex. Civ. App.), 191 S. W. 358; Reel v. Reel, 59 W. Va. 106, 52 S. E. 1023. Possession taken as part payment, however, may be sufficient: Puterbaugh v. Puterbaugh, 131 Ind. 289, 15 L. R. A. 341, 30 N. E. 519. Early English cases contra, have been overruled. Such are Owen v. Davies, 1 Ves. Sr. 82, 83; Main v. Melbourne, 4 Ves. 720 (payment of substantial part of consideration will take case out of statute, but payment of small part will not). In Delaware, it is said that since the statute in that state makes no exception in regard to part payment for goods, one strong reason for the rule fails. Accordingly, it is held that "wherever non-performance on the part of the vendor after receiving the purchase-money, or a part thereof, would put the party into a situation that it is a fraud upon him, unless the agreement is performed, the court upon the principle of preventing fraud should decree a specific performance": Houston v. Townsend, 1 Del. Ch. 416, 12 Am. Dec. 109; and see Matthes v. Wier (Del. Ch.), 84 Atl. 878. In Iowa, payment is sufficient part performance by virtue of statute: Pressley v. Roe, 83 Iowa, 545, 50 N. W. 44; Daily v. Minnick, 117 Iowa, 563, 60 L. R. A. 840, 91 N. W. 913. See, also, Powers v. Crandall, 136 Iowa, 659, 111 N. W. 1010 (services); Cook v. Ely (Iowa), 116 N. W. 129 (services); Chantland v. Sherman, 148 Iowa, 352, 125 N. W. 871 (conveyance).

35 These three reasons are well stated in Clinan v. Cooke, 1 Schooles & L. 22. See, also, ante, § 817.

36 Townsend v. Fenton, 32 Minn. 482, 21 N. W. 726; McKee v. Phillips, 9 Watts, 85; Bradley v. Owsley (Tex.), 19 S. W. 340 ("The insolvency of the vendor or of his estate is but an unfor-

whether such insolvency existed at the date of the contract, or occurred subsequently.<sup>37</sup>

§ 2247. (§ 825.) Conveyance by Plaintiff not Sufficient—Exchange of Lands.—A conveyance by a plaintiff in pursuance of an agreement for an exchange of lands is not sufficient part performance to warrant the court in granting equitable relief.<sup>38</sup> While such a conveyance is referable to a contract, it is not necessarily referable to a contract for the land sought to be recovered. Part performance which takes a case out of the operation of the statute must be done or allowed by the party sought to be charged. Where, however, there is in addition an act of part performance upon the part of the defendant, as by taking possession of the property conveyed, the plaintiff may have specific performance. This rests upon the same principle as that which authorizes such relief in favor of a vendor.<sup>39</sup> Where the plaintiff has

tunate condition; not a fraud upon the vendee, although it may affect him detrimentally").

- 37 Townsend v. Fenton, 32 Minn. 482, 21 N. W. 726.
- 38 Smith v. Hatch, 46 N. H. 146 (dictum). See, also, Peabody v. Fellows, 177 Mass. 290, 58 N. E. 1019; Worth v. Patton, 5 Ind. App. 272, 31 N. E. 1130; Clegg v. Brannan (Tex. Civ. App.), 190 S. W. 812. See, however, dictum in Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159.
- 39 See Baldwin v. Sherwood, 117 Ga. 827, 45 S. E. 216; Stewart v. Smith, 6 Cal. App. 152, 91 Pac. 667; Roberge v. Winne; 144 N. Y. 709, 39 N. E. 631; Kittredge v. Kittredge, 79 Vt. 337, 65 Atl. 89. Where the plaintiff, on a contract of exchange, makes conveyance and takes possession of the land which he was to receive; Baker v. Allison, 186 Ill. 613, 58 N. E. 233; Bigelow v. Armes, 108 U. S. 10, 27 L. Ed. 631, 1 Sup. Ct. 83; Union Pac. R. Co. v. McAlpine, 129 U. S. 305, 32 L. Ed. 673, 9 Sup. Ct. 286; or, without conveyance, takes possession of such land and makes valuable improvements; Evins v. Sandefur Julian Co., 81 Ark. 70, 98 S. W. 677; his acts entitle him to specific performance in the character of vendee, under the usual rules. Both parties taking possession: See School District v. Holt, 226 Mo. 406, 136 Am. St. Rep. 651, 126 S. W. 462.

made a conveyance he is not remediless, for he may maintain an action at law for the value of the property.<sup>40</sup>

§ 2248. (§ 826.) Whether Personal Services are a Sufficient Act of Part Performance.<sup>41</sup>—Where the consideration is paid, not in the form of money, but in the form of personal services of a character such that they do not readily admit of a pecuniary estimate or recompense, shall this be considered an act of part performance? On this question the American jurisdictions were very evenly divided; the answer depending on the theory which is adopted as the basis of the whole doctrine. On the first theory stated in a former paragraph, payment in services no more points to a contract concerning specific land than does payment in money; in fact, in the ordinary case,—domestic services by a relative or by an adopted child,—the fact of the services rendered gives rise to no inference of any contract whatever.<sup>42</sup> On the

<sup>&</sup>lt;sup>40</sup> Worth v. Patton, 5 Ind. App. 272, 31 N. E. 1130; Peabody v. Fellows, 177 Mass. 290, 58 N. E. 1019; Root v. Burt, 118 Mass. 521; Henning v. Miller, 83 Hun, 403, 31 N. Y. Supp. 878.

 $<sup>^{41}</sup>$  This paragraph is quoted in full in Fred v. Asbury, 105 Ark. 494, 152 S. W. 155.

<sup>42</sup> Maddison v. Alderson, L. R. 8 App. Cas. (H. of L.) 467; Grant v. Grant, 63 Conn. 530, 38 Am. St. Rep. 379, 29 Atl. 15 (practically an oral agreement to adopt plaintiff); Pond v. Sheean, 132 Ill. 312, 8 L. R. A. 414, 23 N. E. 1018 (adoption of child); Dicken v. McKinley, 163 III. 318, 54 Am. St. Rep 471, 45 N. E. 134 (adoption); Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666 (adoption); Austin v. Davis, 128 Ind. 472, 475, 25 Am. St. Rep. 456, 12 L. R. A. 120, 26 N. E. 890 (adoption); Renz v. Drury, 57 Kan. 84, 45 Pac. 71 (adoption; value of services may be recovered on a quantum meruit); Baldwin v. Squier, 31 Kan. 283, 1 Pac. 591 (same); Ham v. Goodrich, 33 N. H. 32; Devinney v. Corey, 52 Hun, 612, 5 N. Y. Supp. 289, affirmed 127 N. Y. 655, 28 N. E. 254; Shahan v. Swan, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222 (adoption; but court intimates that there may be part performance by services in exceptional cases); Ellis v. Cary, 74 Wis. 176, 17 Am. St. Rep. 125, 4 L. R. A. 55, 42 N. W. 252. See, supra, § 817.

other hand, if equitable fraud be taken as the basis of the doctrine, and the impossibility of restoring the complainant to the situation in which he was before the contract was made, the rendering of services, for a long term of years, the value of which cannot be estimated by any pecuniary standard, must be considered an act of part performance of the highest character; the fraud upon the complainant is often greater than that resulting from either the taking of possession or the making of improvements.<sup>43</sup> This is the conclusion now reached in nearly

43 Hinkle v. Hinkle, 55 Ark. 583, 18 S. W. 1049 (care of parent); Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710 (specific performance refused, since it would be hardship on promisor's wife, who married him in ignorance of the agreement); McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008 (citing many cases); Taft v. Taft, 73 Mich. 502, 41 N. W. 481 (work and labor for plaintiff's father); Wright v. Wright, 99 Mich. 170, 23 L. R. A. 196, 58 N. W. 54 (agreement to devise the property implied from adoption proceedings taken under an unconstitutional statute); Svanburg v. Fosseen, 75 Minn. 350, 74 Am. St. Rep. 490, 43 L. R. A. 427, 78 N. W. 4; Sharkey v. McDermott, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107 (adoption agreement); Hall v. Harris, 145 Mo. 614, 47 S. W. 506 (care of aged parent); Kofka v. Rosicky, 41 Neb. 328, 43 Am. St. Rep. 685, 25 L. R. A. 207, 69 N. W. 788 (adoption agreement); Best v. Gralapp, 69 Neb. 811, 5 Ann. Cas. 491, 96 N. W. 641, 99 N. W. 837; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773, and note; Van Duyne v. Vreeland, 12 N. J. Eq. 142 (adoption contract); Vreeland v. Vreeland, 53 N. J. Eq. 387, 32 Atl. 3 (citing many New Jersey cases; care of aged parent); Rhodes v. Rhodes, 3 Sand. Ch. (N. Y.) 279; Quinn v. Quinn, 5 S. D. 328, 49 Am. St. Rep. 875, 58 N. W. 808; Lothrop v. Marble, 12 S. D. 511, 76 Am. St. Rep. 626, 81 N. W. 885 (services consisted merely in nursing a repulsive invalid for a few days); Brinton v. Van Cott, 8 Utah, 480, 33 Pac. 218 (care of aged woman by young girl); Bryson v. McShane, 48 W. Va. 126, 49 L. R. A. 527, 35 S. E. 848 (dictum; plaintiffs also received possession of part of the land).

The recent cases are very numerous. See, in general, Sears v. Redick, 211 Fed. 856, 128 C. C. A. 234; Naylor v. Shelton, 102 Ark. 30, Ann. Cas. 1914A, 394, 143 S. W. 117; Fred v. Asbury, 105 Ark. 494, 152 S. W. 155; Barry v. Beamer, 8 Cal. App. 200, 96 Pac. 373;

all the states. The promise, in these cases, has nearly always been to make a will devising lands to plaintiff; the services rendered, the care of an aged or invalid relative, often coupled with an abandonment of the plaintiff's previous home or occupation; or, in a large group

Cordano v. Ferretti, 15 Cal. App. 670, 115 Pac. 657 (a daughter's nursing of her mother is a service that admits of pecuniary compensation, and is not within the rule); Parsons v. Cashman, 23 Cal. App. 298, 137 Pac. 1109 (specific performance refused where value of plaintiff's services not in excess of the benefits received by living with the deceased); Gordon v. Spellman, 145 Ga. 682, Ann. Cas. 1918A, 852, 89 S. E. 749; Anderson v. Manners, 243 Ill. 405, 90 N. E. 728; Dalby v. Maxfield, 244 Ill. 214, 135 Am. St. Rep. 312, 91 N. E. 420; Gladville v. McDole, 247 Ill. 34, 93 N. E. 86; Simmons v. Ross, 270 Ill. 372, Ann. Cas. 1916E, 1256, 110 N. E. 507; Bichel v. Oliver, 77 Kan. 696, 95 Pac. 396; Schoonover v. Schoonover, 86 Kan. 487, 38 L. R. A. (N. S.) 752, 121 Pac. 485; Smith v. Cameron, 92 Kan. 652, 52 L. R. A. (N. S.) 1057, 141 Pac. 596; Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812; McQuitty v. Wilbite, 247 Mo. 163, 152 S. W. 598; Merrill v. Thompson, 252 Mo. 714, 161 S. W. 674; O'Connor v. Waters, 88 Neb. 224, 129 N. W. 261; Johnson v. Riseberg, 90 Neb. 217, 133 N. W. 183; Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792; Rine v. Rine, 100 Neb. 225, 158 N. W. 941; Clow v. West, 37 Nev. 267, 142 Pac. 226; Torgerson v. Hauge, 34 N. D. 646, 159 N. W. 6; Kelley v. Devin, 65 Or. 211, 132 Pac. 535; Reed v. Reed, 108 Va. 790, 62 S. E. 792; Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465.

Recent cases of informal adoption of minor children: Hood v. McGehee, 189 Fed. 205 (dictum); Prince v. Prince, 194 Ala. 455, 69 South. 906; Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728; Oles v. Wilson, 57 Colo. 246, 141 Pac. 489; Crawford v. Wilson, 139 Ga. 654, 44 L. R. A. (N. S.) 773, 78 S. E. 30; Lansdell v. Lansdell, 144 Ga. 571, 87 S. E. 782; Stiles v. Breed, 151 Iowa, 86, 130 N. W. 376; Anderson v. Blakesly, 155 Iowa, 430, 136 N. W. 210; Webb v. McIntosh, 178 Iowa, 156, 159 N. W. 637; Anderson v. Anderson, 75 Kan. 117, 9 L. R. A. (N. S.) 229, 88 Pac. 743; Bichel v. Oliver, 77 Kan. 696, 95 Pac. 396; Cathcart v. Myers, 97 Kan. 727, 156 Pac. 751; Clayton v. Supreme Conclave, Improved Order of Heptasophs, 130 Ind. 31, 99 Atl. 949; Odenbreit v. Utheim, 131 Minn. 56, L. R. A. 1916D, 421, 154 N. W. 741; Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522; Horton v. Troll, 183 Mo. App. 677, 167 S. W. 1081;

of cases, the entire change of situation resulting from a virtual adoption of the plaintiff, when a minor, into the promisor's family, and the discharge of the domestic duties and obligations of affection flowing from such relation.

Buck v. Meyer, 195 Mo. App. 287, 190 S. W. 997; Peterson v. Bauer, 83 Neb. 405, 119 N. W. 764; Moline v. Carlson, 92 Neb. 419, 138 N. W. 721; Hannemann v. Ott, 98 Neb. 492, 153 N. W. 506; Thompson v. Waits (Tex. Civ. App.), 159 S. W. 82; Bridgewater v. Hooks (Tex. Civ. App.), 159 S. W. 1004; Cubit v. Jackson (Tex. Civ. App.), 194 S. W. 594. In Illinois, while the general rule of the text is now recognized, an exception is made of an oral contract whereby a minor child is adopted, on the ground that the child is benefited by the support given to it by the foster parent: Snyder v. French, 272 Ill. 43, 111 N. E. 489, following Pond v. Sheean, 132 Ill. 312, 8 L. R. A. 414, 23 N. E. 1018. The court ignores the fact that consideration in such cases moves from the natural parents, consisting in their surrender of the child, a sacrifice which, clearly, cannot be estimated by a pecuniary standard.

While the rule is adopted in Minnesota, where the consideration is that the promisee shall "assume a peculiar and personal relation to the promisor, and render to him services of such a character that it is practically impossible to estimate their value by any pecuniary standard," where the services are of a more ordinary character, performance of them does not take the case out of the statute: Stellmacher v. Bruder, 89 Minn. 507, 99 Am. St. Rep. 609, 95 N. W. 324 (board, lodging, nursing, etc., furnished to promisor). the same effect, see Richardson v. Richardson, 114 Minn. 12, 130 N. W. 4; Muir v. Bartlett (N. H.), 99 Atl. 553. It must be admitted, however, that some courts appear to have lost sight of the foundation of the rule, and to accept as acts of part performance services which appear to be in no way extraordinary, and which, in their nature, readily admit of a pecuniary estimate: See e. q.. Gladville v. McDole, 247 Ill. 34, 93 N. E. 86 (recovery for services being barred by the statute of limitations); Simmons v. Ross, 270 III. 372. Ann. Cas. 1916E, 1256, 110 N. E. 507 (household services by daughter to father); Damkroeger v. James, 95 Neb. 784, 146 N. W. 936; Kelley v. Devin, 65 Or. 211, 132 Pac. 535.

"But a parol agreement of this character, because of the situation and relations of the parties to it and the consequent opportunity for the perpetration of fraud, is regarded with suspicion, § 2249. (§ 827.) Miscellaneous Acts of Part Performance.—While possession, and possession coupled with payment or the making of valuable improvements are the most frequent acts of part performance recognized as sufficient to warrant equitable relief, the courts have interfered in a few other instances. Thus, a dismissal of certain actions at law has been held sufficient, for the plaintiff could not be placed in statu quo.<sup>44</sup> A parol agreement between co-tenants not to partition land has been enforced when the parties, in reliance upon it, have made leases of the property.<sup>45</sup> A release of a dower and homestead right has been held sufficient to warrant the enforcement of a parol contract to convey other land in consideration t<sup>1</sup> ereof.<sup>46</sup> Other instances are stated in the note.<sup>47</sup>

and, when its enforcement is sought, is subjected to close scrutiny. It must not only be mutual, but also definite and certain, both in its terms and as to its subject-matter; and it must be clearly proved: Cooper v. Carlisle, 17 N. J. Eq. 529; Brown v. Brown, 33 N. J. Eq. 657. So, also, it must plainly appear that that which is alleged as part performance is referable to, and was consequent upon, the contract alone, for the purpose of carrying it into effect: Eyre v. Eyre, 19 N. J. Eq. 102; Pom. Spec. Perf., §§ 108, 109'': Vreeland v. Vreeland. supra.

- 44 Slingerland v. Slingerland, 39 Minn. 197, 39 N. W. 146.
- 45 Martin v. Martin, 170 III. 639, 62 Am. St. Rep. 411, 48 N. E. 924.
  - 46 Farwell v. Johnston, 34 Mich. 342.
- 47 Mere abstention from asserting a money demand against a mortgagee on foreclosure is not a part performance of the mortgagee's oral agreement to devise the property: Flood v. Templeton, 148 Cal. 374, 83 Pac. 148. Abandonment of an option, not sufficient: Henry Jenning & Son v. Miller, 48 Or. 201, 85 Pac. 517. Breaking off negotiations with a third party for purchase of land on defendant's promise to purchase and sell the land to plaintiff, insufficient: Lamas v. Bayly, 2 Vern. 627. Buying a building for the purpose of moving it on the land, insufficient: Poland v. O'Connor, 1 Neb. 50, 93 Am. Dec. 327. Conveyance by A to B in consideration of C's oral agreement to convey to A has been held sufficient: Johnson v.

Oral contracts for the conveyance of easements have been enforced when, in pursuance thereof, work has been done in opening windows as directed by defendant, and he has been given employment; 48 and where a railroad has constructed its tracks and located its depot at a certain point, in pursuance of a contract to convey a right of  $I_{way}$ . 49

Hubbell, 10 N. J. Eq. 332, 60 Am. Dec. 773. Contra, Whitchurch v. Bevis, 2 Bro. Ch. 559. Plaintiff's purchase of land in consideration of defendant's oral agreement to release a lien thereon entitled him to specific performance, in Malins v. Brown, 4 N. Y. 403; as did a release of a mortgage on one parcel on faith of an agreement to give a mortgage on another parcel, in Pipkin v. Bank of Miami (Tex. Civ. App.), 179 S. W. 914.

- 48 East India Co. v. Vincent, L. R. 35 Ch. D. 694.
- 49 Telford v. Chicago, P. & M. R. Co., 172 Ill. 559, 50 N. E. 105.

Parol licenses or parol grants of easements have been enforced in the following cases: James Jones & Sons, Ltd., v. Earl of Tankerville, [1909] 2 Ch. 440; Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190 (valuable improvements made; water right); Blankenship v. Whaley, 124 Cal. 300, 57 Pac. 79 (construction and use of watercourse); Churchill v. Russell, 148 Cal. 1, 82 Pac. 440 (water right); Francis v. Green, 7 Idaho, 668, 65 Pac. 362 (agreement to permit use of water); Howes v. Barmon, 11 Idaho, 64, 114 Am. St. Rep. 255, 69 L. R. A. 568, 81 Pac. 48 (not enforced, as nothing done by plaintiff in reliance on the contract); Joseph v. Wild, 146 Ind. 249, 45 N. E. 467 (erection and use of stairway); Munsch v. Stelter, 109 Minn. 403, 134 Am. St. Rep. 785, 25 L. R. A. (N. S.) 727, 124 N. W. 14; Lewis v. Patton, 42 Mont. 528, 113 Pac. 745; Gilmore v. Armstrong. 48 Neb. 92, 66 N. W. 998 (water right); Uncanoonuck Road Co. v. Orr, 67 N. H. 541, 41 Atl. 665 (valuable improvements made; right of way); Shaw v. Proffitt, 57 Or. 192, Ann. Cas. 1913A, 63, 109 Pac. 584, 110 Pac. 1092; Olmstead v. Abbott, 61 Vt. 281, 18 Atl. 315 (valuable improvements; license to flow defendant's land, construction of dam); Forde v. Libby, 22 Wyo. 464, 143 Pac. 1190.

Parol Partition.—Parol agreements for partition, when followed by acts of part performance, have frequently been enforced; the usual acts being the taking of possession of the parcels allotted in severalty: See Betts v. Ward, 196 Ala. 248, 72 South. 110; Ellis v. Campbell, 84 Ark. 584, 106 S. W. 939; Swift v. Swift, 121 Ark.

§ 2250. (§ 828.) Oral Promise to Give.—A parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promisor, has made comparatively large expenditures in permanent improvements upon the land.<sup>50</sup> The ground of the jurisdiction is that

197, 180 S. W. 742; Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. 255 (parol partition of water rights); Reed v. Mathewson, 146 Ga. 819, 92 S. E. 632; Duffy v. Duffy, 243 Ill. 476, 90 N. E. 697; Sires v. Melvin, 135 Iowa, 460, 113 N. W. 106; McMahan v. McMahan, 13 Pa. St. 376, 53 Am. Dec. 481; Kennemore v. Kennemore, 26 S. C. 251, 1 S. E. 881; Allen v. Allen (Utah), 166 Pac. 1169; Martin v. Clark, 76 W. Va. 115, 85 S. E. 62. So, also, of family compromises: See Riggles v. Erney, 154 U. S. 244, 38 L. Ed. 976, 14 Sup. Ct. 1083.

Mutual Wills.—A and B agree, orally, to make wills in each other's favor. A complies. This is not a sufficient part performance. A still controls his property, hence has not changed his position: Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573; Allen v. Bromberg, 163 Ala. 620, 50 South. 884; Burt v. McKibbin (Mo.), 188 S. W. 187; In re Edwall's Estate, 75 Wash. 391, 134 Pac. 1041; McClanahan v. McClanahan, 77 Wash. 138, Ann. Cas. 1915A, 461, 137 Pac. 479. Contra, where A has not revoked his will before B's death: Turnipseed v. Sirrine, 57 S. C. 559, 76 Am. St. Rep. 580, 35 S. E. 757; Brown v. Webster, 90 Neb. 591, 37 L. R. A. (N. S.) 1196, 134 N. W. 185. But if A fully performs and dies, B receiving the benefit of the will, the beneficiaries of B's will may enforce B's agreement. B's position resembles that of the defendant grantee on an oral contract for exchange of lands: Carmichael v. Carmichael, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173; Meador v. Manlove, 97 Kan. 706, 156 Pac. 731.

50 Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590; Dozier v. Matson, 94 Mo. 328, 4 Am. St. Rep. 388, 7 S. W. 268; Wylie v. Charlton, 43 Neb. 840, 62 N. W. 220; Seavey v. Drake, 62 N. H. 393; Tunison v. Bradford, 49 N. J. Eq. 210, 22 Atl. 1073; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Young v. Overbaugh, 145 N. Y. 158, 39 N. E. 712; Cauble v. Worsham, 96 Tex. 86, 97 Am. St. Rep. 871, 70 S. W. 737. Although the principle is stated in the above cases, in some of them there was a real consideration.

Recent cases in support of the text: Clinchfield Coal Corporation v. Steinman, 217 Fed. 875, 133 C. C. A. 585; Steinman v. Clinchfield

a failure to convey after the donee has made a change of position would amount to a fraud. Equity does not ordinarily interfere to enforce voluntary agreements; but in this case the courts have construed a consideration into the agreement. In the language of a leading case: "Anything that may be detrimental to the promisee or beneficial to the promisor in legal estimation will con-

Coal Corporation, 240 Fed. 561, 153 C. C. A. 365; Kinsell v. Thomas, 18 Cal. App. 683, 124 Pac. 220 (parol gift of homestead); Garbutt etc. v. Mayo, 128 Ga. 269, 13 L. R. A. (N. S.) 58, 57 S. E. 495; Hadden v. Thompson, 118 Ga. 207, 44 S. E. 1001; Sanford v. Davis, 181 Ill. 570, 54 N. E. 977; Clancy v. Flusky, 187 Ill. 605, 52 L. R. A. 277, 58 N. E. 594; Langston v. Bates, 84 Ill. 524, 25 Am. Rep. 466; Osterhaus v. Creviston, 62 Ind. App. 382, 111 N. E. 634; Swales v. Jackson, 126 Ind. 282, 26 N. E. 62; Bevington v. Bevington, 133 Iowa, 351, 12 Ann. Cas. 490, 9 L. R. A. (N. S.) 508, 110 N. W. 840; Kelly v. Kelly (Iowa), 130 N. W. 380; Pranger v. Pranger (Iowa), 164 N. W. 607; Bichel v. Oliver, 77 Kan. 696, 95 Pac. 396; Nelson v. Schoonover, 89 Kan. 388, 131 Pac. 147; Whitaker v. McDaniel, 113 Md. 388, 78 Atl. 1; Welch v. Whelpley, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744; Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125; Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031; Peterson v. Bauer, 83 Neb. 405, 119 N. W. 764; White v. Poole, 74 N. H. 71, 65 Atl. 255; Messiah Home for Children v. Rogers, 212 N. Y. 315, 106 N. E. 59; Tonseth v. Larsen, 69 Or. 387, 138 Pac. 1080; Stalker v. Stalker, 78 Or. 291, 153 Pac. 52; Hyde-Murphy Co. v. Boyer, 229 Pa. 7, 77 Atl. 1092; Greenwich Coal & Coke Co. v. Learn, 234 Pa. 180, 83 Atl. 74; Cook v. Cook, 24 S. D. 223, 123 N. W. 693; Combest v. Wall (Tex. Civ. App.), 102 S. W. 147, (Tex. Civ. App.), 115 S. W. 354; Wilkerson & Satterfield v. McMurry (Tex. Civ. App.), 167 S. W. 275; Karren v. Rainey, 30 Utah, 7, 83 Pac. 333; Gove v. Gove's Adm'r (Armstrong), 88 Vt. 115, 92 Atl. 10; Halsey v. Peters's Ex'r, 79 Va. 60; Coleman v. Larson, 49 Wash. 321, 95 Pac. 262; Crim v. England, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 310; White v. White, 64 W. Va. 30, 60 S. E. 885.

Substantial improvements placed upon the land by the donee are essential to raise an equity for specific performance in his favor: See the following recent cases, most of them discussing the character and extent of the improvements required to satisfy the rule: Logue v. Langan, 151 Fed. 455, 81 C. C. A. 271; Givens v. Hinton,

stitute a good consideration for a promise. Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party making the expenditure, constitute in equity a consideration for the promise."<sup>51</sup> Such a promise may be enforced against an executor or administrator, as well as against the original promisor.<sup>52</sup> Where the promise is to convey if the promisee will make

113 Ark. 599, 168 S. W. 1079; Kemp v. Hammock, 144 Ga. 717, 87 S. E. 1030 (must be made in lifetime of donor); Swan Oil Co. v. Linder, 123 Ga. 550, 51 S. E. 622 (must be on the property); Dunshee v. Dunshee, 255 Ill. 296, 99 N. E. 593 (improvements of no value); Albright v. Albright, 153 Iowa, 397, 133 N. W. 737 (moving of buildings, construction of roads, grubbing out stumps and trees, sufficient); Pranger v. Pranger (Iowa), 164 N. W. 607 (cultivation of land, building fences, cutting wood, grubbing out stumps, sufficient); Snow v. Snow, 98 Minn. 348, 108 N. W. 295; Tonseth v. Larsen, 69 Or. 387, 138 Pac. 1080; Wallis v. Turner (Tex. Civ. App.), 95 S. W. 61 (insufficient); Hutcheson v. Chandler, 47 Tex. Civ. App. 124, 104 S. W. 434 (must be made during life of donor); Hammond v. Hammond, 49 Tex. Civ. App. 482, 108 S. W. 1024 (same); Baldwin v. Riley, 49 Tex. Civ. App. 557, 108 S. W. 1192 (clearing space for house, insufficient); Altgelt v. Escalera, 51 Tex. Civ. App. 108, 110 S. W. 989 (improvements must be made during life of donor); Elam v. Carter, 55 Tex. Civ. App. 649, 119 S. W. 914 (improvements trivial); Atchley v. Perry, 55 Tex. Civ. App. 538, 120 S. W. 1105 (expenditure of \$100, insufficient); Cook v. Erwin, 63 Tex. Civ. App. 584, 133 S. W. 897 (improvements must be more valuable than use of land); Wilkerson & Satterfield v. McMurry (Tex. Civ. App.), 167 S. W. 275 (removal of trees and grading, sufficient); Price v. Lloyd, 31 Utah, 86, 8 L. R. A. (N. S.) 870, 86 Pac. 767 (improvements suitable to tenancy at will); Short v. Patton, 79 W. Va. 179, 90 S. E. 598.

51 Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657. See, also, Seavey v. Drake, 62 N. H. 393. It must be noted that the courts do not here use the term "consideration" in the technical legal sense of something given for a promise; it is used rather in the sense of something done as the result of a promise.

<sup>52</sup> Seavey v. Drake, 62 N. H. 393.

improvements, there is a real consideration, and relief will be readily granted.<sup>53</sup>

(§ 829.) Marriage not Part Performance.— In cases of contracts made in consideration of marriage it is almost universally held that marriage alone is not such part performance as will take a case out of the operation of the statute of frauds. 54 This results from the statute itself which requires agreements in consideration of marriage to be in writing. To hold marriage alone to be sufficient would render the statute nugatory; "for, so far as the fact of marriage is concerned, such agreements are always performed before they become the subjects of judicial consideration, and no case would ever be within the statute."55 Marriage coupled with other acts, such as the delivery and acceptance of possession, may, however, be sufficient.<sup>56</sup> In this connection a distinction should be noted between cases arising between

53 See Gaines v. Kendall, 176 Ill. 228, 52 N. E. 141; Clancy v. Flusky, 187 Ill. 605, 52 L. R. A. 277, 58 N. E. 594; Bigelow v. Bigelow, 95 Me. 17, 49 Atl. 49; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Fishburne v. Ferguson, 85 Va. 321, 7 S. E. 361. All of the above cases do not make the distinction; but in all there was some fact which might logically be called a consideration.

54 Montacute v. Maxwell, 1 P. Wms. 618; Caton v. Caton, L. R. 1 Ch. App. 137; McAnnulty v. McAnnulty, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; Richardson v. Richardson, 148 Ill. 563, 26 L. R. A. 305, 36 N. E. 608; Keady v. White, 168 Ill. 76, 48 N. E. 314; Manning v. Riley, 52 N. J. Eq. 39, 27 Atl. 810; Reade v. Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 420; Adams v. Adams, 17 Or. 247, 20 Pac. 633; Hannon v. Hounihan, 85 Va. 429, 12 S. E. 157. See, also, Day v. Roby, 77 N. H. 144, 89 Atl. 305; Watkins v. Watkins, 82 N. J. Eq. 483, 89 Atl. 253; Rowell v. Barber, 142 Wis. 304, 27 L. R. A. (N. S.) 1140, 125 N. W. 937. In Nowack v. Berger, 133 Mo. 24, 54 Am. St. Rep. 663, 31 L. R. A. 813, 34 S. W. 489, marriage followed by cohabitation was held sufficient.

55 Henry v. Henry, 27 Ohio St. 121, per Whitman, J. See, also, Caton v. Caton, L. R. 1 Ch. App. 137.

<sup>56</sup> Ungley v. Ungley, L. R. 5 Ch. D. 887.

the parties to the marriage themselves and those arising between a party to the marriage and a third person. In the former case marriage coupled with possession is not, under the prevailing theory, sufficient, for the possession is referable to the *status* as husband or wife, and not necessarily to any other contract.<sup>57</sup>

§ 2252. (§ 829a.) Evidence in Part Performance Cases.—The proof must be full, clear and satisfactory as to the making of the contract and as to its material terms, 58 and as to the acts of part performance relied

57 Henry v. Henry, 27 Ohio St. 121.

58 Among innumerable cases, see Rogers Locomotive & M. Works v. Helm, 154 U. S. 610, 22 L. Ed. 562, 14 Sup. Ct. 1177; Logue v. Langan, 151 Fed. 455, 81 C. C. A. 271; Jones v. Jones, 155 Ala. 644, 47 South. 80; Barnes v. White, 195 Ala. 588, 71 South. 114; Harrison v. Harrison (Ala.), 73 South. 454; Fielder v. Warner, 78 Ark. 158, 95 S. W. 452; Phillips v. Jones, 103 Ark. 550, 146 S. W. 513; Eagle v. Pettus, 109 Ark. 310, 159 S. W. 1116; Williams v. Bailey, 69 Fla. 225, 67 South. 877; Warren v. Gay, 123 Ga. 243, 51 S. E. 302 (whether proof must be beyond reasonable doubt); Prairie Development Co. v. Leiberg, 15 Idaho, 379, 98 Pac. 616; Bower v. Livingston, 251 Ill. 330, 96 N. E. 244; Kofsky v. Kofsky, 254 Ill. 88, 98 N. E. 287; Willis v. Zorger, 258 Ill. 574, 101 N. E. 963 (contract may be proved by circumstances raising a convincing implication); MacQueen v. Anderson, 275 Ill. 409, 114 N. E. 159 (oral lease); Wolf v. Lawrence, 276 Ill. 11, 114 N. E. 567; Barrett v. Geisinger, 148 III. 98, 35 N. E. 354; White v. White, 231 III. 298, 83 N. E. 234 (evidence sufficient); Chicago & E. I. R. Co. v. Chipps, 226 Ill. 584, 80 N. E. 1069 (proof must be beyond reasonable doubt); Wills v. Westendorf, 140 Iowa, 293, 118 N. W. 376; Boeck v. Milke, 141 Iowa, 713, 118 N. W. 874, 120 N. W. 120; Bichel v. Oliver, 77 Kan. 696, 95 Pac. 396 (what evidence sufficient); Shipley v. Fink, 102 Md. 219, 2 L. R. A. (N. S.) 1002, 62 Atl. 360; Kimball v. Batley, 174 Mich. 544, 140 N. W. 915; Burke v. Ray, 40 Minn. 34, 41 N. W. 240; Russell v. Sharp, 192 Mo. 270, 111 Am. St. Rep. 496, 91 S. W. 134 (proof must be beyond reasonable doubt); Collins v. Harrell, 219 Mo. 279, 118 S. W. 432; McQuitty v. Wilhite, 247 Mo. 163, 152

upon to take the contract out of the statute of frauds,<sup>59</sup> and the terms, as proved, must come up to the requirements of certainty.<sup>60</sup> The requirement of clear and convincing proof is particularly stringent in relation to agreements to devise, where the evidence, from the nature of the case, must largely consist in declarations by the

S. W. 598; Hersman v. Hersman, 253 Mo. 175, 161 S. W. 800; Thompson v. Foken, 81 Neb. 261, 115 N. W. 770; Wharton v. Stoutenburgh, 35 N. J. Eq. 266 (may be some conflict); Wolfinger v. McFarland, 67 N. J. Eq. 687, 54 Atl. 862, 63 Atl. 1119; Hartman v. Powell, 68 N. J. Eq. 293, 59 Atl. 628; Lobdell v. Lobdell, 36 N. Y. 327; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Sprague v. Jessup, 48 Or. 211, 4 L. R. A. (N. S.) 410, 83 Pac. 145, 84 Pac. 802 (evidence sufficient); West v. Washington R. Co., 49 Or. 436, 90 Pac. 666 (need not be beyond reasonable doubt); Thayer v. Thayer, 69 Or. 138, 138 Pac. 478; Goff v. Kelsey, 78 Or. 337, 153 Pac. 103 (need not be beyond reasonable doubt); Miller v. Zufall, 113 Pa. St. 317, 6 Atl. 350; Croneberger v. Conrad, 248 Pa. St. 612, 94 Atl. 255; McMillan v. McMillan, 77 S. C. 511, 58 S. E. 431; Folk v. Brooks, 91 S. C. 7, 74 S. E. 46; Steensland v. Noel, 28 S. D. 522, 134 N. W. 207 (proof need not be beyond reasonable doubt); Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 S. E. 770; Monroe v. Sams, 89 Wash. 51, 153 Pac. 1090; Bell v. Whitesell, 64 W. Va. 1, 60 S. E. 879; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297; Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458.

59 Ranson v. Ranson, 233 Ill. 369, 84 N. E. 210; Osterhaus v. Creviston, 62 Ind. App. 382, 111 N. E. 634; Collins v. Collins, 138 Iowa, 470, 114 N. W. 1069; Wright v. Nulton, 219 Pa. 253, 68 Atl. 707; Price v. Lloyd, 31 Utah, 86, 8 L. R. A. (N. S.) 870, 86 Pac. 767.

60 Halsell v. Renfrow, 202 U. S. 287, 6 Ann. Cas. 189, 50 L. Ed. 1032, 26 Sup. Ct. 610; Brown v. Weaver, 113 Ala. 228, 20 South. 964; Kirkpatrick v. Pettis, 127 Iowa, 611, 103 N. W. 956; Koch v. Fischer, 122 Minn. 123, 142 N. W. 18 (oral lease); White v. Poole, 74 N. H. 71, 65 Atl. 255 (sufficient identification of the land); Tonseth v. Larsen, 69 Or. 387, 138 Pac. 1080; Wright v. Nulton, 219 Pa. 253, 68 Atl. 707; Montgomery v. Berrett, 40 Utah, 385, 121 Pac. 569; Adams v. Manning, 46 Utah, 82, 148 Pac. 465; Erickson v. Cook, 67 Wash. 251, 121 Pac. 825; White v. White, 64 W. Va. 30, 60 S. E. 885; Pickens v. Stout, 67 W. Va. 422, 68 S. E. 354; Eckel v. Bostwick, 88 Wis. 493, 60 N. W. 784.

deceased to third persons;<sup>61</sup> and in relation to parol gifts of land, especially those by parents to children.<sup>62</sup>

61 Price v. Wallace, 224 Fed. 576; Monsen v. Monsen, 174 Cal. 97, 162 Pac. 90 (parol adoption); Steinberger v. Young, 175 Cal. 81, 165 Pac. 432 (proof satisfactory); Standard v. Standard, 223 Ill. 255, 79 N. E. 92; Ranson v. Ranson, 233 Ill. 369, 84 N. E. 210; Anderson v. Manners, 243 Ill. 405, 90 N. E. 728 (proof held sufficient by a divided court); Kane v. Hudson, 273 Ill. 350, 112 N. E. 683; Wrestler v. Tippy, 280 Ill. 124, 117 N. E. 404 (mere expression of intention); Davier v. Kaiser, 280 Ill. 334, 117 N. E. 420; Bevington v. Bevington, 133 Iowa, 351, 12 Ann. Cas. 490, 9 L. R. A. (N. S.) 508, 110 N. W. 840; Collins v. Collins, 138 Iowa, 470, 114 N. W. 1069; Ross v. Ross, 148 Iowa, 729, 127 N. W. 1034; Daniels v. Butler, 169 Iowa, 65, 149 N. W. 265 (parol adoption; proof sufficient); Stennett v. Stennett, 174 Iowa, 431, 156 N. W. 406; Brasch v. Reeves, 124 Minn. 114, 144 N. W. 744; Russell v. Sharp, 192 Mo. 270, 111 Am. St. Rep. 496, 91 S. W. 134; Wales v. Holden, 209 Mo. 552, 108 S. W. 89 (oral adoption; proof must be overwhelming); Collins v. Harrell, 219 Mo. 279, 118 S. W. 432; McQuinn v. Moore, 225 Mo. 36, 123 S. W. 858; Oliver v. Johnson, 238 Mo. 359, 142 S. W. 274; Burt v. McKibbin (Mo.), 188 S. W. 187; Peterson v. Bauer, 83 Neb. 405, 119 N. W. 764 (corroboration); Wolfinger v. McFarland, 67 N. J. Eq. 687, 54 Atl. 862, 63 Atl. 1119; Haberman v. Kaufer, 70 N. J. Eq. 381, 61 Atl. 976; Holt v. Tuite, 188 N. Y. 17, 80 N. E. 364 (proof should be beyond reasonable doubt); Tousey v. Hastings, 194 N. Y. 79, 86 N. E. 831; Moore v. Small, 19 Pa. St. 461, per Woodward J.; Spencer v. Spencer, 26 R. I. 237, 58 Atl. 766; Brown v. Golightly, 106 S. C. 519, Ann. Cas. 1918A, 1185, 91 S. E. 869.

62 Logue v. Langan, 151 Fed. 455, 81 C. C. A. 271; Young v. Crawford, 82 Ark. 33, 100 S. W. 87; Wolfe v. Bradberry, 140 Ill. 578, 30 N. E. 665; Woodard v. Woodard, 178 Ill. 295, 52 N. E. 1041; Richardson v. Lander, 267 Ill. 181, 108 N. E. 46; Rotes v. Rotes, 277 Ill. 183, 115 N. E. 116 (mere declarations, consistent with intention to make a gift at some future time); Frye v. Gullion, 143 Iowa, 719, 21 Ann. Cas. 285, 121 N. W. 563; Kelly v. Kelly (Iowa), 130 N. W. 380; Farlow v. Farlow, 154 Iowa, 647, 135 N. W. 1; Poorman v. Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524 (an instructive statement); Cook v. Cook, 24 S. D. 223, 123 N. W. 693; Monroe v. Sams, 89 Wash. 51, 153 Pac. 1090; Stone v. Hill, 52 W. Va. 63, 43 S. E. 92.

(§ 830.) Specific Performance Because Fraud, Independent of Doctrine of Part Performance.— Independently of the doctrine of part performance, relief may be granted when the defendant has been guilty of fraud which leads to an irretrievable change of posi-Accordingly, where a marriage is obtained under a fraudulent promise to convey property, the defendant may be ordered to carry out his contract;64 although, as we have seen, marriage is not a sufficient part performance to take a case out of the statute. Likewise, where there is a fraudulent omission to have an agreement reduced to writing, which induces an irretrievable change of position, equity will grant relief.65 A mere failure to fulfill a promise to have an agreement reduced to writing is not sufficient, however, in the absence of fraud.66

- 63 The text is quoted in McGuire v. Murray, 107 Me. 108, 77 Atl. 692; and cited in Swick v. Rease, 62 W. Va. 557, 59 S. E. 510; Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638.
- 64 Mullet v. Halfpenny, Prec. in Ch. 404; Peek v. Peek, 77 Cal. 106, 11 Am. St. Rep. 244, 1 L. R. A. 185, 19 Pac. 227; Allen v. Moore, 30 Colo. 307, 70 Pac. 682.
- 65 Wood v. Midgley, 5 De Gex, M. & G. 41 (dictum); Peek v. Peek, 77 Cal. 106, 11 Am. St. Rep. 244, 1 L. R. A. 185, 19 Pac. 227; Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co., 63 Md. 285; Wooldridge v. Scott, 69 Mo. 669 (dictum); Herndon v. Durham & Southern R'y Co., 161 N. C. 650, 77 S. E. 683. The text is quoted in Lechenger v. Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638, dissenting opinion. See, also, 2 Pom. Eq. Jur., § 921, and cases cited.
- 66 Wood v. Midgley, 5 De Gex, M. & G. 41 ("The law has said that the defendant is not to be sued unless upon an agreement signed by him. Is it a fraud on that law for him to say, I have agreed, but I will not sign an agreement?"); Wooldridge v. Scott, 69 Mo. 669. For early English cases contra, see Leak v. Morrice, 2 Cas. in Ch. 135; Hollis v. Whiteing, 1 Vern. 151. See, also, Cookes v. Mascall, 2 Vern. 200.

### CHAPTER XLI.

# PARTIAL PERFORMANCE WITH COMPENSATION—DAMAGES IN PLACE OF A SPECIFIC PERFORMANCE.

#### ANALYSIS.

§§ 831-836. Partial performance with compensation.

§ 832. The deficiency may be in quantity or quality of, or interest in, the estate, or a defect in title.

§ 833. Vendee's option of specific performance with compensation, or rescission.

§ 834. Limitations on vendee's right: Dower right of vendor's wife.

§ 835. Indemnity instead of compensation, occasionally given.

§ 836. Where no basis for estimating compensation.

§ 837. Damages in equity in place of a specific performance.

§ 2254. (§ 831.) Partial Performance With Compensation.—Where the vendor is unable to perform his contract in its entirety either because of a deficiency in the quantity or the quality of the estate, or because of defects in his title or interest, equity may give him a decree for specific performance with compensation or abatement for the deficiency or defect, if he can substantially perform his contract. Also, where the vendor is unable even substantially to perform his contract, the vendee, at his election, may have specific performance with compensation for the deficiency, on the principle that "where one party would be foiled at law, but the other may have the reasonable, substantial effect of his contract, compensation shall be admitted; not, where the effect would be to put upon him something constitutionally different from that for which he contracted." But the contract

1 Lord Erskine in Halsey v. Grant, 13 Ves. 73, 79, citing Lord Eldon in Drewe v. Hanson, 6 Ves. 675. The text is quoted in Mc-

"does not lie in compensation" if the purchaser "does not get the thing which is the principal object of the contract. It is not merely a small abatement." The vendor who is unable to perform completely is in a less favorable position than the vendee who has the option, generally, of specific performance with compensation or of refusal to perform if the contract is materially affected by the vendor's inability. It is readily seen that courts may vary as to what is a "material" inability, but it is usually recognized that the main object of the vendee in the contract must not be affected.

Cowen v. Pew, 18 Cal. App. 302, 123 Pac. 191; and cited in Smiddy v. Grafton, 163 Cal. 16, Ann. Cas. 1913E, 921, 124 Pac. 433; Knipe v. Troika, 92 Kan. 549, 141 Pac. 557. Sections 831-837 are cited in Saxon v. White, 21 Okl. 194, 95 Pac. 783. Sections 831 et seq. are cited in Hazzard v. Morrison, 104 Tex. 589, 143 S. W. 142.

- 2 Drewe v. Hanson, 6 Ves. 675, 679, per Lord Eldon.
- 3 Lord Thurlow held, in the old Cambridge Wharf and House case, cited in Drewe v. Hanson, 6 Ves. 675, 678, that though the vendor could not deliver the wharf, the main object of the vendee's contract, the vendee must accept the house with compensation. This case clearly goes too far, and has been many times criticised. Lord Thurlow was very severe on the vendee. In Poole v. Shergold, 1 Cox C. C. 273, Lord Kenyon observed of it: "That was a determination contrary to all justice and reason." See Sugden, Vend. & Purch., 5th ed., 251, for early authorities. In Towner v. Ticknor, 112 Ill. 217, 224, the court suggested the rule: "Where the buyer gets substantially all for which he contracted, he ought not to be permitted to refuse to go on and perform the contract on account of a slight deficiency when full compensation can be made in money, and when the deficiency is occasioned by no bad faith on the part of the vendor." In Knatchbull v. Grueber, 1 Madd. 167, it was said that if title to an inconsiderable part of the estate cannot be made, if not essential to the full enjoyment, specific performance will be given with compensation. Also, see King v. Bordeau, 6 Johns. Ch. 38, 10 Am. Dec. 312; Drewe v. Hanson, 6 Ves. 673, 678; Oldfield v. Round, 5 Ves. 508; Bailey v. Piper, L. R. 18 Eq. 683; Courcier v. Graham, 2 Ohio, 341.

§ 2255. (§ 832.) The Deficiency may be in Quantity or Quality of, or Interest in, the Estate or a Defect in the Title.<sup>4</sup>—The vendor's inability to complete performance may be due to a deficiency in the amount of the land,<sup>5</sup> or a deficiency in the quality of the estate,<sup>6</sup> as where the

4 This paragraph is cited in Smiddy v. Grafton, 163 Cal. 16, Ann. Cas. 1913E, 921, 124 Pac. 433.

5 The deficiency of the amount of land being small, the vendor was given specific performance, or it was recognized as his right, with compensation to the vendee in the following cases: Bailey v. Piper, L. R. 18 Eq. 683; Smyth v. Sturges, 108 N. Y. 495, 504, 505, 15 N. E. 544 (deficiency in partitions, closets, and pipes of store); Howland v. Norris, 1 Cox C. C. 59, 61; McQueen v. Farquhar, 11 Ves. 467; Calcraft v. Roebuck, 1 Ves. Jr. 221, 224. See, also, Mansfield v. Wiles, 221 Mass. 75, 108 N. E. 901; Mundy v. Irwin, 20 N. M. 43, 145 Pac. 1080; Charles B. James Land & Inv. Co. v. Vernon, 129 Tenn. 637, 52 L. R. A. (N. S.) 959, 168 S. W. 156 (twelve acres out of one hundred and twenty-seven); Hammer v. Westphal, 120 Md. 15, 87 Atl. 488. But the deficiency in the amount of the estate being material, the vendor was refused specific performance with abatement to the vendee in the following cases: Drewe v. Corp, 9 Ves. 368 (deficiency affected whole estate); Piers v. Lambert, 7 Beav. 546, 547 (sale of waterside premises and wharf or jetty. No title could be made to jetty. The court refused specific performance, as the "jetty was essential to the beneficial enjoyment of said premises contracted to be sold"); Dalby v. Pullen, 3 Sim. 29 (vendor could not give title to one-seventh part of the estate); Lord Brooke v. Roundthwaite, 5 Hare, 298; Chicago, Mil. & St. Paul R. R. v. Durant, 44 Minn. 361, 46 N. W. 676; Raffy v. Shallcross, 4 Madd. 227 (vendor could give title to but one-half of estate); Magennis v. Fallon, 2 Molloy, 585, 588 (destruction of ornamental timber releases vendee, as that is more than a slight variation from contract, and the value could not be estimated). See, also, Bluegrass Realty Co. v. Shelton, 148 Ky. 666, 41 L. R. A. (N. S.) 384, 147 S. W. 33 (reservation of graveyard in tract sold for subdivision into lots).

6 Deficiency in quality of the estate being small, the vendor compelled the vendee to accept the land, or the right was recognized, in these cases: King v. Bardeau, 6 Johns. Ch. 38, 10 Am. Dec. 312 (where one building of one lot projected slightly on the other lot, both being sold together); Drewe v. Corp., 9 Ves. 368 ("any small

particulars of situation, advantages, parts, character, do not correspond to the description; or to a deficiency in interest,<sup>7</sup> as having only leasehold, and not freehold, as

deficiency may be remedied by compensation"); Leyland v.-Illingworth, 2 De Gex, F. & J. 248 (the vendor described the property as "well supplied with water." There was no natural supply of water on the premises, and the court held this was such a misdescription that vendor must give compensation to the vendee for the variance, or he would be released from his bargain); Magennis v. Fallon, 2 Molloy, 585, 588 (for ordinary dilapidation and neglect before conveyance the vendor must make compensation, and the vendee must accept the conveyance with compensation. The court said: "A slight variation in the qualification of it will not disable the vendor from having a decree for specific performance when compensation can be made pecuniarily for the difference"); Drewe v. Hanson, 6 Ves. 673, 678 (here an estate was deficient in not having a right to certain tithes given in the description for sale. Lord Eldon said it was "a prodigiously strong measure" of a court of equity to decree a specific performance when the estate sold tithe free was not, but probably the court speculates that "tithes and lands are subject of separate and accurate valuation, and the value of one does not affect the value of the other," and likewise, though there is a failure of tithes, a part only of the subject of the contract, the whole is not affected, as it would be if the contract was for tithes only. See, also, Shepherd v. Croft, [1911] 1 Ch. 521 (underground watercourse; though vendor knew of defect and did not disclose it); Furtinata v. Butterfield, 14 Cal. App. 25, 110 Pac. 962. The deficiency in quality being material, specific performance was refused the vendor in these cases: Magennis v. Fallon, 2 Mollov, 585, 588 (destruction of ornamental timber before conveyance); Perkins v. Ede, 16 Beav. 193 (a strip of land to which seller could not give title lay between the house and the road).

7 Deficiency in interest being small, vendor was given specific performance upon paying compensation in the following cases: Oldfield v. Round, 5 Ves. 508 (easement of footpath across meadow); Hughes v. Jones, 3 De Gex, F. & J. 307 (encumbrance); Winne v. Reynolds, 6 Paige, 407, 413 (slight encumbrance); Horniblow v. Shirley, 13 Ves. 81 (encumbrance of rent charge); Halsey v. Grant, 13 Ves. 73 (encumbrance of rent charge); Calcraft v. Roebuck, 1 Ves. Jr. 221 (two acres out of two hundred and thirty-one acres not freehold); Howland v. Norris, 1 Cox C. C. 59, 61. The deficiency

contracted for, holding subject to an encumbrance<sup>8</sup> or an easement, etc.; or to a defect in title.<sup>9</sup> It is enough, however, if the defect of title is cured before the time for the decree, <sup>10</sup> if the vendor acted in good faith.<sup>11</sup>

of interest being large, specific performance was refused in these cases: Fordyce v. Ford, 4 Bro. C. C. 494, 497 (estate sold as freehold proved to be nearly all leasehold); Drewe v. Corp, 9 Ves. 368 (similar facts); O'Kane v. Kiser, 25 Ind. 168, 170 (contract called for unencumbered title; there was a mortgage upon the land); Hinckley v. Smith, 51 N. Y. 21 (similar facts); Lanyon v. Chesney, 186 Mo. 540, 85 S. W. 568 (vendor did not have title to part of the land); Murray v. Nickerson, 90 Minn. 197, 95 N. W. 898 (vendor's interest was limited by interest of a co-tenant).

<sup>8</sup> Spooner v. Cross, 127 Iowa, 259, 102 N. W. 1118 (mortgage); Roberts and Corley v. McFaddin, Weis, and Kyle, 32 Tex. Civ. App. 47, 74 S. W. 105 (oil lease on the land).

9 Defect in title not being great, specific performance was given vendor with compensation in Mittigan v. Cooke, 16 Ves. 1; Poole v. Shergold, 1 Cox, 273, 274; Calcraft v. Roebuck, 1 Ves. Jr. 221, 224; Peers v. Lambert, 7 Beav. 546, 547; Knatchbull v. Grueber, 1 Madd. 167; Le Grand v. Whitehead, 1 Russ. 309. But specific performance was refused vendor when there was an important defect in title: Raffy v. Shallcross, 4 Madd. 227 (title to but one-half of estate); Fildes v. Hooker, 3 Madd. 193, 195, vendor could not give a secure lease for full term); Drewe v. Corp, 9 Ves. 368; Cato v. Thompson, 9 Q. B. D. 616 (title not marketable); Westmacott v. Robins, 4 De Gex, F. & J. 390 (title not marketable); Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097 (inchoate dower); Murray v. Nickerson, 90 Minn. 197, 95 N. W. 898 (defect by co-tenant's title); Lanyon v. Chesney, 186 Mo. 540, 85 S. W. 568 (no title to part of the land); Roberts and Corley, v. McFadden, Weiss, and Kyle, 32 Tex. Civ. 47, 74 S. W. 105 (an oil lease on the land); Schencke v. Wicks, 23 Utah, 576, 65 Pac. 732 (cloud of a trust deed); Scott v. Alvarez, [1895] 2 Ch. D. 603 (specific performance refused on failure of title, notwithstanding condition in sale restricting any objection to title). See, also, Solomon v. Shewitz, 185 Mich. 620, 152 N. W. 196 (dower).

10 Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298; Van Bibber v. Reese, 71 Md. 608, 6 L. R. A. 332, 18 Atl. 892; Hawes v. Swanzey, 123 Iowa, 51, 98 N. W. 586. See, also, ante, §§ 772, 808.

11 Dalby v. Pullen, 3 Sim. 29.

One general rule may be stated, that where the deficiency or defect in any of these respects is not material, the vendor may have specific performance with compensation or abatement against the vendee. But where the deficiency or defect is material, to compel the vendee to perform would be to make a new contract, and that equity will not do. But in all cases where the vendor seeks specific performance he must show that he acted in good faith in these particulars, and did not know of the defect in his title—did not consciously misrepresent.<sup>12</sup> A vendee, once having refused the title, cannot afterward compel the vendor to perfect it.<sup>13</sup>

§ 2256. (§ 833.) Vendee's Option of Specific Performance With Compensation, or Rescission.—Wherever the deficiency or defect does not substantially alter the contract, it is plain that the buyer, being himself subject to specific performance, can enforce the contract against the seller with compensation for the deficiency. The rule, however, goes further than this, in the vendee's favor; where the deficiency or defect is material, the vendee is given the option to refuse performance or to have specific performance with compensation or abatement.<sup>14</sup> But where the deficiency is so great as prac-

<sup>12</sup> Eggert v. Pratt, 126 Iowa, 727, 102 N. W. 786; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724.

<sup>13</sup> Milmoe v. Murphy, 65 N. J. Eq. 767, 56 Atl. 292.

<sup>14</sup> Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097 (inchoate dower; value not easily estimated); Dale v. Lister, cited in 16 Ves. 7 (vendor could not make title to part of estate beyond his life. Vendee given reduction of purchase price for the deficiency); Bennet v. Fowler, 2 Beav. 302 (defective title. The court said: "The obligation to which a vendor is subject to make out a good title is intended for the benefit of the purchaser only"); Harding v. Parshall, 56 Ill. 219 (defective title); Townsend v. Vanderwereker, 160 U. S. 171, 182, 40 L. R. A. 382, 16 Sup. Ct. 258 (citing 3 Pom. Eq. Jur., §§ 1405, 1407); Nuttigan v. Cooke, 16 Ves. 1. See, also, the

tically to make compensation or damages the main object of the suit, the vendee will be denied specific perform-

following, chiefly recent, cases: Barnes v. Wood, L. R. 8 Eq. 424; McDuffee v. Hestonville etc. R. Co., 158 Fed. 827; Broatch v. Boysen, 236 Fed. 516, 149 C. C. A. 568; Manning v. Carter, 192 Ala. 307, 68 South. 909; Wellington Realty Co. v. Gilbert, 24 Colo. App. 118, 131 Pac. 803; Phinizy v. Guernsey, 111 Ga. 346, 78 Am. St. Rep. 207, 50 L. R. A. 680, 36 S. E. 796; Kuhn v. Eppstein, 219 Ill. 154, 2 L. R. A. (N. S.) 884, 76 N. E. 145; Eppstein v. Kuhn, 225 Ill. 115, 10 L. R. A. (N. S.) 117, 80 N. E. 80; McConnell v. Brillhart, 17 Ill. 354, 65 Am. Dec. 661; Paris v. Golden, 96 Kan. 668, 153 Pac. 528 (deducting amount of mortgage); Morgan's Heirs v. Boone's Heirs, 4 T. B. Mon. (Ky.) 291, 16 Am. Dec. 153; Pingree v. Coffin, 12 Gray (Mass.), 288; Cashman v. Bean, 226 Mass. 198, 115 N. E. 574; Nelson v. Gibe, 162 Mich. 410, 127 N. W. 304; Melin v. Woolley, 103 Minn: 498, 22 L. R. A. (N. S.) 595, 115 N. W. 654, 946 (interest of co-tenant); Lackawanna Coal & Iron Co. v. Long, 231 Mo. 605, 133 S. W. 35; Barthel v. Engle, 261 Mo. 307, 168 S. W. 1154; Campbell v. Hough, 73 N. J. Eq. 601, 68 Atl. 759 (co-tenant); Farrell v. Bork, 76 N. J. Eq. 615, 79 Atl. 897; Gibert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785; Bostwick v. Beach, 103 N. Y. 414, 9 N. E. 41; Palmer v. Gould, 144 N. Y. 671, 39 N. E. 378; Bryant Timber Co. v. Wilson, 151 N. C. 154, 134 Am. St. Rep. 982, 65 S. E. 932; Flowe v. Hartwick, 167 N. C. 448, 83 S. E. 841; Lucas v. Scott, 41 Ohio St. 636; Saxon v. White, 21 Okl. 194, 95 Pac. 783; Latta v. Hax, 219 Pa. St. 483, 68 Atl. 1016; Harbers v. Gadsden, 6 Rich, Eq. (S. C.) 284, 62 Am. Dec. 390; Moses v. Wallace, 7 Lea (Tenn.), 413; Hazzard v. Morrison (Tex. Civ. App.), 130 S. W. 244, 104 Tex. 589, 143 S. W. 142; Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93 (undivided half interest); Ward v. Walker (Tex. Civ. App.), 159 S. W. 320; Williams v. Pearman (Tex. Civ. App.), 164 S. W. 43; White v. Dobson, 17 Gratt. (Va.) 262; Baldwin v. Brown, 48 Wash. 303, 93 Pac. 413; Dorr v. Midelburg, 65 W. Va. 778, 23 L. R. A. (N. S.) 987, 65 S. E. 97; Castleman's Adm'r v. Castleman, 67 W. Va. 407, 28 L. R. A. (N. S.) 393, 68 S. E. 34 (rule applies to judicial sales); Neill v. McClung, 71 W. Va. 458, 76 S. E. 878; Milam v. Williams, 73 W. Va. 467, 80 S. E. 770; Wright v. Young, 6 Wis. 127, 70 Am. Dec. 453. This paragraph of the text is cited in Mundy v. Irwin, 20 N. M. 43, 145 Pac. 1080. The rule of the text does not apply where the contract itself provides for the exclusive remedy of rescission in case of defective title: Schwab v.

ance with compensation.<sup>15</sup> There are some other exceptions to this doctrine, as will be shown. But to be entitled to specific performance with compensation, the buyer must, generally, have been unaware of the deficiency at the time of the bargain.<sup>16</sup> Whenever the seller is unable to convey all that he agreed to, the buyer is entitled as a matter of right, in all cases, if he will pay the

Baremore, 95 Minn. 295, 104 N. W. 10. That where the contract is for exchange of land, the court will not specifically enforce with a money judgment for deficiency in defendant's land, since that would be making a new contract, see Sternberger v. McGovern, 58 N. Y. 12; Williams v. Pearman (Tex. Civ. App.), 164 S. W. 43.

15 Durham v. Legard, 34 Beav. 611 (by mistake of vendor, estate of eleven thousand eight hundred acres was sold as estate of twenty-one thousand seven hundred acres. Court refused vendee specific performance with compensation, as it was not a case for compensation, but one to avoid the contract); Chicago, Mil. & St. Paul R. R. v. Durant, 44 Minn. 361, 46 N. W. 676 (the part that could be conveyed would be relatively so small "that compensation or damages would apparently be the main object of the suit"). But abatement has often been granted to the extent of one-half the price: See, e. g., Burrow v. Scammell, 19 Ch. D. 175; Wilkinson v. Kneeland, 125 Mich. 261, 84 N. W. 142.

16 Lucas v. Scott, 41 Ohio St. 636, 641, citing Pom. Spec. Perf., § 438; Castle v. Wilkinson, L. R. 5 Ch. App. 534 (purchaser knowing of wife's interest cannot now compel husband to convey his own interest alone, with or without compensation, as his contract was to convey, with his wife, the whole estate). See, also, the cases: Kaiser v. Klein, 29 S. D. 464, 137 N. W. 52, quoting the text; Mundy v. Shellaberger, 161 Fed. 503, 88 C. C. A. 445; Olson v. Lovell, 91 Cal. 506, 27 Pac. 765; Rose v. Henderson, 63 Fla. 564, 603, 59 South. 138; Thompson v. Musick, 85 Kan. 399, 116 Pac. 612; Moore v. Lutjeharms, 91 Neb. 548, 136 N. W. 343; Palmer v. Gould, 144 N. Y. 671, 39 N. E. 378; Joyner v. Crisp, 158 N. C. 199, 73 S. E. 1004; Farthing v. Rochelle, 131 N. C. 563, 43 S. E. 1; Kuratli v. Jackson, 60 Or. 203, Ann. Cas. 1914A, 203, 38 L. R. A. (N. S.) 1195, 118 Pac. 192, 1013 (vendee knows of inchoate dower of vendor's wife): Wetherby v. Griswold, 75 Or. 468, 147 Pac. 388 (visible physical encumbrance on the land); Nicholson v. Ertel, 231 Pa. 105, 79 Atl. 984 (where contract gives vendee option to rescind or take title as it is).

full contract price, to specific performance of whatever interest the seller has.<sup>17</sup>

§ 2257. (§ 834.) Limitations on the Vendee's Right: Dower Right of Vendor's Wife. 18—The buyer's right to specific performance with compensation is subject to certain limitations; as, when it conflicts with the intervening rights of third parties, 19 an instance of which is the case of the right of the wife to be protected in her dower interest. 20 Where the wife of a vendor refuses to convey her inchoate dower interest in the land which the vendor has contracted to sell, equity in many jurisdictions denies specific performance with compensation against the vendor for the deficiency, viz., the dower interest, on the ground that compulsion upon the husband would tend to cause him to procure his wife's conveyance of dower against her will. 21 For that reason

17 Bennett v. Fowler, 2 Beav. 302; Williams v. Kilpatrick, 195 Ala. 563, 70 South. 742; Walton v. McKinney, 11 Ariz. 385, 94 Pac. 1122; McGinn v. Willey, 24 Cal. App. 303, 141 Pac. 49; Long v. Chandler, 10 Del. Ch. 339, 92 Atl. 256; Harding v. Parshall, 56 Ill. 219; Mitchell v. Mutch (Iowa), 164 N. W. 212; Anderson v. Kennedy, 51 Mich. 467, 16 N. W. 816; Stromme v. Rieck, 107 Minn. 177, 131 Am. St. Rep. 452, 119 N. W. 948; Jasper v. Wilson, 14 N. M. 482, 23 L. R. A. (N. S.) 982, 94 Pac. 951; Rodman v. Robinson, 134 N. C. 503, 101 Am. St. Rep. 877, 65 L. R. A. 682, 47 S. E. 19; West v. Washington R. Co., 49 Or. 436, 90 Pac. 666; Millard v. Martin, 28 R. I. 494, 68 Atl. 420; Leonard v. King, 63 Tex. Civ. App. 224, 135 S. W. 742 (though contract provides it is to be void if title not perfected); Newell v. Lamping, 45 Wash. 304, 88 Pac. 195.

<sup>18</sup> Sections 834-836 are cited in Taylor v. Matthews, 53 Fla. 776, 44 South. 146.

<sup>19</sup> Thomas v. Deering, 1 Keen, 729, 748.

<sup>20</sup> Westmacott v. Robins, 4 De Gex, F. & J. 390.

<sup>21</sup> The text is quoted in Free v. Little, 31 Utah, 449, 88 Pac. 407. See Hawralty v. Warren, 18 N. J. Eq. 124, 128, 90 Am. Dec. 613, where the rule is stated: "The court will not order him [the husband] to procure his wife's conveyance of dower interest, nor re-

the buyer must be satisfied to take less than he contracted for by the amount of the dower interest, or abandon the contract. But, by a rule *contra*, in England<sup>22</sup> and in many American jurisdictions,<sup>23</sup> the husband's failure to

quire him to furnish indemnity against her right of dower, unless in cases of clear fraud"; Humphrey v. Clement, 44 Ill. 299, 302; Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695; Peeler v. Levy and Wife, 26 N. J. Eq. 330; Riesz's Appeal, 73 Pa. St. 485; Lucas v. Scott, 41 Ohio St. 636; Sternberger v. McGovern, 56 N. Y. 12; Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 21 L. R. A. 133, 17 S. E. 558; Barbour v. Hickey, 2 App. D. C. 207; Fortune v. Watkins, 94 N. C. 304, 315; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724. Recent cases are: Long v. Chandler, 10 Del. Ch. 339, 92 Atl. 256; Murphy v. Hohne (Fla.), 74 South. 973; Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 14 Ann. Cas. 652, and note, 111 S. W. 480; Bateman v. Riley, 72 N. J. Eq. 316, 73 Atl. 1006; Kuratli v. Jackson, 60 Or. 203, Ann. Cas. 1914A, 203, 38 L. R. A. (N. S.) 1195, 118 Pac. 192, 1013; Haden v. Falls, 115 Va. 779, Ann. Cas. 1915C, 1034, 80 S. E. 576. See, also, Leo v. Deitz, 63 Or. 261, 127 Pac. 550 (same rule as to curtesy of vendor's husband). The other grounds urged in support of the rule by Sharswood, J., in Riesz's Appeal, supra, are clearly shown to be untenable, in Pom. Spec. Perf., §§ 460, 461. If the vendee knows the vendor is a married man, and therefore is aware of the wife's interest, he is not entitled to compensation, on any view: Pom. Spec. Perf., § 461; supra, § 833, at note 16; People's Sav. Bank Co. v. Parisette, 68 Ohio St. 450, 96 Am. St. Rep. 672, 67 N. E. 896.

22 Wilson v. Williams, 3 Jur., N. S., 810; and see Barnes v. Wood, L. R. 8 Eq. 424.

23 Wright v. Young, 6 Wis. 127, 70 Am. Dec. 453; Springle v. Shields, 17 Ala. 295; Wingate v. Hamilton, 7 Ind. 73; Hazelrig v. Hutson, 18 Ind. 481; Martin v. Merrit, 57 Ind. 34, 26 Am. Rep. 45; Troutman v. Gowing, 16 Iowa, 415; Leach v. Forney, 21 Iowa, 271, 89 Am. Dec. 574; Zebley v. Sears, 38 Iowa, 507; Miller v. Nelson, 64 Iowa, 458, 20 N. W. 759; Walker v. Kelly, 91 Mich. 212, 51 N. W. 934 (compensation for wife's dower given); Sanborn v. Nockin, 20 Minn. 178. See, also, the recent cases: Hirschman v. Forehand, 114 Ark. 436, 170 S. W. 98; Williams v. Wessels, 94 Kan. 71, 145 Pac. 856; Tebeau v. Ridge, 261 Mo. 547, L. R. A. 1915C, 367, 170 S. W. 871; Bethell v. McKinney, 164 N. C. 71, 80 S. E. 162; O'Malley v. Miller, 148 Wis. 393, 134 N. W. 840.

convey the whole title because of any interest his wife may have, is treated as an ordinary case of defective title, and he must convey his interest with compensation for the amount of her interest, whether dower or of other nature. Even where the first mentioned rule prevails which refuses to bring compulsion upon the husband out of tenderness for the wife, if the husband and wife are acting in collusion to defeat the buyer, equity will then disregard the protective principle and compel conveyance of the husband's interest with compensation, or indemnity.<sup>24</sup>

§ 2258. (§ 835.) Indemnity Instead of Compensation Occasionally Given.—It is the general rule of equity not to give indemnity with specific performance, but this rule has been departed from, as where a collusive husband was compelled to convey his interest and give an indemnity for the inchoate dower right of the wife in the form of a mortgage on the land.<sup>25</sup> If the dower interest should never vest, the indemnity would be released.

§ 2259. (§ 836.) Where no Basis of Estimating Compensation.—Equity will refuse a decree for conveyance with compensation or abatement for the deficiency, if it is unable to compute fairly the value of the deficiency

<sup>24</sup> See next section; also, Pom. Spec. Perf., § 462.

<sup>25</sup> Hawralty v. Warren, 18 N. J. Eq. 124, 128, 90 Am. Dec. 613; Young v. Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456. It was given, however, in the following cases: Young v. Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456; Lounsbery v. Locander, 25 N. J. Eq. 554, 559 ("a court of equity will not compel the vendor to give an indemnity except under extraordinary circumstances"); Horniblow v. Shirley, 13 Ves. 82 (indemnity for tithes by vendee retaining part of purchasemoney like a mortgage lien); Halsey v. Grant, 13 Ves. 73. See, also, Minge v. Green, 176 Ala. 343, 58 South. 381; Farrell v. Bork, 76 N. J. Eq. 615, 79 Atl. 897.

or defect,<sup>26</sup> as the contingency of a forfeiture, which the vendee discovered after making the contract.<sup>27</sup>

§ 2260. (§ 837.) Damages in Equity in Place of a Specific Performance.—"If the vendor has disabled himself from performance after making the contract, and if the disability existed at the time of making the contract from a defect in his title, a court of equity will, in either of these cases, award damages to the vendee-plaintiff, provided he commenced his suit in good faith, without any knowledge of the disability; but will not, in general, grant damages if the plaintiff was aware of the disability at the time of bringing his suit."<sup>28</sup>

26 Westmacott v. Robins, 4 De Gex, F. & J. 390, 397; Cato v. Thompson, 9 Q. B. D. 616, 618 (restrictive building covenants); Humphrey v. Clement, 44 Ill. 299, 302 (court said value of dower, being uncertain, could not be estimated; that value based on the actuary tables might be unjust to one party or the other, as such indeterminate interest was not in contemplation at the making of the contract; cf. Pom. Spec. Perf., § 460); Sternberger v. McGovern, 56 N. Y. 12 (inchoate dower interest cannot be estimated with fairness to vendor); Magennis v. Fallon, 2 Molloy, 585, 588; Perkins v. Ede, 16 Beav. 193; Rudd v. Lascelles, [1900] L. R. 1 Ch. 815 (restrictive covenants. The court says: "It is almost impossible to assess compensation for covenants of this nature"). See, also, Latta v. Hax, 219 Pa. 483, 68 Atl. 1016.

- 27 Westmacott v. Robins, 4 De Gex, F. & J. 390, 397.
- 28 4 Pom. Eq. Jur., § 1410, note. This paragraph is quoted in Dunlop v. Baker, 239 Fed. 193, 152 C. C. A. 181, and cited in Northwestern Lumber Co. v. Grays Harbor & P. S. R'y Co., 208 Fed. 624. See 1 Pom. Eq. Jur., 4th ed., § 237, notes 3, (f), (g), and (h), where the rules on this subject are more fully stated, and cases cited. In addition to the recent cases there cited, see Greer v. Pope, 140 Ga. 743, 79 S. E. 846; Brauer v. Laughlin, 235 Ill. 265, 85 N. E. 283; Barz v. Sawyer, 159 Iowa, 481, 141 N. W. 319; Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638; Warren v. Dail, 170 N. C. 406, 87 S. E. 126; Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051; Latta v. Hax, 219 Pa. 483, 68 Atl. 1016; Roach v. Irvin, 245 Pa. 162, 91 Atl. 243; Branham v. Artrip, 115 Va. 314, 79 S. E. 390.

There is also some authority for the view that where the plaintiff might fairly and reasonably have expected the court to grant specific performance, but that relief is denied for reasons which operate upon the court's judicial discretion, the case will be retained for the awarding of damages: Waite v. O'Neil, 72 Fed. 348, 76 Fed. 408, 34 L. R. A. 550, 22 C. C. A. 248; also, where the statute of limitations has run upon the contract pending the suit; Combs v. Scott, 76 Wis. 662, 45 N. W. 532. See 1 Pom. Eq. Jur., 4th ed., p. 377, § 237, note (h).

## CHAPTER XLII.

# EQUITABLE ESTATES AND INTERESTS UNDER THE CONTRACT OF SALE AND PURCHASE OF LAND.

### ANALYSIS.

§	838. T	he equit	table conver	sion.				
§§ 839-	-846. R	ights of	f inheritance	from	parties	to	the	contract.
§	839. G	eneral p	principle.					

§ 840. Heir or devisee of vendee. § 841. Vendor's representatives.

§ 842. Rights of inheritance where the contract is never performed.

§ 843. Same—When the equitable conversion is not made.

§ 844. On death of vendor in possession, the rents go to heir.

§ 845. Effect of unperformed conditions.

§ 846. Option to purchase, exercised after death of vendor.

§ 847. Devise of lands contracted for.

§ 848. Contract to sell revokes will pro tanto.

§ 849. Dower interests under the contract.

§§ 850-856. Assignees and subsequent purchasers. § 850. Rights of the assignee of the vendee.

§ 851. Assignee of the vendee not subject to specific performance.

§ 852. Grantee of vendor is subject to specific performance.

§ 853. The equitable grounds for the rights against the grantee of the vendor and in favor of the assignee of the vendee.

§ 854. Assignment of the purchase-money notes transfers the security.

§ 855. Vendor's assignee in bankruptcy subject to specific performance.

§ 856. Vendee's assignee in bankruptcy not subject to specific performance.

§ 857. Waste by vendee; by vendor.

§ 858. Vendor may be liable as trustee, for deterioration.

§ 859. Loss by fire or other accident; usually falls on vendee.

§ 860. Vendee generally entitled to insurance money.

§ 861. Loss by occurrence of contingency on the vendee.

§ 862. Foreclosure of vendee's equity of specific performance.

§ 863. Sale of the property in lieu of strict foreclosure.

§ 2261. (§ 838.) The Equitable Conversion.—Lord Eldon, in Seton v. Slade, states the result of the contract to purchase land thus: "The effect of a contract to purchase is very different at law and in equity. At law the estate remains that of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be to be discussed between the representatives of the vendee."

1 Seton v. Slade, 7 Ves. 265, at 274. The text is quoted in Taylor v. Russell, 65 W. Va. 632, 64 S. E. 923. See, also, 1 Pom. Eq. Jur., §§ 368, 372; 3 Pom. Eq. Jur., § 1260.

Few propositions have been more frequently repeated by the courts than the statement that on a contract for the sale and purchase of lands, "the vendor is deemed the trustee for the purchaser of the estate sold, and the purchaser as the trustee for the vendor of the purchase-money." It is difficult to understand in what sense the vendee can be called a trustee of the purchase-money in the absence of some fund definitely set aside and appropriated for the purpose, which the vendor may follow so long as it can be traced. While the vendor, after the purchase-money is fully paid, may properly be described as trustee (see Wall v. Bright, 1 Jacob & W. 494, 508), his position before that time has more points of analogy to that of a mortgagee under the original English system, since he holds the legal title of the land, not only for the eventual benefit of the vendee, but for his own security as well. This analogy is much more useful in working out the details of the rules resulting from the theory of equitable conversion. English judges have been at more pains than American judges to state and describe with accuracy the positions in equity of the vendor and vendee. See extracts from these opinions in 3 Pom. Eq. Jur., § 1260, note 3, especially from Sir George Jessel's famous judgment in the great case of Lysaght v. Edwards, L. R. 2 Ch. D. 499. That the vendor, if properly a trustee, is an express and not a constructive trustee. see 3 Pom. Eq. Jur., § 1046.

§ 2262. (§ 839.) Rights of Inheritance from Parties to the Contract-General Principles.-The rights of the heir and the representatives of the vendor and vendee, on the decease of either before title has passed under a valid contract to convey lands, follow directly from the fundamental principle of equity, that "in equity, upon an agreement for the sale of lands, the contract is regarded for most purposes, as if already specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase-money." In working out the testamentary rights of the heir and the representatives as to land under the contract for sale, equity considers these rights as if the title to the land had actually passed before the death of the vendor or the vendee.3 "Although the purchase-money is unpaid, [if] the contract is valid and binding, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee."4

§ 2263. (§ 840.) Heir or Devisee of Vendee.—Thus, where the vendee dies, having a contract for lands, but the conveyance has not yet been made to him, the vendee's interest in the lands "shall be considered as real estate and descend to his heir, or he may devise them by will, and his representatives shall pay the purchase

<sup>&</sup>lt;sup>2</sup> Haughwout v. Murphy, <sup>22</sup> N. J. Eq. 531, 546. In general, see <sup>1</sup> Pom. Eq. Jur., §§ 368, 372.

<sup>3</sup> In Loventhal v. Home Ins. Co., 112 Ala. 108, 57 Am. St. Rep. 17, 33 L. R. A. 258, 20 South. 419, it is said: "As land the vender may convey or devise it, and as land it is descendible to his heirs, who may in a court of equity compel specific performance of the contract."

<sup>4</sup> Thomas v. Howell, L. R. 34 Ch. D. 166, quoting Lysaght v. Edwards, L. R. 2 Ch. D. 506.

money out of the assets." The heir or devisee of the vendee in equity can compel the executor or administrator to pay the unpaid purchase-money out of the personalty, for equity regards the transaction as completed, and a conversion to have been made of that much of the vendee's personalty from the date of the contract.

§ 2264. (§ 841.) Vendor's Representatives.—In the case of the vendor's death, where he is under contract to sell lands, his heir receives the title in trust for the vendee, and must convey upon payment of the purchase money. But the purchase-money goes not to the heir, but to the personal representative, of the vendor,<sup>7</sup> for

5 Milner v. Mills, Moseley, 123; Hathaway v. Payne, 34 N. Y. 92, 103. The text is cited in Flomerfelt v. Siglin, 155 Ala. 633, 130 Am. St. Rep. 67, 47 South. 106. See, also, Grandjean v. Beyl (In re Grandjean's Estate), 78 Neb. 349, 15 Ann. Cas. 577, 110 N. W. 1108; Grandjean v. Beyl, 78 Neb. 354, 114 N. W. 414. A person taking the legal title, therefore, holds it in trust for the vendee's heirs: Roggenkamp v. Roggenkamp, 68 Fed. 605, 15 C. C. A. 600; Musham v. Musham, 87 Ill. 80; Sentill v. Robeson, 55 N. C. 510 (Pearson, J.).

6 Daniels v. Davison, 16 Ves. 249, 253, holding that "the benefit of the agreement should go to the heir [of the vendee]; the executor paying for the purchase"; Wimbish v. Montgomery Co., 69 Ala. 575, 578; Reid v. Davis, 4 Ala. 83; Baldwin v. Thompson, 15 Iowa, 504, 508; Loventhal v. Home Ins. Co., 112 Ala. 108, 113, 57 Am. St. Rep. 17, 33 L. R. A. 258, 20 South. 419.

7 Baden v. Pembroke, 2 Vern. 213. The text is cited in Flomerfelt v. Siglin, 155 Ala. 633, 130 Am. St. Rep. 67, 47 South. 106. In Hathaway v. Payne, 34 N. Y. 92, 103, it is said: "The vendor in such a case is deemed in equity to be the trustee for the vendee of the title, and the vendee is the trustee of the vendor for the purchase-money. . . . The money due on the contract is treated as personal estate of the vendor; and in case of death it goes to executors or administrators of the vendor, and does not descend to the heir, and every subsequent purchaser from either, with notice becomes subject to the same equities as the party would be from whom he purchased." Also see In re Manchester & Southport R'y Co., 19 Beav. 365; Rhodes v. Meredith, 260 Ill. 138, Ann. Cas. 1914D, 416,

the vendor's interest had been "converted" by the contract from realty into personalty. The executor of the vendor can bring suit for specific performance of the contract, and compel the purchaser to pay the purchase price, and joining the heir, compel him to convey the land to the purchaser; the executor holding the proceeds as personalty for those entitled.

§ 2265. (§ 842.) Rights of Inheritance Where the Contract is Never Performed.—If the contract cannot be carried out after the death of either of the parties, the rights of the heir or next of kin in the testator's interest are treated precisely as if the contract had been carried out, if the contract was valid and enforceable by the testator at his death. Thus, where after the vendee's death, the contract was rescinded, the administrator was compelled to pay to the vendee's heir an amount from the personalty equivalent to the price of the land.9 Where a purchaser loses his right to specific performance by his laches, the interest of the next of kin of the deceased vendor is not affected. Although the land does not pass to the vendee, yet the estate will belong to the next of kin of the vendor and not the heir, who held the title in trust for the vendee. This disposition arises from the principle that a valid contract works an equitable conversion of the land into personalty from the time when it is made. And on the principle of equitable

<sup>102</sup> N. E. 1063; In re Strang's Estate, 131 Iowa, 583, 106 N. W. 631; Moore v. Burrows, 34 Barb. (N. Y.) 173; Williams v. Haddock, 145 N. Y. 144, 150, 39 N. E. 825.

<sup>8</sup> Bubb's Case, Freem. Ch. 38; Keep v. Miller, 42 N. J. Eq. 100, 107, 6 Atl. 495; Williams et al. v. Haddock, 145 N. Y. 144, 39 N. E. 825; Newton v. Swazey, 8 N. H. 9; Bender v. Luckenbach, 162 Pa. St. 18, 29 Atl. 295, 296.

<sup>9</sup> Matthews v. Gadd, 5 South Australian Law Reports, 129; Whittaker v. Whittaker, 4 Bro. C. C. 31; Lysaght v. Edwards, L. R. 2 Ch. D. 499, 521.

conversion, the purchase-money became a part of the vendor's personal estate, and as such was distributable to his widow and next of kin.<sup>10</sup>

§ 2266. (§ 843.) Same—When the Equitable Conversion is not Made.—But the contract must be valid and enforceable at the time of the death of the testator in order that the equitable character of the estate shall prevail over the legal, i. e., that there shall be in equity a conversion, 11 as, of the vendor's interest in the land into personalty.

As an illustration of this principle, the question of title is very important. Not only must there be a good contract from the legal point of view of consideration, but if the vendor could not make a good title, equity would not decree specific performance, 12 and there is no conversion. Then the vendor's interest at his death is land, and the vendee's interest is personalty, notwithstanding the contract. Lord Hardwicke stated the rule: "When an ancestor, after the making of a will, agrees for the purchase of particular lands, the heir at law would have a right to them, provided a good title can be made out,

<sup>10</sup> Miller v. Miller, 25 N. J. Eq. 354; Curre v. Bowyer, 5 Beav. 6, note (b).

<sup>11 &</sup>quot;A valid contract," according to Jessel, M. R., in Lysaght v. Edwards, L. R. 2 Ch. D. 506, "means in every case a contract sufficient in form and substance, so that there is no ground for setting it aside as between the vendor and purchaser—a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract."

<sup>12</sup> Jessel, M. R., in Lysaght v. Edwards, supra, speaking of the effect of title says: "The contract will not be a valid contract unless he has either made out his title according to the contract, or the purchaser has accepted the title, for however bad a title may be, the purchaser has a right to accept it, and the moment he has accepted the title the contract is fully binding upon the vendor."

otherwise if it cannot."<sup>13</sup> And the heir of the vendee cannot have the money laid out in other lands. The interest is then only personalty. <sup>14</sup> But the fact of the purchaser being able to pay or not able to pay is immaterial; if there is a valid contract, the conversion is effected. <sup>15</sup>

§ 2267. (§ 844.) On Death of Vendor in Possession, the Rents go to the Heir.—Where the vendor is himself ' in receipt of the rents at the time of his death, as is usually the case up to the time for the possession to be changed from the vendor to the vendee, not the next of kin, but the heir, who takes the legal title, to hold until the purchase-money shall be paid, is entitled to the rents up to the time the vendee could claim them, in lieu of interest money paid. 16 It is true that equity considers the equitable conversion to have been made from the date of the contract, so that the next of kin can demand the specific performance of the contract, and have the purchase-money, but nevertheless equity having permitted the vendor himself to retain the beneficial interest in the land—the rents—up to the change of possession, the heir is entitled to that same beneficial interest as realty.

§ 2268. (§ 845.) Effect of Unperformed Conditions. Enforceability of the contract at the time of death of one

<sup>13</sup> Green v. Smith, 1 Atk. 572; Thomas v. Howell, L. R. 34 Ch. D. 166; Broome v. Monck, 10 Ves. 597; Mills v. Harris, 104 N. C. 626, 10 S. E. 704, quoting Pom. Eq. Jur., § 1161.

<sup>14</sup> Lysaght v. Edwards, L. R. 2 Ch. D. 499, at p. 517, the court says: "If the title is not good, there is no valid agreement, and the whole doctrine [of equitable conversion] assumes there is a valid agreement."

<sup>15</sup> Lysaght v. Edwards, L. R. 2 Ch. D. 499, at page 517.

<sup>16</sup> Lumsden v. Fraser, 12 Sim. 263; Shadforth v. Temple, 10 Sim. 184; Watts v. Watts, L. R. 17 Eq. 217.

of the parties refers to the validity of the contract and not to events in the nature of conditions which may not have been performed because such performance was not due at the time of the death of testator. It is sufficient if these conditions are performed by his representatives. Provisions of the nature of conditions in contracts of sale do not alter the rule that the contract of sale is an equitable conversion of the realty into personalty.<sup>17</sup>

§ 2269. (§ 846.) Option to Purchase, Exercised After Death of Vendor,—When a binding option for the purchase of land is not exercised until after the death of the vendor, it is the rule (often criticised for its harshness), that the conversion then relates back, as between the heir and personal representative of the vendor, to the date of the contract by which the option was given. The personal representative of the vendor, therefore, is entitled to the purchase-money; but the heir is allowed to receive and retain the rents up to the time when the option was exercised.<sup>18</sup>

§ 2270. (§ 847.) Devise of Lands Contracted for.— Lands contracted for pass by the devise of the vendee, and his executor must pay the purchase price out of the personalty.<sup>19</sup> Even though the devise is general, as,

17 Williams v. Haddock, 145 N. Y. 144, 39 N. E. 825. The text is quoted in Flomerfelt v. Siglin, 155 Ala. 633, 130 Am. St. Rep. 67, 47 South. 106.

18 3 Pom. Eq. Jur., § 1163, and notes, where the rule is more fully stated. In addition to the cases there cited, see Newport Waterworks v. Sisson, 18 R. I. 411, 28 Atl. 336. Contra, rejecting the rule, and holding the heir entitled to the purchase price, see Smith v. Loewenstein, 50 Ohio, 346, 34 N. E. 159, and Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 469, Ann. Cas. 1913B, 62, L. R. A. 1916F, 352, 97 N. E. 43.

19 Potter v. Potter, 1 Ves. Sr. 436, 440; Daire v. Beversham, Nels. 76; Greenhill v. Greenhill, 2 Vern. 679. Before the Wills Act of 1838, in England, the contract must have been made before the

"all my lands," it passes the equitable title of lands contracted for by the vendee. The devisee can bring suit to compel specific performance of the contract. A devise by the vendor of "all real estate which may be vested in me as trustee" passes the vendor's title in lands contracted to be sold; the devisee in trust, and not the heir, taking the title to hold for the purchaser. 21

§ 2271. (§ 848.) Contract to Sell Revokes Will Pro Tanto.—Where a testator, subsequent to making a will devising certain lands, enters into a valid contract to sell the lands, the contract is usually said to revoke the clause of the will relating to the same land. Another view is that the contract takes the land out from under the operation of the will, and hence there is nothing for the will to act upon.<sup>22</sup> The contract to sell operates an equitable conversion of the land, and the prospective devisee can receive it then only in trust to convey, as from that time the land is in equity personalty of the vendor. The conversion by the contract "had the effect of taking the land from under the operation of the first clause of her will, and giving the proceeds of it to her residuary legatees and devisees as a part of her personal estate." 23

execution of the will, and it must have been a valid and enforceable contract by the buyer before the execution of the will, e. g., a contract in writing, and not by parol; Rose v. Cunnyngham, 11 Ves. 550, 554; but after the Wills Act of 1838, in England, permitting after-acquired property to pass, it was sufficient if the contract was valid and enforceable at the death of the testator.

- 20 Buck v. Buck, 11 Paige, 170.
- 21 Lysaght v. Edwards, L. R. 2 Ch. D. 499.
- 22 Knollys v. Alcock, 5 Ves. 649, 654; Cotter v. Layer, 2 P. Wms. 622. In Walton v. Walton, 7 Johns. Ch. 258, 267, the rule is expressed: "A valid contract for the sale of lands devised is as much a revocation of the will in equity as a legal conveyance of them would be at law. The estate from the time of the contract is considered the estate of the vendee."
  - 23 Coles v. Feeney, 52 N. J. Eq. 493, 495, 29 Atl. 172.

Though the contract to sell is rescinded, the clause of devise in the will is not allowed to operate on the land. Chancellor Kent states the doctrine of revocation of a testamentary clause by contract to sell to be in equity like a legal conveyance in law. There a subsequent reconveyance does not restore the devise. Once revoked by the contract the devise is gone forever, unless the will is republished.<sup>24</sup> As the executor's power depends upon the establishment of the contract as against the devisees under the clause of the will, the devisees should be made parties to the bill.<sup>25</sup>

§ 2272. (§ 849.) Dower Interests Under the Contract. "A notable exception to the identity of equitable and legal estates formerly existed, in that a widow was not dowable in a trust estate." But this anomaly has now been removed by legislation in England and the United States generally wherever dower interests are recognized, and the widow of the vendee is entitled to the dower interest in the lands of which her husband is beneficially seised by his contract. The courts have often had to determine whether the statute giving the widow dower in equitable estates extended to those arising from a contract for the sale of land, but there has been no hesitation in finding that they were so included. 28

Following the general rule, in order that the widow may have dower under the statute, the contract for the

<sup>24</sup> Walton v. Walton, 7 Johns. Ch. 258, 268.

<sup>25</sup> Coles v. Feeney, 52 N. J. Eq. 493, 495, 29 Atl. 172.

<sup>26</sup> Young v. Young, 45 N. J. Eq. 27, 36, 16 Atl. 921, citing the court in Cushing v. Blake, 3 Stew. Eq. 689, 695.

<sup>27</sup> Young v. Young, 45 N. J. Eq. 27, 36, 16 Atl. 921; Hart v. Logan, 49 Mo. 47; Tink v. Walker, 148 Ill. 234, 35 N. E. 765; Longwell v. Bentley, 23 Pa. St. 99, 103; In re Ransom, 17 Fed. 331; Malin v. Coult, 4 Ind. 535.

<sup>28</sup> Thompson v. Thompson, 1 Jones (N. C.), 430. See, also, Spaulding v. Haley, 101 Ark. 296, 142 S. W. 172.

lands must have been enforceable by the vendee at his death, or of such nature that it could be completed after his death.<sup>29</sup>

In a number of states, alienation by the vendee of his equitable interest in the lands contracted for, but not conveyed, defeats the widow's right to dower. He must be beneficially seised at his death for her dower right to attach.<sup>30</sup>

If the personalty of the vendee's estate, the primary fund for the purchase of the land contracted for, is insufficient to complete the purchase, in most jurisdictions it is held that the widow must contribute her proportion with the heirs towards the purchase-money.<sup>31</sup>

Where the contract for the sale of the lands is made prior to the marriage of the vendor, equity regards him as holding his legal title in trust for the vendee, and by the usual rule that no dower interest attaches to a trust estate, the widow of the vendor has no dower in the lands contracted to be sold before her marriage.<sup>32</sup> But if the contract fails of completion because of defect of title, the vendor's widow has her dower.<sup>33</sup> No equitable conversion had taken place.

§ 2273. (§ 850.) Assignees and Subsequent Purchasers—Right of the Assignee of the Vendee.—The assignee of the vendee's contract is regarded in equity as

<sup>29</sup> Tink v. Walker, 148 Ill. 234, 35 N. E. 765.

<sup>30</sup> In re Ransom, 17 Fed. 331; Hawley v. James, 5 Paige, 318; Morse v. Thorsell, 78 Ill. 600; Lynn v. Gephart, 27 Md. 547; Abbott v. Bosworth, 36 Ohio St. 605.

<sup>31</sup> Greenbaum v. Austrian, 70 Ill. 591; Virgin v. Virgin, 189 Ill. 145, 59 N. E. 586; Hart v. Logan, 49 Mo. 47, etc.; but see contra, Caroon, Adm'r, v. Cooper et al., 63 N. C. 386.

<sup>32</sup> Lunsford v. Jarrett, 11 Lea, 192; Rawlings v. Adams, 7 Md. 26; Dean's Heirs v. Mitchell's Heirs, 4 J. J. Marsh. 451; Adkins v. Holmes, 2 Ind. 197, 199; 4 Kent's Commentaries, 50.

<sup>33</sup> Lunsford v. Jarrett, 11 Lea, 192.

stepping into his shoes.34 succeeding to his rights to the land, which is regarded as a trust res or mortgage secur-"The assignee of a contract, although it is a chose in action, after a demand of performance, and refusal on the part of the obligor, may in equity maintain suit in his own name for specific performance."35 This right of the assignee of a vendee to compel specific performance of the contract for conveyance is everywhere recognized.36 The assignee of the vendee's option to purchase may enforce the option in equity. It is a right growing out of the contract for the option, and equity completes the right.<sup>37</sup> The vendor's defense of insolvency of the vendee in a contract for a lease does not avail him against the vendee's assignee, who is solvent. The latter is given specific performance against the vendor, although the assignor could not obtain it.38 But to obtain specific performance, the assignee must respond to all obligations for which the vendor holds the land in the way of a security. Thus the unpaid notes of the vendee given to the vendor for the land must be paid by the assignee of the vendee before he can obtain specific performance of the contract. The assignee can enforce the rights of the assignor under the contract, but "he can

<sup>34</sup> Crockford v. Alexander, 15 Ves. 138; Button v. Schroyer, 5 Wis. 598; Costello v. Friedman, 8 Ariz. 215, 71 Pac. 935; Keller v. Lewis, 53 Cal. 113; Fairchild v. Mullan, 90 Cal. 190, 27 Pac. 201; Hester v. Hunnicut, 104 Ala. 282, 16 South. 162.

<sup>35</sup> Ross v. Page, 11 N. D. 458, 92 N. W. 822; Murphy v. Marland, 8 Cush. 575; Brooklyn El. R. R. Co. v. Brooklyn, B. & W. E. R. R. Co., 23 App. Div. 29, 48 N. Y. Supp. 665 (the vendee railroad company is given an injunction against the assignee of the vendor railroad company, violating certain operating rights sold plaintiff).

<sup>36</sup> For instance, see Corbus v. Teed, 69 Ill. 205; Currier v. Howard,
14 Gray, 511; Owen v. Frink, 24 Cal. 171. See, also, Lenman v. Jones, 222 U. S. 51, 56 L. Ed. 89, 32 Sup. Ct. 18.

<sup>37</sup> House v. Jackson, 24 Or. 89, 32 Pac. 1027; Wilson v. Seybold, 216 Fed. 975.

<sup>38</sup> Crosbie v. Tooke, 1 Mylne & K. 431.

have no greater rights than they [the assignors] had, and he is bound to do all which they would be required in equity and good conscience to perform before obtaining a conveyance." The assignee of the vendee is not entitled to specific performance while his obligation to his assignor remains unsettled, for the assignor must be allowed to receive the conveyance from the vendor to hold as security against the assignee until the latter has satisfied his obligation. Thus, where a vendor conveyed to the vendee's assignee before the latter had paid the vendee, in fact before the assignee's obligation had matured, the court decreed that the assignee should convey to his assignor.40

§ 2274. (§ 851.) Assignee of Vendee not Subject to Specific Performance.—Although the assignee of the vendee has all the *right* of the vendee in the contract, he is not subject to the *obligations* of the contract, except upon his option to enforce specific performance. Thus he can proceed in equity against the vendor to secure the land, but the vendor cannot proceed against him, the assignee, to compel him to take the land.<sup>41</sup> The remedy of the

<sup>&</sup>lt;sup>39</sup> Wass v. Mugridge, 128 Mass. 394; Stephens v. Coryell, 169 Mich. 48, 134 N. W. 1094.

<sup>40</sup> Bird v. Hall, 30 Mich. 374 (Cooley, J., here said: "These parties cannot be allowed to deprive him [the vendee and assignor] of his security and turn him over to the contingencies of successive suits at law after his demand has matured. He has a right to be protected against the suits and the contingencies by having ample and effectual security in his own hands, and the remedy in equity was alone adequate to the case".

<sup>41</sup> Comstock v. Hitt, 37 Ill. 542 (here the vendor was treated as a mortgagee, and the assignee as the grantee of the mortgagee. The court held: "Taking a deed 'subject to an outstanding mortgage' creates no personal liability on the grantee to pay off the encumbrance unless he has specially agreed so to do, or the amount of the mortgage has been deducted from the purchase price." In Corbus v. Teed, 69 Ill. 205, the law is thus stated: "Where the assignee of

vendor is against the buyer, and (by way of enforcing the vendor's "lien") against the land.

§ 2275. (§ 852.) Grantee of Vendor is Subject to Specific Performance.—Just the reverse is true of the grantee of the vendor. He is subject to specific performance by the vendee or the vendee's assignee, where he has notice of the prior contract,<sup>42</sup> or has given no value for his title.<sup>43</sup>

It is everywhere settled that if the grantee takes the title from vendor without knowledge of the prior contract, giving value therefor, he can retain it, and the vendee has no remedy against him.<sup>44</sup>

the vendee does not offer to pay the money, and does not produce the assignment, the vendor has a clear right to hold the party with whom he contracted to the contract, and tender the deed to him in fulfillment of the contract, though the assignee has paid in part. It was optional with the assignee to perform or not. Complainant (vendor) could not compel him to perform. Should he file a bill for such a purpose the answer would be that he had made no contract with the complainant''). The text is cited and followed in Couch v. Crane, 142 Ga. 22, 82 S. E. 459; see, also, Southern Pac. Co. v. Butterfield, 39 Nev. 177, 154 Pac. 932.

42 2 Pom. Eq. Jur., § 688, notes 5 and (e), and cases cited; Veith v. McMurtry, 26 Neb. 341, 42 N. W. 6; Elsbury v. Skull, 32 Ind. App. 556, 70 N. E. 287; Randolph v. Wheeler, 182 Mo. 145, 81 S. W. 419 (in this case the right of the grantee of land subject to a prior contract to have specific performance against the vendee was recognized); Handy v. Rice, 98 Me. 504, 57 Atl. 847; Potter v. Sanders, 6 Hare, 1; Moore v. Crawford, 130 U. S. 122, 32 L. R. A. 878, 9 Sup. Ct. 447; Lovejoy v. Potter, 60 Mich. 95, 26 N. W. 844; White v. Mooers et al., 86 Me. 62, 65, 29 Atl. 936; Walker v. Cox, 25 Ind. 271; Bryant v. Booze, 55 Ga. 438. See, also, Noyes v. Bragg, 220 Mass. 106, 107 N. E. 669; Smith v. Umstead (N. J. Eq.), 65 Atl. 442; Johnson v. Olberg, 32 S. D. 346, 143 N. W. 292; Crowley v. Byrne, 71 Wash. 444, 129 Pac. 113.

43 McCullom v. Mackrell et ux., 13 S. D. 262, 83 N. W. 255; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921, 51 N. J. Eq. 491, 27 Atl. 627.

44 The text is cited in Ehrenstrom v. Phillips, 9 Del. Ch. 74, 77 Atl. 80. See Rathbone v. Groh, 137 Mich. 373, 100 N. W. 588;

§ 2276. (§ 853.) The Equitable Ground for Rights Against the Grantee and in Favor of the Assignee of the Vendee.—This power of the buyer or his assignee to enforce specific performance against the grantee with notice or without value given, is due to the view in equity that a trust attaches to the land by the contract, and whoever takes the land with notice or without paying value, holds merely the legal title in trust for the buyer or his assignee. It is to be added that the title is held not as a dry trust but as a security title, unless the entire consideration has been paid.45 Neither the vendor nor his assignee have any right of specific performance against the vendee's assignee, however, since there is no trust res held by the assignee. The buyer holds no particular fund which is turned over to his assignee. His obligation is only to pay out of his general substance. His assignee's only obligation is personal to him, the buyer, and therefore cannot be reached by the seller. The only right of the vendor or his assignee against the vendee's assignee, if he have the land without having paid the purchase price when due, is to have the land sold to satisfy the debt, as on the foreclosure of a mortgage.

§ 2277. (§ 854.) Assignment of the Purchase-money Notes Transfers the Security.—The vendor's interest when the purchase-money is unpaid in part or whole has frequently been said to be like the interest of a mortgagee. Following out the anal-

Martin v. Thomas, 56 W. Va. 220, 49 S. E. 118; Weaver v. Snively, 73 Neb. 35, 102 N. W. 77; Flackhammer v. Himes, 24 R. I. 306, 53 Atl. 46; Hunter v. Coe (McDevitt), 12 N. D. 505, 97 N. W. 869. See 2 Pom. Eq. Jur., § 767.

<sup>45</sup> Jackson's Case, Lane, 60. See 2 Pom. Eq. Jur., § 688.

<sup>46</sup> The vendor "carves out his own security, which is in the nature of a mortgage and to which all the essential incidents of a mortgage attach.... There cannot be a sensible distinction drawn

ogy,<sup>47</sup> if an assignment is made of the purchasemoney notes this operates in equity as a transfer of the security.<sup>48</sup> The vendor, though continuing to hold the legal title, holds it first in trust for the assignee of the notes as security for the purchasemoney notes, and only after the satisfaction of that security, on a resulting trust for the vendee. The assignee of the notes may file a bill in equity to subject the estate to the payment of his debt, although there has been no assignment of the estate to him.<sup>49</sup>

§ 2278. (§ 855.) Vendor's Assignee in Bankruptcy Subject to Specific Performance.—Where the vendor is bankrupt, if all the purchase-money has been paid, specific performance can be enforced against him, as he is a mere trustee, holding nothing but the bare legal title. But where the purchase-money has not all been paid, the vendor's assignee in bankruptcy holds the interest the vendor had in the lien on the land for the purchase-money, but specific performance can be had against the assignee in bankruptcy by joining him with the vendor. As the court in Swepson v. Rouse<sup>50</sup> puts it, the vendor

between the case of a legal title conveyed to secure the payment of a debt and a legal title retained to secure payment"; Lowery v. Peterson, 75 Ala. 109.

47 For the effect of assigning the mortgage note, see 3 Pom. Eq. Jur., § 1210.

48 The text is cited in Aycock Bros. Lumber Co. v. First Nat. Bank, 54 Fla. 604, 45 South. 501. See Gessner v. Palmateer, 89 Cal. 89, 13 L. R. A. 187, 24 Pac. 608, 26 Pac. 789; Wright v. Troutman, 81 Ill. 374; Lewis v. Shearer, 189 Ill. 184, 59 N. E. 580; Tanner v. Hicks, 12 Miss. (4 Smedes & M.) 294; Adams v. Cowherd, 30 Mo. 458; Graham v. McCampbell, Meigs, 52, 33 Am. Dec. 126; McClintic v. Wise's Adm'rs, 25 Gratt. (Va.) 448, 18 Am. Rep. 694. Also, see Stephens v. Chadwick, 10 Kan. 406; Hadley v. Nash, 69 N. C. 162; Church v. Smith, 39 Wis. 492; Lowery v. Peterson, 75 Ala. 109. See, also, 3 Pom. Eq. Jur., 4th ed., § 1261, notes 1 and (e).

49 Graham v. McCampbell, Meigs, 52, 33 Am. Dec. 126.

50 Swepson v. Rouse, 65 N. C. 34, 37, 6 Am. Rep. 735.

was not a "mere naked trustee," but "to secure the residue of the purchase-money, he had a lien on the land, which was an assignable interest upon his bankruptcy and necessarily passed to his assignee."

§ 2279. (§ 856.) Vendee's Assignee in Bankruptcy not Subject to Specific Performance.—But the assignee of the vendee in bankruptcy, on the contract, is not subject to specific performance of the contract.<sup>51</sup> There is no reason why the vendor as a creditor should be preferred to other creditors. There is no trust res to be delivered, as in the case of the vendor's assignee in bankruptcy. The contract, however, is not discharged by the vendee's bankruptcy, and his assignees may at their option have specific performance of the contract against the vendor.<sup>52</sup>

§ 2280. (§ 857.) Waste by Vendee; by Vendor.—The vendor's only interest in the use of the land he has contracted to sell is to have his security unimpaired so that it may satisfy the unpaid purchase-money. The vendee in possession is entitled to make any use of the property so long as he does not materially affect its value as security for the purchase-money. In order that the vendor may have an injunction to prevent waste, he must show that the vendee is lessening the value of the land so as to impair his security, and thus to injure his property,—the security.<sup>53</sup> The analogy to the mortgage is close.

<sup>51</sup> Pearce v. Bastable, [1901] L. R. 2 Ch. 122, 125.

<sup>52</sup> Brook v. Hewitt, 3 Ves. 253 (the court said: "The bankruptcy was an assignment; if the party had made an actual assignment, the assignee would without doubt be entitled to a performance").

<sup>53</sup> In Moses v. Johnson, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146, 147, the vendee was enjoined from felling timber, as it would impair the land as security, the court saying: "A vendor who sells on credit, retaining the title as security for the purchase-money, sustains the same relation to the vendee, so far as the question of

A mortgagee cannot maintain an action to restrain waste without showing that his security will be impaired.<sup>54</sup> Whether buildings annexed by the vendee subsequently to his taking possession can be removed by him is a point in conflict among the cases. The California courts hold that as the original security is not impaired by their removal, the vendee can remove them.<sup>55</sup> In Illinois it is held that the improvements, becoming permanently annexed to the land, cannot be removed.<sup>56</sup>

Since in equity the real interest in the property is in the vendee, the vendor, though holding possession of the land, must not make other than ordinary use of the land, and he will be enjoined from committing waste, such as cutting trees, quarrying,<sup>57</sup> or removing soil.<sup>58</sup>

# § 2281. (§ 858.) Vendor may be Liable as Trustee for Deterioration.—This rule is well stated by Lord Cole-

security is concerned, as does the mortgagee to the mortgagor." See, also, Miller v. Waddingham, 91 Cal. 377, 380, 13 L. R. A. 680, 27 Pac. 750; Laughlin v. North Wisconsin Lumber Co., 176 Fed. 772, 193 Fed. 367, 113 C. C. A. 291; Baldwin v. Pool, 74 Ill. 97; Thienes v. Francis, 69 Or. 171, 134 Pac. 1195, 138 Pac. 845.

- 54 Lord Eldon, in Crockford v. Alexander, 15 Ves. 138. In this case the vendee obtained possession from the lessee of the vendor, and began to cut timber. Lord Eldon enjoined him from destroying the property as a trespasser, although in equity by his contract he was entitled to possession.
- 55 Miller v. Waddingham, 91 Cal. 377, 391, 13 L. R. A. 680, 27 Pac. 750.
  - 56 Smith v. Moore, 26 III. 392.
- 57 Holmberg v. Johnson, 45 Kan. 197, 25 Pac. 575 (in this case the vendor had the right by the contract to retain possession and use the land for five years. He was restrained from cutting timber and quarrying).
- 58 Clarke v. Ramuz, [1891] L. R. 2 Q. B. 456. See, also, Foster v. Deacon, 3 Madd. 394 (vendor accountable for deterioration); Royal Bristol Perm. Building Soc. v. Bomash, 35 Ch. D. 390 (same; removing fixtures); Worrall v. Munn, 38 N. Y. 137, 53 N. Y. 185 (vendee entitled to recover the value of materials removed).

ridge: "During the interval prior to completion the vendor in possession is a trustee for the purchaser and as such has duties to perform towards him, not exactly the same as in the case of other trustees, but certain duties, one of which is to use reasonable care to preserve the property in a reasonable state of preservation, and so far as may be, as it was when the contract was made"; 59 or as Lord Kay expresses it, "To take reasonable care that the property is not deteriorated in the interval before completion." 60

§ 2282. (§ 859.) Loss by Fire or Other Accident; Usually Falls on Vendee.—Upon whom should the loss, as where the buildings are destroyed by fire, occurring between the date of the contract and the conveyance, fall? Following out the rule of equity that "as soon as the contract is finally concluded, although it is wholly executory in form," there results by its operation an equitable conversion of the land and the purchase-money, and the purchaser then becomes the equitable owner of the land, the conclusion can hardly be escaped that the loss should fall on the vendee. Of course the risk of

<sup>&</sup>lt;sup>59</sup> Clarke v. Ramuz, [1891] L. R. 2 Q. B. 456.

<sup>60</sup> Ibid. In Phillips v. Sylvester, L. R. 8 Ch. App. 173, it was held that a vendor who insisted on remaining in possession as further security was liable for deterioration of the property.

<sup>61</sup> Pom. Eq. Jur., § 1406. This paragraph of Pom. Eq. Jur. is quoted in Good v. Jarrard, 93 S. C. 229, 43 L. R. A. (N. S.) 383, 76 S. E. 698, and cited in Kimberlin v. Templeton, 55 Ind. App. 155, 102 N. E. 160; Manning v. North British & Mercantile Ins. Co., 123 Mo. App. 456, 99 S. W. 1095; Marion v. Wolcott, 68 N. J. Eq. 20, 59 Atl. 242; Sutton v. Davis, 143 N. C. 474, 55 S. E. 844; Northern Texas Realty & Construction Co. v. Lary (Tex. Civ. App.), 136 S. W. 843; Waite v. Stanley, 88 Vt. 407, L. R. A. 1916C, 886, 92 Atl. 633.

<sup>62</sup> This paragraph of the text is cited and followed in Sewell v. Underhill, 197 N. Y. 168, 27 L. R. A. (N. S.) 233, 134 Am. St. Rep. 863, 18 Ann. Cas. 795, 90 N. E. 430; and quoted in Fouts v. Foudray, 31 Okl. 221, Ann. Cas. 1913E, 301, 38 L. R. A. (N. S.) 251, 120 Pac.

loss by special stipulation can be placed on either party; as where the vendor by his contract was to complete a certain building before vendee's taking possession, the

960. Loss on the vendee: Osborn v. Nicholson, 13 Wall. 654, 660, 20 L. Ed. 689; Columbian Ins. Co. v. Lawrence, 2 Pet. 25, 46, 7 L. Ed. 335; Kuhn v. Freeman, 15 Kan. 423 (a railroad obtained by eminent domain a right of way through lands contracted for by the vendee. Although the compensation allowed for the right of way was less than the damage to the property, the vendee was obliged by the court to bear the loss); Marks v. Tichenor, 85 Ky. 536, 4 S. W. 225 (the court said the loss would always fall upon the vendee except where it was due to the vendor's negligence, or where by express terms of the contract the vendor was to deliver possession of the land in the same situation in which it was at the time of making of the contract); Willis v. Wozencroft, 22 Cal. 608, 618; Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582; Phinizy v. Guernsey, 111 Ga. 346, 78 Am. St. Rep. 207, 36 S. E. 796; State Mut. Fire Ins. Co. v. Updegraff, 21 Pa. St. 513, 519; Davidson v. Hawkeye Ins. Co., 71 Iowa, 532, 60 Am. Rep. 818, 32 N. W. 514; Goldman v. Rosenberg, 116 N. Y. 78, 15 Am. St. Rep. 410, 22 N. E. 397 (court here acknowledged general rule that loss should fall on vendee, but said it did not apply to the case by the terms of the contract); Skinner & Sons v. Houghton, 92 Md. 68, 84 Am. St. Rep. 485, 48 Atl. 85; Dunn v. Yakish, 10 Okl. 388, 61 Pac. 926. See, also, the following recent cases: Strachan v. Drake, 61 Colo. 444, 158 Pac. 310; Manning v. North British & Mercantile Ins. Co., 123 Mo. App. 456, 99 S. W. 1095; Marion v. Wolcott, 68 N. J. Eq. 20, 59 Atl. 242; Cropper v. Brown, 76 N. J. Eq. 406, 139 Am. St. Rep. 770, 74 Atl. 987 (purchase at judicial sale); Sutton v. Davis, 143 N. C. 474, 55 S. E. 844; Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623. Contra, see Good v. Jarrard, 93 S. C. 229, 43 L. R. A. (N. S.) 383, 76 S. E. 698. Where the state of the title is such at the time of the loss that specific performance could not then be enforced, see Bechtel v. Dakota Nat. Bank, 35 S. D. 191, 151 N. W. 887; Northern Texas Realty & Construction Co. v. Lary (Tex. Civ. App.), 136 S. W. 843.

It has been held at law, in a number of cases, that the loss falls on the vendor: See Thompson v. Gould, 20 Pick. 134 (action at law by vendee to recover purchase price paid); Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65 (action at law by vendor); Gould v. Murch, 70 Me. 288, 289, 35 Am. Rep. 325 (action at law by vendor); Powell

inference is that loss would fall on the vendor.<sup>63</sup> Equity, from the moment the contract is binding, gives the vendee the entire benefit of the rise in value of the land and of all subsequent improvements, and any other advantage that may accrue to the estate. If the vendee is owner in equity so as to receive all increment, he should be considered owner so as to accept the burden of any loss not due to the vendor's fault. This was the view taken by Lord Eldon in Paine v. Meller,<sup>64</sup> which established the doctrine in England,<sup>65</sup> as a general rule of equity, that all loss by fire or other accident shall fall

v. Dayton etc. R. R., 12 Or. 488, 8 Pac. 544; 14 Or. 356, 12 Pac. 665; 16 Or. 33, 8 Am. St. Rep. 251, 16 Pac. 863 (action at law); Hallett v. Parker, 68 N. H. 598, 39 Atl. 433; Smith v. McClusky, 45 Barb. 610 (but see Goldman v. Rosenburg, supra).

It has been suggested that a just and practical rule would be to make the loss fall upon the party in possession at the time: Professor Williston, in 9 Harv. Law Rev. 106. Contra, in favor of the accepted doctrine, see Professor Keener in 1 Columbia Law Rev. 1.

63 Counter v. Macpherson, 5 Moore P. C. C. 83.

64 Paine v. Meller, 6 Ves. 349, 1 P. Wms. 61. Lord Eldon there said: "If the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his; . . . they may be devised as his; they may be assets; and they would descend to his heir. If a man had signed a contract for a house upon that land which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it."

65 Robertson v. Skelton, 12 Beav. 260 (here the vendor was in possession when certain of the buildings fell and damaged neighboring buildings of a third party. The liability for this damage—was put upon the vendee, the court holding that "Any deterioration of the property arising from accident, as by fire, without fault of the vendor, falls upon the purchaser"); Twigg v. Fifield, 13 Ves. 513, 518 (but where the sale is through the court, as in case of a lunatic, the purchase is not complete until chancery has confirmed the report of its master for the sale, and up to the time of that confirmation the loss falls on the vendor); Ex parte Minor, 11 Ves. 559.

on the vendee rather than on the vendor, after the vendor is in position to make a good title, or the vendee has accepted the title; in other words, as soon as the contract is capable of specific performance by the vendor.

§ 2283. (§ 860.) Vendee Generally Entitled to the Insurance Money.—On principle it would seem clear that in all jurisdictions throwing the loss by fire on the vendee, the insurance money should go to the vendor in trust for the vendee, to be paid when the vendee should satisfy the security lien of the vendor. Such is the view of the American courts which have passed upon the question; 66 but in England, in a decision 7 very difficult to reconcile with the general equity doctrine of Paine v. Meller, 68 it was declared by a divided court that the vendee is not entitled to the insurance money, and by a later decision that the vendor himself must refund the money to the insurance company if paid to him. 69

66 State Mut. Fire Ins. Co. v. Updegraff, 21 Pa. St. 513; Phinizy v. Guernsey, 111 Ga. 346, 349, 78 Am. St. Rep. 207, 36 S. E. 796; Skinner & Sons v. Houghton, 92 Md. 68, 84 Am. St. Rep. 485, 48 Atl. 85. See, also, Kaufman v. All Persons, 16 Cal. App. 388, 117 Pac. 586; Millville Aerie No. 1836, Fraternal Order of Eagles, v. Weatherby, 82 N. J. Eq. 455, 88 Atl. 847; Skinner & Sons etc. Dry-Dock Co. v. Houghton, 92 Md. 68, 84 Am. St. Rep. 485, 48 Atl. 85; Reed v. Lukens, 44 Pa. St. 200, 84 Am. Dec. 425; Brakhage v. Tracy, 13 S. D. 343, 83 N. W. 363. This same doctrine is ably supported by Lord Justice James in his dissent in Rayner v. Preston, L. R. 18 Ch. D. 1. He concludes: "It [the insurance money] reached the vendor's hands . . . as money which ought to be laid out in reinstating the premises, or, in other words, as money which the purchaser alone had any real or substantial interest in." This view is supported by the reason that the vendor is in reality, in most respects, a trustee for the vendee.

67 Rayner v. Preston, L. R. 18 Ch. D. 1. One can only say of this case that it is a most extraordinary decision, whether viewed in the light of equitable principle or from the point of practical justice.

<sup>68</sup> Paine v. Meller, 6 Ves. 349.

<sup>69</sup> Castellain v. Preston, L. R. 11 Q. B. D. 380.

(§ 861.) Loss by Occurrence of Contingency on Vendee.—By the same reasoning that casts the loss by fire on the vendee, is the loss by the happening of a con-Thus, in White v. Nutt, 70 tingency put upon the vendee. where one contracted for an estate for two lives, and one of the lives dropped prior to conveyance of the estate, the buyer was compelled to accept conveyance and bear the loss, for "in equity the estate is as conveyed from the time of the articles sealed."71 The Lord Keeper doubted, however, had all the lives dropped, whether the vendee should have the loss on him, as, "no estate being left, there could be no conveyance."72 But this dictum was properly overthrown in a later case where, the only life having dropped, the buyer was nevertheless compelled to pay the purchase price. 73 Similarly, where the agreement is for the purchase of an annuity for the vendee's life, though the vendee die before the first sum be due, and the vendor will never have any annuity to pay, yet must the estate of the vendee pay the purchase price.74

§ 2285. (§ 862.) Foreclosure of Vendee's Equity of Specific Performance.—The analogy of the relation arising from the contract of sale and the mortgage relation serves equity again in tracing the right of the vendor to be freed from the vendee's continuing right of specific performance where the vendee himself will not pay the purchase-money. The vendee, who corresponds to the mortgagor, failing to pay the purchase-money, still has his equity of redemption; the vendor has neither his

<sup>70</sup> White v. Nutt, 1 P. Wms. 61.

<sup>71</sup> Id.

<sup>72</sup> Id.

<sup>73</sup> Kenney v. Wexhan, 6 Madd. 355.

<sup>74</sup> Coles v. Trecothick, 9 Ves. 234, 246; Kenney v. Wexhan, 6 Madd. 355, 357; Jackson v. Lever, 3 Bro. C. C. 605.

money nor the land, for he has hanging over him the vendee's right in equity to have the land, and has no power over the land other than that of a mortgagee, *i. e.*, to hold it as security. But to do justice to the vendor, where the vendee fails to pay the purchase-money, equity allows a foreclosure of the vendee's right to have specific performance, analogous to the foreclosure of the mortgagor's equity of redemption. By the decree, the vendee is ordered within a reasonable fixed time, to pay the purchase-money, or to be forever foreclosed of his equity in the contract.<sup>75</sup>

§ 2286. (§ 863.) Sale of the Property, in Lieu of Strict Foreclosure.—Most jurisdictions in the United States, however, do not decree a strict foreclosure, but, instead, decree that if the purchase-money is not paid within a time set by the court, the property shall be sold, and the vendor's interest satisfied out of the proceeds.<sup>76</sup>

75 This paragraph is quoted in full in Phillis v. Gross, 32 S. D. 438, 143 N. W. 373. See, also, Button v. Schroyer, 5 Wis. 598 (a leading case on this point. The court says: "The relation between the parties is analogous to that of equitable mortgagor and mortgagee. The former has an equity of redemption, the latter the correlative right of foreclosure." The lower court had given the usual decree for a foreclosure and sale, but the supreme court said as to the sale, "We think the decree of sale erroneous. The proper decree in such cases is, that the money due upon the contract be paid within such reasonable time as the court may direct, or that the vendee be foreclosed of his equity"); Baker v. Beach, 15 Wis. 108; Heins v. Thompson & Flieth Lumber Co., 165 Wis. 563, 163 N. W. 173; Dickson v. Loehr, 126 Wis. 641, 4 L. R. A. (N. S.) 986, 106 N. W. 793; Keller v. Lewis, 53 Cal. 113; Fairchild v. Mullan, 90 Cal. 190, 27 Pac. 201; S. P. R. R. v. Allen, 112 Cal. 455, 44 Pac. 796. See, also, Pom. Eq. Jur., § 1262.

76 Burger v. Potter, 32 Ill. 66. The text is cited in Aycock Bros. Lumber Co. v. First Nat. Bank, 54 Fla. 604, 45 South. 501. In Keller v. Lewis, 53 Cal. 113, the court decreed a foreclosure of the vendee's right to purchase, if he should not pay the purchase-money within a definite time, but added: "If the vendor obtains his money

This may be treated as a forced sale of the vendee's equitable interest to satisfy the unpaid purchase-money, any balance accruing to the vendee.<sup>77</sup>

and his interest, he gets all he expected when he entered into the contract." In Denton v. Scully, 26 Minn. 325, 4 N. W. 41, at page 326, the court thus refers to the ways of meeting the vendee's default: "A not unreasonable remedy would be to require the defendants [vendees] to pay as they have agreed to do, or to abandon the contract. Accordingly a court of equity not unfrequently administers this remedy by ascertaining the amount owing on the contract, by fixing the day by which the defendants are to pay it, and in default of such payment, declaring the contract forfeited, and restoring the plaintiff to possession; or if, upon a consideration of the circumstances of the case and the interests of all parties concerned, it appears more just and equitable, to direct a sale of defendant's interests in the bonded lands, or in some instances a sale of the land itself, and the application of the proceeds to the payment of the defendant's liabilities under the contract." The same rule was applied in Thomson v. Smith, 63 N. Y. 301; Walker v. Casgrain, 101 Mich. 604, 608, 60 N. W. 291; Huffman v. Cauble, 86 Ind. 591; Martin v. O'Bannon, 35 Ark. 62; Lewis v. Boskins, 27 Ark. 61; Hester v. Hunnicutt, 104 Ala. 282, 287, 16 South. 162. See, also, Ferguson v. Blood, 152 Fed. 98, 82 C. C. A. 482 (deficiency judgment); Nelson v. Husted, 182 Fed. 921; Freeman v. Paulson, 107 Minn. 64, 131 Am. St. Rep. 438, 119 N. W. 651; Smith v. Smith, 84 N. J. Eq. 299, 93 Atl. 890; Councill v. Bailey, 154 N. C. 54, 69 S. E. 760; Singleton v. Cuttino, 107 S. C. 465, 92 S. E. 1046; Marshall v. Porter, 73 W. Va. 258, 80 S. E. 350.

77 Abbott v. Moldestead, 74 Minn. 293, 299, 73 Am. St. Rep. 348, 77 N. W. 227 (court said its decree would operate as a sale or assignment of the vendee's equitable interest and not a cancellation of the contract).

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### CHAPTER XLIII.

## SUITS TO COMPEL TRANSFER OR ISSUE OF STOCK.

#### ANALYSIS.

§ 864. Suits against corporations to compel the transfer or issue of stock.

§ 2287. (§ 864.) Suits Against Corporations to Compel the Transfer or Issue of Stock.—"Cases frequently arise where corporations or joint-stock companies refuse to recognize the rights of assignees of stock, and make the transfers on their books and issue new certificates in place of the old ones presented, or where certificates have been presented to the company without the owner's consent and negligence, and new certificates have been issued instead thereof to others purporting to be entitled thereto." In some jurisdictions the legal writ of mandamus is available to a party seeking relief from such refusal; but generally it is held that this writ is not proper. The commonest remedies are that in

- 1 Pom. Eq. Jur., § 1412. This section of Pom. Eq. Jur. is quoted in Birmingham Nat. Bank v. Roden, 97 Ala. 404, 11 South. 883, and cited in Snyder v. Charleston & S. Bridge Co., 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.
- <sup>2</sup> Hair v. Burnell, 106 Fed. 280; People v. Crockett, 9 Cal. 112; People v. Goss, 99 Ill. 355; State v. First Nat. Bank, 89 Ind. 302; Slemmons v. Thompson, 23 Or. 215, 31 Pac. 514.
- 3 The text is cited in State v. Bank of Conception, 174 Mo. App. 589, 163 S. W. 945. See Stackpole v. Seymour, 127 Mass. 104 (no public interest or corporate right is in question); State v. Rombauer, 46 Mo. 155; State v. Warren Foundry, 32 N. J. L. 439; Shipley v. Mechanics' Bank, 10 Johns. 484. See, also, Townes v. Nichols, 73 Me. 515 (weight of authority said to favor this view; court refused

equity and that at law for damages. In the first case mentioned above, equity has jurisdiction to compel the corporation to make the transfer and issue new certificates to the lawful assignee.<sup>4</sup> If this relief cannot be

to commit itself). "Mandamus is not well adapted to the trial of questions of fact or the determination of controversies of a strictly private nature. Its office is rather to command and enforce the performance of those duties in which the public have some concern, and where the right is clear, and does not depend upon a complication of disputed facts which must be settled from the conflicting testimony of witnesses": State v. Carpenter, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261.

4 Mechanics' Bank v. Seton, 1 Pet. 299, 7 L. Ed. 152 (the remedy at law in such a case is not clear and perfect); Wilson v. Atlantic & St. L. R. Co., 2 Fed. 459; Jessup v. Chicago & N. W. R. Co., 188 Fed. 931; Bates v. United Shoe Machinery Co., 216 Fed. 140, 132 C. C. A. 384; Thornton v. Martin, 116 Ga. 115, 42 S. E. 348; Real Estate Trust Co. v. Bird, 90 Md. 229, 44 Atl. 1048; Iasigi v. Chicago etc. R. R., 129 Mass. 46; Scherck v. Montgomery, 81 Miss. 426, 33 South. 507; Whiting v. Enterprise Land etc. Co., 265 Mo. 374, 177 S. W. 589; Fitzpatrick v. O'Neill, 43 Mont. 552, Ann. Cas. 1912C, 296, 118 Pac. 273; Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 111 Am. St. Rep. 637, 3 L. R. A. (N. S.) 551, 62 Atl. 971 (suit lies against foreign corporation); Archer v. American Waterworks Co., 50 N. J. Eq. 33, 24 Atl. 508; Kruse v. Hudson County Consumers' Brewing Co., 79 N. J. Eq. 392, 82 Atl. 104 (remedy lost by laches); Farrell v. Passaic Water Co., 82 N. J. Eq. 97, 88 Atl. 627 (registration of bond); Middlebrook v. Merchants' Bank, 41 Barb. 481, 3 Abb. Dec. 295; Travis v. Knox Terpezone Co., 215 N. Y. 259, Ann. Cas. 1917A, 387, L. R. A. 1916A, 542, 109 N. E. 250 (suit lies against foreign corporation); Iron R. R. Co. v. Fink, 41 Ohio St. 321, 52 Am. Rep. 84 (as incidental to other equitable relief); Nicholson v. Franklin Brewing Co., 82 Ohio St. 94, 137 Am. St. Rep. 764, 19 Ann. Cas. 699, 91 N. E. 991 (cannot compel registration of transfer made contrary to by-law); Ardmore State Bank v. Mason, 30 Okl. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080; Mundt v. Commercial Nat. Bank, 35 Utah, 90, 136 Am. St. Rep. 1023, and note, 99 Pac. 454; Feckheimer v. Nat. Exch. Bank, 79 Va. 80. "To say that the holder shall not be entitled to the stock, because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remgiven, equity may award dámages instead; in fact, it is frequently said that alternative relief may be given.<sup>5</sup> In the second class, equity may "decree that the corporation replace the stock upon its books, and issue new certificates to the original owner, or if it is unable to do this by reason of its not having or being able to procure any shares, to pay the value of the stock." As inci-

edy of an action for damages, in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases, and confer a power on corporate bodies which has no sanction in the law. A court of equity will enforce a specific performance on a contract for the sale of real estate, and compel the execution of a deed by the vendor to the vendee, although an action at law may be brought to recover damages for the breach of the contract. Such a case bears a striking analogy to the one now presented, and the same principle is manifestly applicable where the remedy at law is inadequate to furnish the proper relief": Cushman v. Thayer Mfg. Co., 76 N. Y. 365, 32 Am. Rep. 315. It has been said that the court compels an issuance of certificates, not of shares: Burnall v. Bushwick R. R., 75 N. Y. 211.

5 Birmingham Nat. Bank v. Roden, 97 Ala. 404, 11 South. 883; State v. Carpenter, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261. To the effect that the decree should not be conditional, and that damages should not be awarded until it appears that the specific relief cannot be granted, see Consolidated Min. & P. Co. v. Huff, 62 Kan. 405, 63 Pac. 442. In general, see In re Reading Iron Works, 149 Pa. St. 182, 24 Atl. 202.

6 Pom. Eq. Jur., § 1412. See, also, Hildyard v. South Sea Co., 2-P. Wms. 77; Ashby v. Blackwell, 2 Eden, 299; Blaisdell v. Bohr, 68 Ga. 56; Vernon, G. & R. R. Co. v. Washington Township, 48 Ind. App. 309, 95 N. E. 599; Chew v. Bank of Baltimore, 14 Md. 299 (sale of stock by lunatic); Sewall v. Boston etc. Co., 4 Allen, 277, 81 Am. Dec. 701; Pratt v. Taunton Copper Co., 123 Mass. 110, 25 Am. Rep. 37; Pratt v. Boston & Albany R. Co., 126 Mass. 443; Pollock v. National Bank, 7 N. Y. 274, 57 Am. Dec. 520. The cases under this head almost invariably arise where the owner's name has been forged. It is no answer that the officers of the company have been without blame in allowing the unauthorized transfer, or that the certificate was obtained by a purchaser in good faith; Western. Union Tel. Co. v. Davenport, 97 U. S. 369, 24 L. Ed. 1047.

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dental to this relief, an account may be taken of dividends paid.<sup>7</sup> When necessary, an injunction may issue in aid of the remedy in either class of cases.<sup>8</sup>

<sup>7</sup> Hildyard v. South Sea Co., 2 P. Wms. 77; Ashby v. Blackwell, 2 Eden, 299; Blaisdell v. Bohr, 68 Ga. 56; Pollock v. National Bank, 7 N. Y. 274, 57 Am. Dec. 520.

<sup>8</sup> Thornton v. Martin, 116 Ga. 115, 42 S. E. 348.

## CHAPTER XLIV.

## MARSHALING OF SECURITIES.

### ANALYSIS,

§ 865. In general.

§ 866. Paramount encumbrancer must not be inconvenienced.

§ 867. Rights of third parties must not be prejudiced.

§ 868. Rule applicable only between creditors of one debtor.

§ 869. Homesteads.

§ 870. Relief given.

§ 2288. (§ 865.) In General.—"The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is, that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only,—as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another,—the former must seek satisfaction out of that fund which the latter cannot touch." The right is purely equitable and

1 Pom. Eq. Jur., § 1414. This section of Pom. Eq. Jur. is quoted in Clark v. Wright, 24 S. C. 526; Farwell v. Bigelow, 112 Mich. 289, 70 N. W. 579; Gilliam v. McCormack, 85 Tenn. 597, 4 S. W. 521; Wyman v. Fort Dearborn Nat. Bank, 181 Ill. 279, 72 Am. St. Rep. 259, 48 L. R. A. 565, 54 N. E. 946; quoted, also, in Mulherin v. Porter, 1 Ga. App. 153, 58 S. E. 60; Newby v. Fox, 90 Kan. 317, 47 L. R. A. (N. S.) 302, 133 Pac. 890; Stowe v. Powers, 19 Wyo. 291, 116 Pac. 576. This paragraph of the text, or Pom. Eq. Jur., § 1414, is cited in Mansur v. Dupree, 150 Fed. 329, 80 C. C. A. 213 (first creditor paid in full out of doubly charged fund on relinquishing his security in the other fund); Bramlett v. Kyle, 168 Ala. 325, 52 South. 926; Quinnipiac Brewing Co. v. Fitzgibbons, 73 Conn. 191, 47

cannot be asserted at law, except where it is incidental to an equitable defense permitted in a legal action.<sup>2</sup> It is to be observed that the prior creditor cannot be compelled to give up either of his securities until his debt is paid.<sup>3</sup> "The operation of the principle is not affected by the nature of the property which constitutes the double fund, but applies wherever a paramount creditor holds collateral security, or can resort collaterally to other real or personal estate for the satisfaction of the debt." "The rules of marshaling securities are applied under a variety of circumstances; but generally, in this

Atl. 128; Mark v. American Brick Mfg. Co., 10 Del. Ch. 58, 84 Atl. 887; Rownd v. State, 152 Ind. 39, 51 N. E. 914, 52 N. E. 395; Records v. McKim, 115 Md. 299, 43 L. R. A. (N. S.) 197, 80 Atl. 968; Bearse v. Lebowich, 212 Mass. 344, 99 N. E. 175; Paddock-Hawley Iron Co. v. McDonald, 61 Mo. App. 559; Merchants' State Bank of Fargo v. Tufts, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; Rogis v. Barnatowich, 36 R. I. 227, 89 Atl. 838; King v. Patterson, 129 Tenn. 1, 164 S. W. 1191; White v. Fulghum, 87 Tenn. 281, 10 S. W. 501; Wahrmund v. Edgewood Distilling Co. (Tex. Civ. App.), 32 S. W. 227; Lowry v. Haynes, 44 Tex. Civ. App. 431, 98 S. W. 1068; St. Croix Lumber Co. v. Joseph, 142 Wis. 55, 124 N. W. 1049. In general, see Ex parte Kendall, 17 Ves. 514, 520; Covington City Nat. Bank v. Commercial Bank, 65 Fed. 547; Gusdorf v. Ikelheimer, 75 Ala. 148; Terry v. Rosell, 32 Ark. 378; Ross v. Duggan, 5 Colo. 85; Boone v. Clark, 129 Ill. 466, 5 L. R. A. 276, 21 N. E. 850; Equitable Mortgage Co. v. Lowe, 53 Kan. 39, 35 Pac. 829; Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203; Evertson v. Booth, 19 Johns. 486, 492; Besley v. Lawrence, 11 Paige, 581; Ziegler v. Long, 2 Watts, 205; Willis v. Holland, 13 Tex. Civ. App. 689, 36 S. W. 329; Hudson v. Dismukes, 77 Va. 242. See, also, cases cited in following notes.

<sup>&</sup>lt;sup>2</sup> Barlow v. Britton, 70 Miss. 427, 12 South. 460; Johnson v. Moyse (Miss.), 12 South. 483; Cain v. Moyse, 71 Miss. 653, 15 South. 115.

<sup>3</sup> Union Bank of Georgetown v. Laird, 15 U. S. (2 Wheat.) 390, 4 L. Ed. 269. See, also, Bank of Defiance v. Ryan, 144 Iowa, 725, 123 N. W. 940.

<sup>4</sup> Ross v. Duggan, 5 Colo. 85. See, also, Gusdorf v. Ikelheimer, 75 Ala. 148.

country, between mortgagees, mortgagees and judgment creditors, and between judgment creditors."5

§ 2289. (§ 866.) Paramount Encumbrancer must not be Inconvenienced.—Relief will not be given if it will delay or inconvenience the paramount encumbrancer in the collection of his debt, or prejudice him in any manner; for it would be unreasonable that he should suffer because some one else has taken imperfect security:

5 Pom. Eq. Jur., § 1414. In the following cases the rule was applied between mortgagees: Aldrich v. Cooper, 8 Ves. 382, 395, 2 Lead. Cas. Eq., 4th Am. ed., 2280, notes; Tidd v. Lister, 10 Hare, 140, 157, 3 De Gex, M. & G. 857; Gibson v. Seagrim, 20 Beav. 614; Russell v. Howard, 2 McLean, 489, Fed. Cas. No. 12,156; York etc. Ferry Co. v. Jersey Co., Hopk. Ch. 460; Moore v. Cofield, 10 Ga. App. 197, 73 S. E. 45; Miles v. National Bank of Kentucky, 140 Ky. 376, 131 S. W. 26. See, also, G. Ober & Sons Co. v. Keating, 77 Md. 100, 26 Atl. 501.

Between mortgagee and judgment creditor: Bank of Commerce v. First Nat. Bank, 150 Ind. 588, 50 N. E. 566; State Sav. Bank v. Harbin, 18 S. C. 425.

Miscellaneous: Kendig v. Landis, 135 Pa. St. 612, 19 Atl. 1058 (between judgment creditor and holder of mechanic's lien); Bruce v. Laing (Tex. Civ. App.), 64 S. W. 1019; Halkett v. Young, 73 N. J. Eq. 10, 75 Atl. 825.

"When creditor No. 1 has a lien upon two funds, A and B, and creditor No. 2 has a subsequent lien upon fund B alone, the theory of the remedy is, that the lien of creditor No. 2 is transferred to and enforced against fund A. It is possible that some cases may have carried the principle to the extent of permitting creditor No. 2 to maintain an equitable suit for the purpose of compelling creditor No. 1 to enforce his security, in the first place, out of fund A, so as to leave fund B, if possible, subject to the plaintiff's subsequent lien. This form of the relief is not, in my opinion, warranted by the principle; it was not allowed in the analogous remedy of marshaling assets; and it seems to interfere with the prior vested rights of creditor No. 1": Pom. Eq. Jur., § 1414, note.

6 Pom. Eq. Jur., § 1414. The text is quoted in Jones v. Harris, 90 Ark. 51, 117 S. W. 1077; Stowe v. Powers, 19 Wyo. 291, 116 Pac. 576, and cited in Hanesley v. National Park Bank of New York, 147 Ga. 96, 92 S. E. 879; Lowry v. Haynes, 44 Tex. Civ. App.

Thus, relief has been denied where the fund to be resorted to has been dubious, or one which might involve the creditor in litigation; and a mere personal remedy has been held insufficient to warrant interference. In some jurisdictions it is held that a creditor who has adequate security within the state cannot be compelled to resort to property elsewhere; while in others the fact that a portion of the security is situated elsewhere is held to be immaterial. It would seem that a creditor should not be compelled to resort to property in a foreign country

431, 98 S. W. 1068. This portion of Pom. Eq. Jur. is quoted in Farwell v. Bigelow, 112 Mich. 285, 70 N. W. 579; Clark v. Wright, 24 S. C. 526; Ohio Cultivator Co. v. People's Nat. Bank, 22 Tex. Civ. App. 643, 55 S. W. 765; and cited to this effect in Boone v. Clark, 129 Ill. 466, 5 L. R. A. 276, 21 N. E. 850; Wilkes v. Adler, 68 Tex. 689, 5 S. W. 497; Wahrmund v. Edgewood Distilling Co. (Tex. Civ. App.), 32 S. W. 227; Gotzian v. Shakman, 89 Wis. 52, 46 Am. St. Rep. 820, 61 N. W. 304. See, also, Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553; Friedlander v. Fenton, 180 Ill. 312, 72 Am. St. Rep. 207, 54 N. E. 329 (affirming Heidelbach v. Fenton, 79 Ill. App. 357); Sweet v. Redhead, 76 Ill. 374; General Ins. Co. v. United States Ins. Co., 10 Md. 517, 69 Am. Dec. 174; Briggs v. Planters' Bank, Freem. (Miss.) 574; People v. Remington, 121 N. Y. 328, 8 L. R. A. 458, 24 N. E. 793; Evertson v. Booth, 19 Johns. 486, 492; Witte v. Clarke, 17 S. C. 313; Hudkins v. Ward, 30 W. Va. 204, 8 Am. St. Rep. 22, 3 S. E. 600. But where A had a mortgage on lots 1 and 2, and B a second mortgage on 1, A could not, by taking with notice a second mortgage on 2, defeat B's right to have the first mortgage marshaled: Miles v. National Bank of Kentucky, 140 Ky. 376, 131 S. W. 26.

- 7 Walker v. Covar, 2 S. C. 16. The text is quoted in Jones v. Harris, 90 Ark. 51, 117 S. W. 1077; Stowe v. Powers, 19 Wyo. 291, 116 Pac. 576.
- 8 Palmer v. Snell, 111 Ill. 161. See, also, Wolf v. Smith, 36 Iowa, 454 (necessity to resort to many promissory notes of different individuals will prevent relief).
- 9 Calloway v. People's Bank, 54 Ga. 572; Denham v. Williams, 39 Ga. 312.
- 10 Willey v. St. Charles Hotel Co., 52 La. Ann. 1581, 28 South. 182; York etc. Ferry Co. v. Jersey Co., Hopk. Ch. 460.

unless it is made to appear that he will not be prejudiced thereby.<sup>11</sup> It is sometimes said that the creditor seeking the relief must show, and make it clearly appear, that the rights of his co-creditor will neither be injured nor injuriously delayed.<sup>12</sup>

§ 2290. (§ 867.) Rights of Third Parties must not be Prejudiced.—Relief will not be given if it will prejudice the rights of third persons. The question frequently arises when there are more than two liens to be adjusted. For instance, a third mortgage may be given, covering property included in the first but not in the second. To compel a marshaling of securities would prejudice the rights of this third party. The right to marshaling being a mere equity and not a lien, it is generally held that it is subject to displacement and defeat by subsequently acquired liens upon the funds. This is more clearly

- 11 Farwell v. Bigelow, 112 Mich. 285, 70 N. W. 579; Sternberger v. Sussman, 69 N. J. Eq. 199, 60 Atl. 195.
- 12 General Ins. Co. v. United States Ins. Co., 10 Md. 517, 69 Am. Dec. 174; Watkins v. Worthington, 2 Bland, 531; Worthington v. Craddock, 3 Bland, 514, note; Pope v. Baltimore Warehouse Co., 103 Md. 9, 62 Atl. 1119.
- 13 The text is cited in Keasler v. Wray (Tex. Civ. App.), 171 S. W. 534. See Averall v. Wade, Lloyd & G. 252; Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553; Georgia Chem. Works v. Cartledge, 77 Ga. 547, 4 Am. St. Rep. 96; Cannon v. Kreipe, 14 Kan. 324; Leib v. Stribling, 51 Md. 285; Herbert v. Mechanics' B. & L. Ass'n, 17 N. J. Eq. 497, 90 Am. Dec. 601; Ziegler v. Long, 2 Watts, 205; White v. Fulghum, 87 Tenn. 281, 10 S. W. 501; Birch River Boom & Lumber Co. v. Glendon Boom & Lumber Co., 71 W. Va. 139, 76 S. E. 167. See, however, to the effect that the right to marshal will not be displaced by subsequent rights or liens unless they are those of innocent purchasers for value without notice, or holders of some other superior equity, Ingersoll v. Somers Land Co., 82 N. J. Eq. 476, 89 Atl. 288.
- 14 Gilliam v. McCormack, 85 Tenn. 597, 4 S. W. 521. See, also, Harron v. Du Bois, 64 N. J. Eq. 657, 54 Atl. 857.

so when the subsequent lien is acquired without actual knowledge of the facts.<sup>15</sup>

- § 2291. (§ 868.) Rule Applicable Only Between Creditors of One Debtor.—In order to obtain the relief, the parties must be creditors of the same debtor, and both funds must belong to one debtor. Accordingly, it is generally held that there can be no marshaling as between the debtor and creditor; 7 nor is the doctrine applicable as between a purchaser of an equity of redemption and a prior mortgagee. The same principle prevents the application of the rule as against a mere surety.
- § 2292. (§ 869.) Homesteads.—The doctrine of marshaling will not be applied so as to work an injustice to
  - 15 Webb v. Hunt, 2 Ind. Ter. 612, 53 S. W. 437.
- 16 The text is quoted in Keasler v. Wray (Tex. Civ. App.), 171 S. W. 534. See Carter v. Neal, 24 Ga. 346, 71 Am. Dec. 136; Boone v. Clark, 129 Ill. 466, 724, 5 L. R. A. 276, 21 N. E. 850 (citing Pom. Eq. Jur., § 1414); Rogers v. Blum, 56 Tex. 1; Blakemore v. Wise, 95 Va. 269, 64 Am. St. Rep. 781, 28 S. E. 332. See, also, A. A. Cooper Wagon & Buggy Co. v. Irvin, 83 Neb. 832, 120 N. W. 430; Gaines v. Hill, 147 Ky. 445, 39 L. R. A. (N. S.) 999, 144 S. W. 92; Baker v. Davie, 211 Mass. 429, 97 N. E. 1094; Birch River Boom & Lumber Co. v. Glendon Boom & Lumber Co., 71 W. Va. 139, 76 S. E. 167.
- 17 Rogers v. Meyers, 68 Ill. 92; Plain v. Roth, 107 Ill. 588; Citizens' Savings Bank v. Wood, 134 Iowa, 232, 111 N. W. 929. In some jurisdictions an exception is made in favor of a homestead claimant. See § 869.
- 18 Stevens v. Church, 41 Conn. 369. See, also, Miller v. Cook,
   135 Ill. 190, 10 L. R. A. 292, 25 N. E. 756; Scharff v. Meyer, 133 Mo.
   428, 54 Am. St. Rep. 672, 34 S. W. 858.
- 19 Ex parte Kendal, 17 Ves. 520; Swift & Co. v. Kortrecht, 112 Fed. 709, 50 C. C. A. 429; Trentman v. Eldridge, 98 Ind. 525; In re Hobson, 81 Iowa, 392, 11 L. R. A. 255, 46 N. W. 1095; Woollen v. Hillen, 9 Gill, 185, 52 Am. Dec. 690; Dorr v. Shaw, 4 Johns. Ch. 17; Hall v. Hyer, 48 W. Va. 353, 37 S. E. 594.

the debtor. Consequently, it is generally held that it cannot be invoked to compel a creditor to resort to a homestead in the first instance.<sup>20</sup> The object of the exemption is to protect the debtor and his family. If a creditor without a lien were allowed to compel its application upon a prior claim, the right might be practically valueless. Some cases even go so far as to allow the debtor a right to compel the mortgagee to resort first to the other property covered by the mortgage;<sup>21</sup> but while

20 The text is quoted in Mulherin v. Porter, 1 Ga. App. 153, 58 S. E. 60. See First Nat. Bank v. Browne, 128 Ala. 557, 86 Am. St. Rep. 156, 29 South. 552; Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553; Dickson v. Chorn, 6 Iowa, 19, 71 Am. Dec. 382; Frick Co. v. Ketels, 42 Kan. 527, 16 Am. St. Rep. 507, 22 Pac. 580; Ralls v. Prather, 21 Ky. Law Rep. 555, 52 S. W. 800 (denying rehearing of 51 S. W. 318); Armitage v. Toll, 64 Mich. 412, 31 N. W. 408 ("the law excludes the homestead from all remedies of creditors in all courts, and the power of the creditor against the will of the owner is absolutely subverted"); McArthur v. Martin, 23 Minn. 74; Koen v. Brill, 75 Miss. 870, 65 Am. St. Rep. 633, 23 South. 481 (to allow such procedure would work a gross injustice); Mitchelson v. Smith, 28 Neb. 583, 26 Am. St. Rep. 357, 44 N. W. 871; Wilson v. Patton, 87 N. C. 318. See, also, the recent cases: In re Bailey, 176 Fed. 990; Century Savings Bank v. Robt. Moody & Son, 204 Fed. 963, 123 C. C. A. 285; Nolan v. Nolan, 155 Cal. 476, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056, 101 Pac. 520; Bankers' Life Ass'n v. Engelson, 148 Iowa, 594, 126 N. W. 951; A. A. Cooper Wagon & Buggy Co. v. Irvin, 83 Neb. 832, 120 N. W. 430; Pugh v. Whitsitt (Tex. Civ. App.), 161 S. W. 953; Gordon v. Deavitt, 84 Vt. 59, 78 Atl. 113. Where, however, the homestead claimant sells the other property covered by the mortgage, the homestead becomes the primary fund for payment: Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 43 Am. St. Rep. 491, 56 N. W. 821.

21 The text is quoted in Mulherin v. Porter, 1 Ga. App. 153, 58 S. E. 60. See Frick Co. v. Ketels, 42 Kan. 527, 16 Am. St. Rep. 507, 22 Pac. 580. See, also, Miller v. McCarty, 47 Minn. 321, 28 Am. St. Rep. 375, 50 N. W. 235 (citing authorities on both sides); Blood v. Munn, 155 Cal. 228, 100 Pac. 694; Nolan v. Nolan, 155 Cal. 476, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056, 101 Pac. 520; Bankers' Life Ass'n v. Engelson, 148 Iowa, 594, 126 N. W. 951; contra, see Bramlett v. Kyle, 168 Ala. 325, 52 South. 926.

much may be said in favor of the justice of this rule, it would seem in conflict with the general principle that only creditors can compel marshaling of securities. In a few jurisdictions it is held that a creditor may compel marshaling even as against a homestead claim.<sup>22</sup>

(§ 870.) Relief Given.—The right to have securities marshaled is not a lien; but neither is it a mere incident to the remedy. The right is not generally enforced by an independent action, but it exists and may be asserted whenever an opportunity is afforded.<sup>23</sup> Questions frequently arise when the prior lienholder releases property upon which he alone has a lien, or satisfies his claim in full out of property on which both have Of course if the remaining property is sufficient to satisfy both liens, no complaint can be made.24 Where it is not sufficient, and the other property is released without a satisfaction of the debt, it is held that the subsequent lienholder is entitled to a preference in payment, to the extent of the amount which should have been realized upon the property released.<sup>25</sup> Where the claim is satisfied out of the property upon which there is a common lien, the junior creditor has been allowed a substitution, or a decree for subrogation, or an assign-

<sup>22</sup> White v. Polleys, 20 Wis. 503, 91 Am. Dec. 432; State Sav. Bank v. Harbin, 18 S. C. 425; People's Bank v. Price, 47 S. C. 134, 24 S. E. 1038. It is held in South Carolina, however, that a mere general creditor cannot compel marshaling: Pearson v. Pearson, 59 S. C. 367, 82 Am. St. Rep. 846, 37 S. E. 917.

<sup>23</sup> Bank of Orangeburg v. Kohn, 52 S. C. 120, 29 S. E. 625.

<sup>24</sup> Blanchette v. Farsch, 18 S. D. 20, 99 N. W. 79; Avery v. Popper (Tex. Civ. App.), 45 S. W. 951; Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697.

<sup>25</sup> Gore v. Royse, 56 Kan. 771, 44 Pac. 1053; Glass v. Pullen, 6 Bush, 346; McConnell v. Muldoon, 30 Abb. N. C. 352, 24 N. Y. Supp. 902. See, also, Blood v. Munn, 155 Cal. 228, 100 Pac. 694; First State Bank of Teague v. Cox (Tex. Civ. App.), 139 S. W. 1; Schaad v. Robinson, 59 Wash. 346, 109 Pac. 1072.

ment of the rights of the prior lienor.<sup>26</sup> In some instances an injunction may issue to protect the second claimant in the assertion of his right.<sup>27</sup>

26 Cheesebrough v. Millard, 7 Johns. Ch. 409, 7 Am. Dec. 494 (entitled to have prior lien assigned to him); Hunt v. Townsend, 4 Sand. Ch. 510 (entitled to substitution); Herriman v. Skillman, 33 Barb. 378 (subrogation); Jones v. Zollicoffer, 9 N. C. 623, 11 Am. Dec. 795 (entitled to have prior lien assigned to him); Appeal of Ramsey, 2 Watts, 228, 27 Am. Dec. 301 (same); Hudkins v. Ward, 30 W. Va. 204, 8 Am. St. Rep. 22, 3 S. E. 600 (subrogation); Anthes v. Schroeder, 79 Neb. 355, 112 N. W. 593.

27 Nuzum v. Morris, 25 W. Va. 559.

# CHAPTER XLV. CREDITORS' SUITS.

### ANALYSIS.

§ 871.	In general.
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- §§ 872-874. Adequacy of legal remedy.
  - § 872. In general—Supplementary proceedings.
  - § 873. In case of fraudulent conveyance, other remedies are inadequate.
  - § 874. But complainant must show the necessity of setting aside the fraudulent conveyance.
  - § 875. Discovery of assets.
- §§ 876-881. What property may be reached.
  - § 876. Intangible property.
  - § 877. Choses in action.
  - § 878. Contingent interests.
  - § 879. Equitable interests.
  - § 880. Fraudulent transfers of personalty may be set aside.
  - § 881. Property which cannot be reached by the suit.
- §§ 882-888. How far the legal remedies must be first pursued.
  - § 882. Necessity for judgment at law—Statutes changing the rule.
  - § 883. What judgment is sufficient.
  - § 884. When judgment may be dispensed with.
  - § 885. Is an attachment lien sufficient to support a creditor's bill?
  - § 886. Steps beyond judgment—In suits to reach assets not subject to execution.
  - § 887. Same—In suits to remove fraudulent obstructions.
  - § 888. What is a sufficient return of execution..
  - § 889. Limitations and laches.
  - § 890. Who may bring suit.
  - § 891. Parties defendant.
  - § 892. Joinder of parties plaintiff; one creditor suing in behalf of others.
  - § 893. Creditor suing for himself obtains priority.
  - § 894. Except in certain suits, where a trust or *quasi*-trust exists for all creditors.
  - § 895. When the lien of the creditor's bill accrues.

§ 2294. (§ 871.) In General.—"The jurisdiction of equity to entertain suits in aid of creditors undoubtedly had its origin in the narrowness of the common-law remedies by writs of execution. These writs, issued by courts of common law, besides being otherwise limited in their operation, were, of course, confined to those estates and interests recognized by the law, and did not extend to estates and interests equitable in their nature. Creditors' suits were therefore permitted to be brought in those instances where the relief by execution at common law was ineffectual; as for a discovery of assets;2 to reach equitable and other interests not subject to levy and sale at law; 3 and to set aside fraudulent conveyances and obstructions.4 Statutes in England and in certain American states have greatly extended the scope of writs of execution, thereby providing for adequate legal relief in cases where formerly resort to equity was necessary, and even extending the relief to instances where, perhaps, a creditor's bill would not lie.<sup>5</sup> In other

- 1 "Creditors' suits may be brought either while the debtor is living, or after his death against his estate. In the latter case, the suit ends in administration, if the executor or administrator does not admit assets. If assets are admitted, a decree is simply made for payment of the debt. The jurisdiction of equity to entertain suits of this latter class has been considered under the head of Administration [see Pom. Eq. Jur., § 1154]. The present discussion will be confined to suits of the first class": Pom. Eq. Jur., § 1415, note.
  - 2 See post, § 875.
  - 3 See post, §§ 876-879.
  - 4 See post, §§ 873, 880, 887.
- 5 "In England, by the statute of frauds, 29 Car. II, c. 3, sec. 10, legal execution was given against the lands, tenements, and hereditaments of a person seised in trust for the debtor at the time of execution sued out. This exception to the property capable of being reached by the ordinary writs was obviously very narrow,—extending only to real estate seised in trust at the time of execution sued out, and not embracing chattels real, trusts under which the

states, statutes have increased the efficiency of creditors' suits by dealing with the subject directly.''6

General—Supplementary Proceedings.—It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law; but such remedy, in order to oust and prevent jurisdiction in equity, must be in all respects as satisfactory as the relief furnished by a court of equity. The question has frequently arisen whether certain statutory remedies have not provided an adequate remedy for the creditor; especially, whether the proceedings "supplemental" or "supplementary" to

debtor had not the whole interest, equities of redemption, or any equitable interest parted with before execution sued out: See Forth v. Duke of Norfolk, 4 Madd. 503. By statute 1 & 2 Vict., c. 110, the remedies of creditors by ordinary writs of execution are very complete. As an example of the legislation in American states of the first type referred to in the text, see Cal. Code Civ. Proc., sec. 688'': Pom. Eq. Jur., § 1415, note.

- 6 Pom. Eq. Jur., § 1415. For cases under such statutes, see post, § 882. This paragraph is cited in Spear Mining Co. v. Shinn, 93 Ark. 346, 124 S. W. 1045; Ziska v. Ziska, 20 Okl. 634, 23 L. R. A. (N. S.) 1, 95 Pac. 254.
  - 7 Pom. Eq. Jur., § 1415; see, also, Id., §§ 279, 280.
- 8 Mann v. Appel, 31 Fed. 378, citing Pom. Eq. Jur., § 297; Sabin v. Anderson, 31 Or. 487, 49 Pac. 870.
- 9 That a creditor's bill must show that there was not an adequate remedy by garnishment, see Meier v. Waco State Bank (Tex. Civ. App.), 27 S. W. 881. See, also, Brown v. Floersheim Mercantile Co., 206 Mass. 373, 92 N. E. 494 (will not lie to reach property which can be attached by trustee process). Compare Feidler v. Bartleson, 161 Fed. 30, 88 C. C. A. 194, affirming Bartleson v. Feidler, 149 Fed. 299. Statutory proceeding in Massachusetts enabling assignee in insolvency to recover the value of property fraudulently conveyed, etc., by the insolvent renders unnecessary a suit by such assignee to set aside a fraudulent execution: Ames v. Sheehan, 161 Mass. 274, 37 N. E. 199.

execution existing in many of the states have not rendered the suit in equity unnecessary and obsolete. The question should be solved in accordance with the well-established principle that "where new power is conferred upon the law courts by statutory legislation, . . . unless the statute contains negative words or other language expressly taking away the pre-existing equitable jurisdiction, or unless the whole scope of the statute, by its reasonable construction and its operation, shows a clear legislative intent to abolish that jurisdiction, the former jurisdiction of equity to grant its relief under the circumstances continues unabridged." 10

Creditors' suits which have for their object the setting aside of fraudulent conveyances have not been supplanted by supplemental proceedings. 11 "It seems to have been the intention of the framers of that statute [creating supplemental proceedings] to provide a summary process for the discovery, and application to the judgment, of property subject to execution, concealed and withheld by the debtor, or others in collusion with him, without pretending, when it came to a test under oath, to assert any substantial ground therefor. But where the property alleged to belong to the judgment

<sup>10</sup> Pom. Eq. Jur., § 279, quoted and followed in Sabin v. Anderson, 31 Or. 487, 49 Pac. 870.

<sup>11</sup> Vansickle v. Shenk, 150 Ind. 431, 50 N. E. 381, though such proceedings might have reached notes held by the grantor for the purchase-money for the land conveyed; Rhodes v. Green, 36 Ind. 7; Ryan v. Maxey, 14 Mont. 81, 35 Pac. 515; Feldenheimer v. Tressel, 6 Dak. 265, 43 N. W. 94, reviewing authorities; Gere v. Dibble, 17 How. Pr. 31 (even after appointment of receiver in supplementary proceedings); Bennett v. McGuire, 58 Barb. 625 (even after plaintiff has commenced supplementary proceedings); Matlock v. Babb, 31 Or. 516, 49 Pac. 873; Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703; Swifts v. Arents, 4 Cal. 390; Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413; Gordon v. Lemp, 7 Idaho, 677, 65 Pac. 444; Koechl v. Leibinger & Oehm Brew. Co., 50 N. Y. Supp. 568, 26 App. Div. 573; Anderson v. Provident Life & Trust Co., 25 Wash. 20, 64 Pac. 933.

debtor is claimed by others, either by way of absolute title or pledge or mortgage, or debts claimed to be owing to the judgment debtor are disputed by his alleged debtor, such claims of ownership, lien, or denial of indebtedness cannot be adjudicated and determined summarily."<sup>12</sup> Further, a creditor's bill may still be resorted to for the purpose of reaching equitable interests; <sup>13</sup> and it has been maintained that it will lie, in a suitable case, for the purpose of discovering and reaching concealed assets. <sup>14</sup> It is obvious that dicta <sup>15</sup> to the effect that creditor's bills can only be pursued in "exceptional" cases are careless and wholly misleading.

§ 2296. (§ 873.) In Case of Fraudulent Conveyance, Other Remedies are Inadequate.—Legal remedies for reaching property conveyed in fraud of creditors are rarely adequate. Though the conveyance may be utterly void, and the property liable to seizure and sale on execution, the execution purchaser receives a title clouded by the apparent title of the fraudulent grantee. "The legal remedy is slow and expensive compared with the equitable, and much more hazardous. In the legal proce-

<sup>12</sup> Ryan v. Maxey, 14 Mont. 81, 35 Pac. 515. To the same effect, see Feldenheimer v. Tressel, 6 Dak. 265, 43 N. W. 94; Matlock v. Babb, 31 Or. 516, 49 Pac. 873. See, also, Phillips v. Price, 153 Cal. 146, 94 Pac. 617. Supplementary proceedings may well be an exclusive remedy where it is merely sought to reach a debt owing to the judgment debtor, as in Herrlich v. Kaufmann, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857. See, also, Matteson & Williamson Mfg. Co. v. Conley, 144 Cal. 483, 77 Pac. 1042.

<sup>13</sup> Feldenheimer v. Tressel, 6 Dak. 265, 43 N. W. 94; Catlin v. Doughty, 12 How. Pr. 457.

<sup>14</sup> South Bend Log Mfg. Co. v. Pierre F. & M. Ins. Co., 4 S. D. 173, 56 N. W. 98; Hart v. Albright, 18 N. Y. Supp. 718, 28 Abb. N. C. 74.

<sup>15</sup> As in Herrlich v. Kaufmann, 99 Cal. 271, 276, 37 Am. St. Rep. 50, 33 Pac. 857. The California cases cited by the learned judge establish no such rule.

dure the method is circuitous. An action must be pushed to judgment and execution, a seizure or levy made, and then another action instituted to settle the title of the property so attached or seized. Equity settles all questions with all parties in a single suit."

The remedies under the attachment and garnishment laws are not as adequate and efficient to reach property

16 Brown v. J. Wayland Kimball Co., 84 Me. 492, 24 Atl. 1007, by Peters, C. J. "Although the property might be sold in its present situation on the execution at law, yet equity will not require the creditor to sell a doubtful or obstructed title at law, but will set aside the conveyance and remove the obstructions to a fair sale'': Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Weingarten v. Marcus, 121 Ala. 187, 25 South. 852; Birmingham Shoe Co. v. Torrey, 121 Ala. 89, 25 South. 763; Williams v. Dismukes, 106 Ala. 402, 17 South. 620; Ernest v. Merritt, 107 Ga. 61, 32 S. E. 898; Wisconsin Granite Co. v. Gerrity, 144 Ill. 77, 33 N. E. 31; Andrews v. Donnerstag, 70 Ill. App. 236; Henderson v. Thornton, 37 Miss. 448, 75 Am. Dec. 70; Glover v. Hargadine-McKittrick Dry-Goods Co., 62 Neb. 483, 87 N. W. 170; Orr v. Peters, 197 Pa. 606, 47 Atl. 849; Garland v. Rives, 4 Rand. 282, 15 Am. Dec. 756; Anderson v. Provident Life & Tr. Co., 25 Wash. 20, 64 Pac. 933; Gullickson v. Madsen, 87 Wis. 19, 57 N. W. 965. See, also, Maynard v. Armour Fertilizer Works, 138 Ga. 549, 75 S. E. 582; Becker v. Linton, 80 Neb. 655, 127 Am. St. Rep. 795, 114 N. W. 928; but see Hyde v. Baker, 212 Pa. St. 224, 108 Am. St. Rep. 865, 61 Atl. 823. Where the relief sought is to have the debtor's deed absolute on its face declared a mortgage, the sale of property so clouded under execution is obviously not an adequate remedy: Wollenberg v. Minard, 37 Or. 621, 62 Pac. 532. In some jurisdictions it is held that the bill will not lie after a lien by attachment has accrued: Taylor v. Lander, 61 Kan. 588, 60 Pac. 320; Bailey v. American Nat. Bank, 12 Colo. App. 66, 54 Pac. 912. And see Ideal Clothing Co. v. Hazle, 126 Mich. 262, 8 Detroit Leg. N. 20, 85 N. W. 735; Suplee v. Callaghan, 200 Pa. St. 146, 49 Atl. 950; People's Nat. Bank v. Kern, 193 Pa. St. 59, 44 Atl. 331, 44 Wkly. Not. Cas. 457. Of course if no cloud is created by the conveyance, as where the conveyance is made after plaintiff's judgment lien has attached, the legal remedy is adequate, and equity will not interfere: Bridges v. Cooper, 98 Tenn. 394, 39 S. W. 723.

conveyed or transferred in fraud of creditors as is the remedy in equity.<sup>17</sup>

§ 2297. (§ 874.) But Complainant must Show the Necessity of Setting Aside the Fraudulent Conveyance. It is usually held, however, that the judgment creditor has no ground for interfering with the fraudulent conveyance, if at the time when the creditor's suit is brought the debtor has other property subject to execution sufficient to discharge the debt. "If his debt can be satisfied out of property upon which his judgment is a lien, it is only inviting useless litigation for him to question conveyances made by the debtor, which, however they may have been intended, do not operate as a fraud upon him." And where the judgment debtor turns over to his creditor property ample, if converted into money, to pay the debt, a court of equity clearly will not entertain a bill to reach other property. 20

The statute, existing in several states, which authorizes a simple contract creditor to subject property fraudulently conveyed, or attempted to be fraudulently conveyed, by the debtor, changes the rule, and authorizes

<sup>17</sup> Mann v. Appel, 31 Fed. 381; Sabin v. Anderson, 31 Or. 487, 49 Pac. 870. But see Childs v. N. B. Carlstein Co., 76 Fed. 86.

<sup>18</sup> Brumbaugh v. Richcreek, 127 Ind. 240, 22 Am. St. Rep. 649, 26 N. E. 664 (averment necessary that at the time when the suit was brought the debtor had no property out of which the debt might be collected); Dunham v. Cox, 10 N. J. Eq. (2 Stockt.) 437, 64 Am. Dec. 460; Bradley v. Larkin, 5 Kan. App. 11, 47 Pac. 315. But see contra, Patton v. Bragg, 113 Mo. 595, 35 Am. St. Rep. 730, 20 S. W. 1059; Hoffman v. Fleming, 43 W. Va. 762, 28 S. E. 790. In this latter case, the court, referring to parties to the fraud, said: "They have no rights which equity is bound to respect." With the cases cited in the notes to this section, cf. § 887, post.

<sup>19</sup> Dunham v. Cox, 10 N. J. Eq. (2 Stockt.) 437, 64 Am. Dec. 460, by Williamson, Ch.

<sup>20</sup> Preston v. Colby, 117 Ill. 447, 4 N. E. 375.

the creditor to proceed without regard to the existence of other legal assets.<sup>21</sup>

The fact that a surety is solvent will not cause equity to refuse relief against a fraudulent conveyance by the principal debtor.<sup>22</sup>

Where judgment has been obtained against two or more debtors jointly, one of whom has made a fraudulent conveyance, the better opinion appears to be that the complainant, seeking to remove the fraudulent obstruction, is not required to show that the other judgment debtors have no property upon which a levy can be made, 23 or that the legal remedies against them have been exhausted. And though a judgment debtor has property in another state subject to execution, his creditors are not required to go out of the state of their residence in search of that property, before proceeding in the state of his and their residence to subject to their judgments property transferred in fraud of his creditors. 5

§ 2298. (§ 875.) Discovery of Assets.—The complainant may demand and obtain a complete discovery of the defendant's assets and a disclosure of the names of his debtors.<sup>26</sup> Even if no relief can be afforded by the court

- McClarin v. Anderson, 109 Ala. 571, 19 South. 982; Henderson v. Farley Nat. Bank, 123 Ala. 547, 82 Am. St. Rep. 140, 26 South.
   226; O'Neil v. Birmingham Brewing Co., 101 Ala. 383, 13 South. 576.
  - 22 State v. Parsons, 147 Ind. 579, 62 Am. St. Rep. 430, 47 N. E. 17.
- Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Crocker v. Huntzicker, 113 Wis. 181, 88 N. W. 232; contra, Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088; Riddick v. Parr, 111 Iowa, 733, 82 N. W. 1002.
  - 24 Multnomah St. R. Co. v. Harris, 13 Or. 198, 9 Pac. 402.
- 25 O'Brien v. Stanbach, 101 Iowa, 40, 63 Am. St. Rep. 368, 69 N. W. 1133.
- 26 Thomas v. Adams, 30 Ill. 37 (against the heirs and administrators of a deceased judgment debtor); Gordon v. Lowell, 21 Me. 251; Mitchell v. Bunch, 2 Paige, 606, 22 Am. Dec. 669; Cadwallader

in which suit is brought, the complainant is entitled to discovery for the purpose of enabling him to reach the

v. Granville etc. Society, 11 Ohio, 292; Clarke v. Webb, 2 Hen. & M. (Va.) 8 (against executor of deceased judgment debtor). "I have no doubt that this court can and ought to lend its aid, whenever that aid becomes requisite, to enforce a judgment at law by compelling a discovery and account, either as against the debtor or as against any third person who may have possessed himself of the debtor's property and placed it beyond the reach of an execution at law": Kent, Ch., in Hendricks v. Robinson, 2 Johns. Ch. 283, 296. "We regard it proper practice, when the liability of the defendant is fixed, and no assets at law are forthcoming, to compel him to disclose his means to pay the debt, especially where the nature of the resources are [sic] pointed out by the bill, and his answers, upon such a point, specifically required: 4 Johns. Ch. 620. If it were otherwise, equitable assets would frequently escape the most searching inquiries of creditors." The bill was against a corporation and asserted that a great number of individuals, whose names were unknown, but who, when discovered, the plaintiffs asked might be made parties, were indebted for subscription of stock, and prayed that the company might set forth their names in their answer; held, that this general description did not make a "fishing bill" which required no answer: Miers v. Zanesville & M. Turnpike Co., 11 Ohio, 273. In Bay State Iron Co. v. Goodall, 39 N. H. 223, 75 Am. Dec. 219, there is a good statement as to the scope of the bill. The court says: "In this proceeding, the complainant is entitled to a discovery of all the real estate on which he had acquired a lien by his proceedings at law, and of the nature and character of the encumbrances upon it, and of the conveyances of it; that, if fraudulent, they may be removed by a decree, and the plaintiff may be enabled to reach it by an execution at law. He is also entitled to a discovery of all the property, both real and personal, now owned by the defendant, wherever it may be situated; that if within the state, it may be reached by an execution, and if elsewhere, or if such that it cannot be taken on execution, as trust funds, choses in action, stocks, etc., the defendant may be compelled, by an order of the court, to transfer the property by a proper conveyance to a receiver, to be sold and applied to the payment of the complainant's debt. He has a right to a full discovery from the defendant of every trust created for his benefit, that the court may see whether it is one on which his creditors have any equitable claim for the satisfaction of their debts."

defendant's property through the medium of the proper legal tribunal.<sup>27</sup>

§ 2299. (§ 876.) What Property may be Reached—Intangible Property.—The principle that a creditor's bill may reach any property of the judgment debtor which, by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law, extends to such intangible property as a patent or copyright. Such property is capable of assignment, and may be reached in a creditor's bill by an order directing its assignment to a re-

A bill praying discovery need not set out the property sought: Dutton v. Thomas, 97 Mich. 93, 56 N. W. 229.

In Alabama it is provided by statute that a creditor who has no lien or judgment may file a bill in chancery for discovery of assets of the debtor, liable to the payment of his debts: Code, Ala. 1886, § 3545. Under this, it has been held that a creditor's bill for discovery must show-"First, that defendant is without visible means, subject to legal process, of value sufficient to pay the demand sued for; second, that he has means or assets not accessible under legal process liable to the satisfaction of the debt, for the discovery of which the bill is presented": Lawson v. Warren, 89 Ala. 584, 8 South. 141. It is not necessary that the creditor know or allege the nature of the assets he seeks to discover: Moore v. Alabama Nat. Bank, 120 Ala. 89, 23 South. 831; Drennen v. Alabama Nat. Bank, 117 Ala. 320, 23 South. 71. Under the statute, a creditor without a lien may file a bill to discover any property which has been fraudulently transferred or conveyed by the debtor: Guyton v. Terrell, 132 Ala. 66, 31 South. 83; and in such a case it is unnecessary to allege insolvency: Rice v. Eiseman, 122 Ala. 343, 25 South. 214.

In Texas it has been held that the effect of the statutory system has been to abolish bills of discovery: Cronin v. Gay, 20 Tex. 460. Consequently, it has been held that a bill of discovery will not lie to compel a judgment debtor to disclose assets on which execution may be levied: Kountze v. Cargill, 86 Tex. 386, 25 S. W. 13.

27 Le Roy v. Rogers, 3 Paige, 234, by Walworth, Ch.

ceiver appointed for the purpose of applying it to the payment of the judgment.<sup>28</sup>

§ 2300. (§ 877.) Choses in Action.—It is probably the majority rule that, in the absence of statutory authorization, a creditor's bill cannot reach the *choses in action* of the judgment debtor, unless the case presents some independent ground of equity jurisdiction, such as fraud, trust, or the like.<sup>29</sup> It is claimed that the purpose of

28 Stephens v. Cady, 14 How. 528, 14 L. Ed. 528 (dictum); Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942, reviewing cases; Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120; Vail v. Hammond, 60 Conn. 374, 25 Am. St. Rep. 330, 22 Atl. 954; Beidler v. Crane, 135 Ill. 92, 25 Am. St. Rep. 349, 25 N. E. 655 (fraudulent conveyance of patent right); Wilson v. Martin-Wilson etc. Fire Alarm Co., 149 Mass. 24, 20 N. E. 318, 151 Mass. 515, 8 L. R. A. 309, 24 N. E. 784; Sprogg v. Dichman, 59 N. Y. Supp. 966, 28 Misc. Rep. 409 (seat in stock exchange); Gillett v. Bate, 86 N. Y. 87.

29 The text is cited in Dow v. Irwin, 21 N. M. 576, L. R. A. 1916E, 1153, 157 Pac. 490. Pom. Eq. Jur., § 1415, is cited to this effect in Gulf Nat. Bank v. Bass (Tex. Civ. App.), 177 S. W. 1019. An important case maintaining this view is Greene v. Keene, 14 R. I. 388, 51 Am. Rep. 400, from which we quote at some length. "The cases in which [the question] has been most frequently considered have been those in which an insolvent debtor has made a voluntary settlement, or conveyance, or other disposition of this species of property, alleged to be in fraud of the rights of creditors. . . . The early cases in England, in which the courts exercised the jurisdiction in favor of the creditor, were of this character. Smither v. Lewis, 1 Vern. 398; Taylor v. Jones, 2 Atk. 600; King v. Dupine, 2 Atk. 603, note; King v. Marissal, 3 Atk. 192; Edgell v. Haywood, 3 Atk. 352; Horn v. Horn, Amb. 79; Partridge v. Gopp, Amb. 596, 598, also 1 Eden, 163, 168. Subsequently, however, even in this class of cases the jurisdiction was denied. Dundas v. Dutens, 1 Ves. Jr. 196, 198; 2 Cox, 240; Caillard v. Estwick, 1 Anstr. 381, 385; Nantes v. Corrock, 9 Ves. Jr. 188, 189; Rider v. Kidder, 10 Ves. Jr. 360, 368; Bank of England v. Lunn, 15 Ves. Jr. 569, 577; McCarthy v. Gould, 1 B. & Beatty, 387, 389, 390; Crogan v. Cooke, 2 B. & Beatty, 230, 233; Grey v. Pearkes, 18 Ves. Jr. 197; Otley v. Lines, 7 Price, 274, 276, 277; creditors' bills is not to give a new species of execution which the law does not afford, but that they merely present instances of the exercise of jurisdiction based on other well-recognized grounds. The conceded failure of justice consequent upon the denial of the jurisdiction results from no defect in the ancient common law which it is the business of equity to supply, but from the act of the legislature in abolishing the common-law remedy of execution against the person. It is to be observed

Cockrane v. Chambers, cited in note to Horn v. Horn, Amb. 79; . Mathews v. Feaver, 1 Cox, 278, 280. The reasons which led the courts to deny the jurisdiction were, that the statute of Elizabeth was not intended to enlarge the remedies of creditors, nor to subject to execution any property not already liable thereto; that the kinds of property in question were not liable to execution at law, and equity had no power to grant execution in aid of the infirmity of the law; hence it would be an idle proceeding to set aside a conveyance which when set aside would leave the property in the name and control of the debtor, where it could not be touched." The opinion in the principal case then proceeds to examine Payard v. Hoffman, 4 Johns. Ch. 450 (Chancellor Kent), and Spader v. Davis, 5 Johns. Ch. 280, s. c., sub nom. Hadden v. Spader, 20 Johns. 554, 562, which are frequently relied on in support of the jurisdiction to reach choses in action; and reaches its conclusion denying the jurisdiction in reliance on the opinion in Donovan v. Finn, 1 Hopk. Ch. 59, 74, 14 Am. Dec. 531. The following cases are also cited as denying the jurisdiction: McFerran v. Jones, 2 Litt. 220, 222, 223; Buford v. Buford, 1 Bibb, 305-308; Doyle v. Sleeper, 1 Dana, 531, 534, 535, 558, 562; Watkins v. Dorsett, 1 Bland, 530, 533, 534, 535; Shaw v. Aveline, 5 Ind. 380, 384, 385; Stewart v. English, 6 Ind. 176, 182; People v. Stanley, 6 Ind. 410, 412; Williams v. Reynolds, 7 Ind. 622, 625; Keightly v. Walls, 27 Ind. 384, 386. Donovan v. Finn, supra, takes the ground that the cases of authority in which relief has been given to judgment creditors were in themselves cases of equitable jurisdiction, involving fraud, or trust, or seeking to subject to the satisfaction of a judgment, property in itself liable to execution, by removing a conveyance which operated as a fraudulent impediment to the execution. "In such cases the court has jurisdiction, not to give a species of execution which the courts of law do not afford, but to give relief in the particular cases allotted to its jurisdiction. . . . To subject these [choses in action] to the satisfaction of a judgthat this reasoning implicitly denies the jurisdiction of equity to reach intangible property as well as choses in action. Numerous cases, however, support the jurisdiction of equity to reach the debtor's choses in action, when the execution cannot be otherwise satisfied, independently of fraud or other ground of jurisdiction, basing the jurisdiction on the general power of equity to furnish a remedy when the strict rules of legal practice fail.<sup>30</sup> The defect in the jurisdiction of equity, if it

ment, by seizing and selling them like goods in possession, would be to alter the established law of the land, and the courts have no power to make such alteration in the name of equity." It is pointed out that the resulting failure of justice is not the fault of the ancient common law, but of the legislature, in abolishing imprisonment for debt. It will be observed that this reasoning denies the jurisdiction to reach intangible property not subject to execution, as well as things in action. In the recent case of Harper v. Clayton, 84 Md. 346, 57 Am. St. Rep. 407, 35 L. R. A. 211, 35 Atl. 1083, 44 Cent. L. J. 97, the authorities were again examined, and the reasoning of Donovan v. Finn adopted. The court remarks: "Nor do we assent to this view that the mere abolition of the extraordinary remedies of outlawry and attachment of the person would confer jurisdiction on equity. Such a conclusion would be in conflict with reason, as well as with modern authority. It would certainly not seem to follow that if the law had always and consistently refused to give an execution against things in action, and had allowed only the extraordinary remedies just mentioned, that upon the destruction of the latter, the former would not only thereupon spring into existence, but become remedies appropriate for a court of equity. The contrary conclusion would, we think, be more reasonable, namely, that the legislature having abolished execution against the person which was used for the purpose of getting satisfaction out of the debtor's effects which could not be reached by other executions, and having failed to provide any new remedy to take its place. it was not intended there should be any. . . . 'No court of chancery at this day would attempt to supply the defects of law by deciding contrary to its settled rules in any manner, to any extent, or under any circumstances, beyond the already settled principles of equity jurisprudence: 1 Pom. Eq. Jur., § 47.' "

30 Hadden v. Spader, 20 Johns. (N. Y.) 554, by Woodworth, J., and Spencer, C. J.; Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454,

exists, has been very generally met by statutes giving the judgment creditor who has exhausted his remedy by execution the right to proceed against the choses in action of his debtor, in order to obtain satisfaction of the judgment.<sup>31</sup>

It seems that a chose in action that may be reached in equity must be one that is in its nature assignable. Thus, a verdict in the debtor's favor for damages in an action for a tort to the person, on which judgment has not been entered, cannot be reached by the creditor.<sup>32</sup> On the other hand, a cause of action for the conversion of,<sup>33</sup> or injury to,<sup>34</sup> the debtor's property may be subjected to the creditor's claim.

It is held that alimony awarded to a wife cannot be applied by creditor's bill to the payment of a debt con-

by Walworth, Chan.; Tarbell v. Griggs, 3 Paige, 207, 33 Am. Dec. 790, by Walworth, Chan.; Tompkins v. Fonda, 4 Paige, 448 (unassigned dower); Bigelow v. Congressional Society, 11 Vt. 283; Pendleton v. Perkins, 49 Mo. 565, by Bliss, J.

- 31 See Tompkins v. Fonda, 4 Paige (N. Y.), 448; Tantum v. Green, 21 N. J. Eq. 364. See, also, Raymond v. Blancgrass, 36 Mont. 449, 15 L. R. A. (N. S.) 976, 93 Pac. 648 (as consequence of such statute, a creditor's bill does not lie to reach a cause of action for conversion of debtor's property).
- 32 Bennett v. Sweet, 171 Mass. 600, 51 N. E. 183. See, also, City of Cincinnati v. Hafer, 49 Ohio St. 60, 30 N. E. 197.
  - 33 German Nat. Bk. v. First Nat. Bk., 55 Neb. 86, 75 N. W. 531.
- 34 Hudson v. Plets, 11 Paige, 180. In City of Cincinnati v. Hafer, 49 Ohio St. 60, 30 N. E. 197, the court said: "Mere personal torts die with the party and are not assignable; but where the action is brought for damage to the estate, and not for injury to the person, personal feelings or character, and the right of action survives to the personal representative, it may be assigned so as to pass an interest to the assignee." And in this case the creditor was allowed to reach the interest. In Hudson v. Plets, 11 Paige, 183, the court said: "The right to an action for an injury to the property of the judgment debtor before the filing of the complainant's bill, whereby the property to which the creditor was entitled to resort for the payment of his debt is destroyed or diminished in value, appears to

tracted before the decree of divorce. "Alimony is not strictly a debt due to the wife, but rather a general duty of support, made specific and measured by the court. . . . It is property in one sense, but not in the broad general sense of the term. It is a specific fund provided for a specific purpose, with restraint and limitation written all over its face by the very law and decree which brought it into existence." 35

§ 2301. (§ 878.) Contingent Interests.—A contingent interest may be subjected to the payment of debts by a creditor's bill.<sup>36</sup> Where a will provides, however, that

be such a thing in action as may properly be reached and applied to the payment of the complainant's debt under a creditor's bill.' In Meriwether v. Bell, 22 Ky. Law Rep. 844, 58 S. W. 987, the court said: "What other claim for unliquidated damages may be reached and subjected under the statute above quoted, we need not determine in this case; but we are satisfied that it must at least include all claims on which an action of indebitatus assumpsit lay at common law, if the plain purpose of its enactment is not to be defeated." In a recent case an administrator recovered judgment against a railroad company for the death of the deceased. It was provided by statute that in such a case the money should go to certain heirs, and not be subject to the debts of the deceased. The administrator was an heir. It was held that he had an interest in the judgment which could be reached by his creditor: Cassady v. Grimmelman, 108 Iowa, 695, 77 N. W. 1067.

35 Romaine v. Chauncey, 129 N. Y. 566, 26 Am. St. Rep. 544, 14 L. R. A. 712, 29 N. E. 826. Similarly, the right of a father under the contract of his son to *support* him during his life cannot be subjected to the payment of a judgment against him: Valparaiso State Bank v. Schwartz, 92 Neb. 575, Ann. Cas. 1914B, 935, 42 L. R. A. (N. S.) 1213, 138 N. W. 757.

36 Jacob v. Howard, 15 Ky. Law Rep. 133, 22 S. W. 332; Bryant v. Bryant, 14 Ky. Law Rep. 358, 20 S. W. 270. See, also, Alexander v. McPeck, 189 Mass. 34, 75 N. E. 88; Clarke v. Fay, 205 Mass. 228, 27 L. R. A. (N. S.) 454, 91 N. E. 328, discussing what contingent interests may be reached. But see Overturf v. Gerlach, 62 Ohio St. 127, 78 Am. St. Rep. 704, 56 N. E. 653, where the court said: "Generally, subject to some exemptions, any sum of money due a debtor

an heir is to take nothing until his sister becomes of age, a sale of his interest will not be decreed if it will cause an inequitable sacrifice of his property.<sup>37</sup>

§ 2302. (§ 879.) Equitable Interests.—In general, any equitable interest of an execution debtor may be reached by a creditor's bill and subjected to the payment of the debt.<sup>38</sup> As examples of the equitable interests and estates which can be reached may be mentioned: Property held for the debtor on an express trust;<sup>39</sup> a trust

may be reached in a proper proceeding by his creditor, where he refuses to apply it to the claim of the creditor. But the money must be due or to become due, subject to no other condition than the lapse of time, for the proceeding presupposes the power to order, without qualification, the payment of money due the debtor from another to the debtor's creditor.''

37 Mears v. Lamona, 17 Wash. 148, 49 Pac. 251.

38 This paragraph is cited in Arbuckle Bros. v. Columbia Grocery Co., 150 Ala. 271, 43 South. 781 (land held on constructive trust). See Gerety v. Donahue, 8 Kan. App. 175, 55 Pac. 476; Galveston etc. R'y v. McDonald, 53 Tex.-510.

39 The text is cited in De Rousse v. Williams (Iowa), 164 N. W. See Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454; Young's Trustee v. Bullen, 19 Ky. Law Rep. 1561, 43 S. W. 687; Hancock v. Twyman, 19 Ky. Law Rep. 2006, 45 S. W. 68; De Hierapolis v. Lawrence, 99 Fed. 321; Spencer v. Richmond, 61 N. Y. Supp. 397, 46 App. Div. 481; Raymond v. Leinberger, 50 Neb. 815, 70 N. W. 400. "If the judgment debtor owns real estate the legal title to which is in another, but without any beneficiary interest, and the judgment debtor owns all the beneficiary interest in the land, a court of equity may in proper proceedings, direct the defendant's interest in the land to be sold, whether or not the title was placed in the third person with fraudulent intent. If the result is to prevent the creditor from enforcing his claim against the land, the impediment may be removed by a court of equity and the land sold to satisfy the judgment": Cochran v. Cochran, 62 Neb. 450, 87 N. W. 152. See, also, Bergmann v. Lord, 194 N. Y. 70, 86 N. E. 828 (to reach a vested remainder in a fund held in trust to apply the income to another for his life).

On the other hand, a charge on a devise, for a person's support, not payable in money, cannot be reached by his creditors: Mer-

resulting to the debtor from payment by him of the purchase price of property and procuring the title to be taken in the name of another;<sup>40</sup> improvements placed by a debtor husband on his wife's land;<sup>41</sup> an equitable interest in land for purchase-money unpaid;<sup>42</sup> an equitable interest by virtue of an executory contract for its purchase;<sup>43</sup> an equity of redemption.<sup>44</sup>

To the rule that all equitable estates and interests of the debtor may be subjected in equity to the creditor's claims an important exception exists in those jurisdictions which recognize the validity of so-called "spend-thrift trusts." In those states "it is competent for testators and grantors, by will or deed, to construct and establish trusts, both of real and personal property, and of the rents, issues, profits, and produce of the same, by appropriate limitations and powers to trustees, which shall secure the application of such bounty to the personal and family uses during the life of the beneficiary, so that it shall not be subject to alienation, either by voluntary act on his part, or in invitum, by his cred-

chants' Nat. Bank v. Crist, 140 Iowa, 308, 132 Am. St. Rep. 267, 23 L. R. A. (N. S.) 526, 118 N. W. 394. See ante, note 35.

- 40 St. Louis Hoop & Stave Co. v. Danforth, 160 Mich. 226, 125
  N. W. 5; McGregor-Noe Hardware Co. v. Horn, 146 Mo. 129, 47 S. W.
  957; Goodrich v. Hicks, 19 Tex. Civ. App. 528, 48 S. W. 798; Millard v. Parsell, 57 Neb. 178, 77 N. W. 390; Williams v. Michenor, 11
  N. J. Eq. 520; Kilham v. Western Bank & S. D. Co., 30 Colo. 365, 70 Pac. 409; Golbold v. Lambert, 8 Rich. Eq. (S. C.) 155, 70 Am.
  Dec. 192.
  - 41 Kirby v. Bruns, 45 Mo. 234, 100 Am. Dec. 376.
  - 42 Withers v. Carter, 4 Gratt. 407, 50 Am. Dec. 78.
  - 43 Bank of Opelika v. Kizer, 119 Ala. 194, 24 South. 11.
- 44 Hegler v. Grove, 63 Ohio St. 404, 59 N. E. 162 (statute); Wise v. Taylor, 44 W. Va. 492, 29 S. E. 1003. See, also, Ball v. Paper Cotton Press Co., 141 Mo. App. 26, 121 S. W. 798 (interest of a pledgor). A creditor's bill will lie to foreclose a mortgage given by the debtor to a third person, in order to reach the surplus, if any: Bridges v. Cooper, 98 Tenn. 401, 39 S. W. 720.

itors.''<sup>45</sup> The grantor, however, cannot, by creating a trust for his own benefit, place the proceeds of the trust beyond the reach of his creditors.<sup>46</sup> By the statutory policy of many states, following the lead of the New York Revised Statutes, the income of all trusts created for certain designated objects, such as the support and education of the cestui que trust, is put beyond the reach of the cestui's creditors, except so far as it exceeds the amount necessary for accomplishing such objects. A creditor's bill lies to reach the surplus income only.<sup>47</sup> By the statutes of other states, all trusts created by or proceeding from a person other than the debtor himself are exempt from the operations of a creditor's bill.<sup>48</sup>

§ 2303. (§ 880.) Fraudulent Transfers of Personalty may be Set Aside.—A creditor's bill to remove a fraudulent obstruction to execution may be directed against

45 Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512, 4 Sup. Ct. 522; Wood v. McClelland (Tex. Civ. App.), 53 S. W. 381.

For an extensive collection of recent cases upholding such trusts, see 3 Pom. Eq. Jur., 4th ed., § 989, notes 5 and (f).

- 46 McIlvaine v. Smith, 42 Mo. 45, 97 Am. Dec. 295.
- 47 Rider v. Mason, 4 Sand. Ch. 351; Bramhall v. Ferris, 14 N. Y. 41, 67 Am. Dec. 113; Schuler v. Post, 18 App. Div. 374, 46 N. Y. Supp. 18; Howard v. Leonard, 3 App. Div. 277, 38 N. Y. Supp. 363; First Nat. Bank v. Mortimer, 28 Misc. Rep. 686, 60 N. Y. Supp. 47. See, also, Bergmann v. Lord, 194 N. Y. 70, 86 N. E. 828 (vested remainder in a fund held in trust to apply the income to the use of another for his life may be reached). See 3 Pom. Eq. Jur., §§ 1003-1005.
- 48 See Frazier v. Barnum, 19 N. J. Eq. (4 C. E. Green) 316, 97 Am. Dec. 666; Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512, 4 Sup. Ct. 522 (Illinois). By Massachusetts Stats. 1888, c. 429, § 15, money due from a beneficial association to a certificate holder therein is exempt from equitable as well as legal process: Geer v. Horton, 159 Mass. 259, 34 N. E. 269. In Illinois, the income of trust property cannot be reached by creditors of the cestui while it remains in the hands of the trustee: Binns v. La Forge, 191 Ill. 598, 61 N. E. 382.

a fraudulent transfer of personal property as well as a fraudulent conveyance of real property. It is not often used for this purpose, however, the general practice being to levy on personal property and determine the ownership by action of replevin.<sup>49</sup>

§ 2304. (§ 881.) Property Which cannot be Reached by the Suit.—Motives of public policy clearly prohibit a suit to reach the salary of a state official. <sup>50</sup> In a majority of cases it is held that garnishment does not lie against a municipal corporation. "A municipal corporation cannot be turned into an instrument or agency for the collection of private debts." It has been held that for the same reason a creditor's bill cannot be maintained against a municipal corporation to reach money due its employees or contractors. <sup>51</sup> Other cases establish the more reasonable rule that if the court can ascer-

- 49 O'Brien v. Stambach, 101 Iowa, 40, 63 Am. St. Rep. 368, 69 N. W. 1133; Webb v. Staves, 37 N. Y. Supp. 414, 1 App. Div. 145 (chattel mortgage void for want of proper filing); Pierstoff v. Jorges, 86 Wis. 128, 39 Am. St. Rep. 881, 56 N. W. 735; Ladd v. Smith, 107 Ala. 506, 18 South. 195 (fraudulent transfer of stock); Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703; Highley v. Am. Exch. Nat. Bank, 185 Ill. 565, 57 N. E. 436 (transfer of stock); Sweetser v. Silber, 87 Wis. 102, 58 N. W. 239 (fraudulent chattel mortgage); Gullickson v. Madsen, 87 Wis. 19, 57 N. W. 965 (chattel mortgage); F. Meyer Boot & Shoe Co. v. Shenkberg Co., 11 S. D. 620, 80 N. W. 126 (dictum); Hirsch v. Israel, 106 Iowa, 498, 76 N. W. 811 (chattel mortgage); McNew v. Smith, 5 Gratt. 84. See, also, Hall & Farley v. Alabama Terminal & I. Co., 143 Ala. 464, 5 Ann. Cas. 363, 2 L. R. A. (N. S.) 130, 39 South. 285 (money paid and bonds transferred by corporation in purchase of its own stock).
  - 50 Bank of Tennessee v. Dibrell, 3 Sneed (Tenn.), 379.
- 51 Addyston Pipe & Steel Co. v. City of Chicago, 170 Ill. 580, 44 L. R. A. 405, 48 N. E. 967. The text is cited in Dow v. Irwin, 21 N. M. 576, L. R. A. 1916E, 1153, 157 Pac. 490. Public policy forbids that a county should in any manner be interfered with in settling for necessary public work, even after the same has been completed: Morgan v. Rust, 100 Ga. 346, 28 S. E. 419.

tain that no inconvenience can result to the public in a given case, the suit may be maintained.<sup>52</sup> The defendant in such a suit may be compelled to assign his demand against the municipality to a receiver to be collected and applied to the satisfaction of the plaintiff's demand.<sup>53</sup>

Property devoted to a public use by a private individual or corporation is frequently exempt from execution, and likewise from a creditor's bill. Thus, it is held that land dedicated for a public cemetery cannot be reached, although the owner of the legal title to a portion of the lots receives a portion of the revenues derived from the

52 Riggin v. Hilliard, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402; Knight v. Nash, 22 Minn. 452; Pendleton v. Perkins, 49 Mo. 565; Speed v. Brown, 10 B. Mon. (Ky.) 108. The text is quoted in Dow v. Irwin, 21 N. M. 576, L. R. A. 1916E, 1153, 157 Pac. 490 (dissenting opinion). See, also, Southern R'y Co. v. Hartshorn, 150 Ala. 217, 124 Am. St. Rep. 68, 43 South. 583; Plummer v. School Dist., 90 Ark. 236, 134 Am. St. Rep. 28, 17 Ann. Cas. 508, 118 S. W. 1011; De Field v. Harding Dredge Co., 180 Mo. App. 563, 167 S. W. 593 (though statute prohibits garnishment of municipal corporation); Parsons v. Cathers, 92 Neb. 525, 138 N. W. 747. In Pendleton v. Perkins the court says, by Bliss, J.: "Upon what principle should this fact [the statutory prohibition against garnishing a city] also deprive them of the equitable remedy they would possess if the garnishment process were unknown to the law? So far from that, it is the foundation of their right to relief. The maxim that equity follows the law has no such application; otherwise, in most cases where legal remedies fail, equitable relief would be cut off. The court, in analogy to the former relief in chancery, would disregard the letter of the statute forbidding garnishment, but would conform to its spirit and refuse to interfere when the reason for the prohibition existed." But see Geist v. City of St. Louis, 156 Mo. 643, 79 Am. St. Rep. 545, 57 S. W. 766. Where a creditor's bill seeks to reach an amount alleged to be due from a city to its school board, which can only be correctly ascertained by an accounting. there is not an adequate remedy at law, and equity has jurisdiction: City of New Orleans v. Fisher, 91 Fed. 574, 34 C. C. A. 15.

53 Riggin v. Hilliard, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402; Knight v. Nash, 22 Minn. 452.

sale thereof for burial purposes.<sup>54</sup> On the other hand, where tax-payers had obtained a decree declaring a contract void, it was held that they were entitled to a decree in aid of execution subjecting the property of an electric light plant.<sup>55</sup>

There are various statutory exemptions, such as homesteads, which will prevent a creditor from reaching property even by a creditor's bill. A homestead exemption, however, cannot avail against a creditor's bill unless it exists when the bill is filed.<sup>56</sup> Under the federal statutes, Indians are entitled to many exemptions; but a lease of lands in the Indian country may be reached by creditor's bill.<sup>57</sup>

Money in custodia legis, in the hands of a clerk of court in his official capacity, cannot be made the subject of a creditor's bill.<sup>58</sup>

- § 2305. (§ 882.) Necessity for Judgment at Law—Statutes Changing the Rule.—In the absence of statute, a simple contract creditor cannot, in general, maintain a creditor's bill.<sup>59</sup> Before resorting to equity, he must
- <sup>54</sup> First Nat. Bank v. Hazel, 63 Neb. 844, 56 L. R. A. 765, 89 N. W. 378.
  - 55 Campbell v. Western Electric Co., 113 Mich. 333, 71 N. W. 644.
- 56 Hines v. Duncan, 79 Ala. 112, 58 Am. Rep. 580. See, also, Jayne v. Hymer, 66 Neb. 785, 92 N. W. 1019.
  - 57 Daugherty v. Bogy, 3 Ind. Ter. 197, 53 S. W. 542.
- 58 Anheuser-Busch Brew. Ass'n v. Hier, 52 Neb. 424, 72 N. W. 588; and see United States v. Eisenbeis, 88 Fed. 4, where the money was in court awaiting distribution in condemnation suits brought by the United States. See, also, Adamian v. Hassanoff, 189 Mass. 194, 75 N. E. 126; Berlin Mills Co. v. Lowe, 211 Mass. 28, Ann. Cas. 1914B, 937, 97 N. E. 57.
- 59 Smith v. Ft. Scott, H. & W. R. R. Co., 99 U. S. 398, 25 L. Ed. 437 (judgment necessary); Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687; George v. St. Louis Cable & W. R. Co., 44 Fed. 117 (validity and amount of a purely legal demand must be established at law); Morrow etc. Mfg. Co. v. New England Shoe

reduce his claim to judgment at law. In regard to bills to set aside fraudulent conveyances, it is frequently said that the complainant must have either a judgment at law or some lien upon the property sought to be reached. Most of the cases laying down this rule are mere dicta upon the point; although we shall see that there is considerable real authority for the statement. The reasons given for requiring a judgment are two; (1) that equity should not interfere to aid a legal right before the legal

Co., 57 Fed. 685, 18 U. S. App. 256, 24 L. R. A. 425, 6 C. C. A. 508; Streight v. Junk, 59 Fed. 321, 8 C. C. A. 137, 16 U. S. App. 608; Hook v. Ayres, 64 Fed. 660, 12 C. C. A. 564, 24 U. S. App. 487; Putney v. Whitmire, 66 Fed. 385; Foley v. Guarantee etc. Co., 74 Fed. 764, 21 C. C. A. 78; Goff v. Kelly, 74 Fed. 327; Continental Trust Co. v. Toledo etc. R. Co., 82 Fed. 642; Viquesney v. Allen, 65 C. C. A. 259, 131 Fed. 21; Nesbit v. North Georgia Electric Co., 156 Fed. 979; American Creosote Works v. C. Lembeke & Co., 165 Fed. 809; Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669 (judgment is essential; quoting Pom. Eq. Jur., § 1415); Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 Pac. 236; McKnight v. McKnight, 49 Colo. 60, 111 Pac. 583; Faivre v. Gillman, 84 Iowa, 573, 51 N. W. 46; Mehlhop v. Ellsworth, 95 Iowa, 657, 64 N. W. 638; Peterson v. Gittings, 107 Iowa, 306, 77 N. W. 1056 (must have a lien, or be in a position to perfect a lien); Smith v. Sioux City Nursery & Seed Co., 109 Iowa, 51, 79 N. W. 457; Allen v. Camp, 17 Ky. (1 T. B. Mon.) 231, 15 Am. Dec. 109; Stockbridge v. Mixer, 215 Mass. 415, 102 N. E. 640; Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624 (must reduce his claim to judgment, obtain a lien, or, if a general creditor, show that he has no adequate remedy at law); Missouri, K. & T. Trust Co. v. Richardson, 57 Neb. 617, 78 N. W. 273 (creditor who has neither a judgment nor a lien is not entitled to relief); Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829; Moore v. Omaha Life Ass'n, 62 Neb. 497, 87 N. W. 321; Brumbaugh v. Jones, 70 Neb. 786, 98 N. W. 54 (creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien upon the property cannot maintain the bill); Kudrna v. Ainsworth, 65 Neb. 711, 91 N. W. 711; Fairbanks, Morse & Co. v. Welshans, 55 Neb. 362, 75 N. W. 865; Ainsworth v. Roubal, 74 Neb. 723, 2 L. R. A. (N. S.) 988, 105 N. W. 248; Glorieux v. Schwartz, 53 N. J. Eq. (8 Dick.) 231, 28 Atl. 470, 34 Atl. 1134; remedy is tried;<sup>60</sup> (2) that a simple contract creditor "may never obtain a judgment, and, if he does not, he cannot be injured by any disposition of the property."<sup>61</sup> In a few jurisdictions the equitable rule has been changed by statute, so that suits to set aside fraudulent conveyances may be maintained by simple contract creditors.<sup>62</sup> The federal courts refuse to follow these stat-

Bird v. Magowan (N. J. Eq.), 43 Atl. 278; Wolcott v. Ashenfelter, 5 N. M. 443, 8 L. R. A. 691, 23 Pac. 780 (judgment necessary); Cornell v. Savage, 63 N. Y. Supp. 540, 49 App. Div. 429; Hart v. A. L. Clarke & Co., 194 N. Y. 403, 87 N. E. 808; Dawson v. Sims, 14 Or. 561, 13 Pac. 506 (judgment or lien necessary); First Nat. Bank v. Manassa, 80 Or. 53, 150 Pac. 258 (judgment obtained pending the creditor's suit will not aid it); Kelly v. Herb, 157 Pa. St. 41, 27 Atl. 559; Matarese v. Caldarone, 26 R. I. 348, 58 Atl. 976 (citing Pom. Eq. Jur., § 1415); Gulf Nat. Bank v. Bass (Tex. Civ. App.), 177 S. W. 1019, citing Pom. Eq. Jur., § 1415; O'Day v. Ambaum, 47 Wash. 684, 15 L. R. A. (N. S.) 484, 92 Pac. 421 (surety cannot enjoin fraudulent conveyance by principal); Miller v. Drane, 122 Wis. 315, 99 N. W. 1017.

- 60 Freeman on Executions, § 427. Compare Ladd v. Judson, 174 Ill. 344, 66 Am. St. Rep. 267, 51 N. E. 838 (debtor is entitled to a jury trial).
  - 61 Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624.
- 62 Alabama.—"The real purpose of the statute is to dispense with, and abrogate wholly, the pre-existing law, which required that there should be a judgment at law, or if a judgment, and the assets transferred fraudulently were not subject to execution, that there should be an exhaustion of legal remedies before the court would intervene to avoid fraudulent transfers and conveyances. That rule is blotted out, and any creditor may now . . . invoke the assistance of the court to avoid such transfers or conveyances": Lehman v. Meyer, 67 Ala. 403. See, also, Evans v. Welch, 63 Ala. 256; Merchants' Nat. Bank v. McGee, 108 Ala. 304, 19 South. 356; McKissack v. Voorhees, 119 Ala. 101, 24 South. 523; Builders & Painters' Supply Co. v. First Nat. Bank, 123 Ala. 203, 26 South. 311; Hall & Farley v. Alabama Terminal & I. Co., 143 Ala. 464, 5 Ann. Cas. 363. 2 L. R. A. (N. S.) 130, 39 South. 285. This does not affect creditors' bills for other purposes, however: Marble City Land & F. Co. v. Golden, 110 Ala. 376, 17 South. 935.

utes, however, upon the ground that the money demand is a mere legal claim, upon which the defendant is entitled to the benefits of a jury trial.<sup>63</sup>

Arkansas.—Riggin v. Hilliard, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402 ("in suits to set aside fraudulent conveyances, and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such case insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief").

Connecticut.—Vail v. Hammond, 60 Conn. 383, 25 Am. St. Rep. 330, 22 Atl. 954; Huntington v. Jones, 72 Conn. 45, 43 Atl. 564.

Indiana.—Phelps v. Smith, 116 Ind. 399, 19 N. E. 156.

Maryland.—Balls v. Balls, 69 Md. 388, 16 Atl. 18 (Act of 1835, c. 380, § 2, dispensed with the necessity of a judgment in all cases of proceedings in equity "to vacate any conveyance or contract or other act as fraudulent against creditors"; Abramson v. Horner, 115 Md. 232, 80 Atl. 907.

Massachusetts.—Sanford v. Wright, 164 Mass. 85, 41 N. E. 120; Bernard v. Barney M. Co., 147 Mass. 356, 17 N. E. 887; H. G. Kilbourne Co. v. Standard Stamp Affixer Co., 216 Mass. 118, 103 N. E. 469.

Nebraska.—Under the bulk sales law, see Scheve v. Vanderkolk, 97 Neb. 204, 149 N. W. 401.

North Carolina.-Dawson Bank v. Harris, 84 N. C. 206.

Ohio.—Gem City Acetylene Generator Co. v. Coblentz, 86 Ohio St. 199, Ann. Cas. 1913D, 660, 99 N. E. 302.

Tennessee.-Greene v. Starnes, 1 Heisk. 582 (quoting statute).

Virginia.—Fink v. Patterson, 21 Fed. 602; Stovall v. Border Grange Bank, 78 Va. 188.

West Virginia.—Tuft v. Pickering, 28 W. Va. 330; and see Carr v. Davis, 64 W. Va. 522, 16 Ann. Cas. 1031, 20 L. R. A. (N. S.) 58, 63 S. E. 326 (suit by surety against principal); Cheuvront v. Horner, 62 W. Va. 476, 59 S. E. 964; Halfpenny & Hamilton v. Tate & McDevitt, 65 W. Va. 296, 64 S. E. 28; but the bill cannot be maintained before the complainant's claim is due: Frye v. Miley, 54 W. Va. 324, 46 S. E. 135.

63 Cates v. Allen, 149 U. S. 457, 37 L. Ed. 804, 13 Sup. Ct. 884; Smith v. Railroad Co., 99 U. S. 401, 25 L. Ed. 438; United States v. Ingate, 48 Fed. 251; Atlanta etc. Co. v. Western R'y, 50 Fed.

§ 2306. (§ 883.) What Judgment is Sufficient.—A judgment of a court of record, based upon a claim either in contract or in tort, is ordinarily sufficient. A fraudulent conveyance may be set aside, therefore, although when made the complainant had only an unliquidated claim for damages in tort.<sup>64</sup> In some states, judgments of inferior tribunals, such as justices' courts, are not sufficient, unless steps are taken to make them a lien on real estate.<sup>65</sup> Ordinarily, a judgment of a court of a sister state will not sustain a bill; and the same principle applies to judgments of federal courts when used

790, 2 U. S. App. 227, 1 C. C. A. 676; Putney v. Waymire, 66 Fed. 385; England v. Russell, 71 Fed. 818; Childs v. N. B. Carlstein Co., 76 Fed. 86; Tompkins Co. v. Catawba Mills, 82 Fed. 780; First Nat. Bank v. Prager, 91 Fed. 689, 63 U. S. App. 709, 34 C. C. A. 51; Hall v. Gambril, 92 Fed. 32, 63 U. S. App. 751, 34 C. C. A. 190; Harrison v. Farmers' Loan & Tr. Co., 94 Fed. 728, 36 C. C. A. 443; Peacock, Hunt & West Co. v. Williams, 110 Fed. 917; Hudson v. Wood, 119 Fed. 764. For earlier cases contra, see Buford v. Holley, 28 Fed. 680; Johnston v. Straus, 4 Hughes, 636, 26 Fed. 57; Flash v. Wilkerson, 22 Fed. 689. For a fuller discussion, see 1 Pom. Eq. Jur., § 293, notes to fourth edition.

64 Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709; Schaible v. Ardner, 98 Mich. 70, 56 N. W. 1105; McInnis v. Wiscasset Mills, 78 Miss. 52, 28 South. 725; Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361; Soly v. Aasen, 10 N. D. 108, 86 N. W. 108. To the effect that a judgment obtained against a non-resident upon publication of summons is sufficient, see Parmenter v. Lomax, 68 Kan. 61, 74 Pac. 634. To the effect that a deficiency judgment on mortgage foreclosure is not sufficient before amount determined, see Cotes v. Bennett, 84 Ill. App. 33. To the effect that a bill may be based upon a judgment for alimony, see Twell v. Twell, 6 Mont. 19, 9 Pac. 537.

65 Peterson v. Gittings, 107 Iowa, 306, 77 N. W. 1056 (judgment of inferior court not sufficient); Mansfield v. Wilkinson, 16 Ky. Law Rep. 276, 27 S. W. 808 (not sufficient unless docketed); Crippen v. Hudson, 13 N. Y. 161 (judgment of justice of the peace must first be docketed). See, also, Ballentine v. Beall, 3 Scam. 203.

as a basis for creditors' bills in state courts.<sup>66</sup> Upon this latter question, however, there is a conflict of authority, some courts allowing the judgment of a federal court for a district comprised within the state, to serve as a foundation. The federal courts will sustain a creditor's bill upon a judgment of a state court.<sup>67</sup> A judgment which is reversed on appeal is, of course, not sufficient;<sup>68</sup> but the mere fact that an appeal is pending does not prevent the creditor from maintaining his suit in equity.<sup>69</sup> As to the effect of a judgment becoming dormant while the bill is pending, there is a conflict of authority.<sup>70</sup> In general, the judgment cannot be attacked in the equitable proceedings; but if it is void, it

66 Steere v. Hoagland, 39 Ill. 264 (neither the judgment of a sister state nor of a federal court is sufficient); Winslow v. Leland. 128 Ill. 304, 338, 21 N. E. 588 (judgment of federal court not sufficient); Guy B. Waite Co. v. Otto (N. J. Eq.), 54 Atl. 425 (foreign judgment not sufficient); Tarbell v. Griggs, 3 Paige, 207 (judgment of federal court not sufficient); but see Earle v. Grove, 92 Mich. 285, 52 N. W. 615; Zecharie v. Bowers, 9 Miss. (1 Smedes & M.) 584, 40 Am. Dec. 111. In the following cases, judgments of federal courts for districts within the state were held sufficient: Chicago & A. Bridge Co. v. Fowler, 55 Kan. 17, 39 Pac. 727 (by virtue of statute making such judgments liens on real estate); First Nat. Bank v. Sloman, 42 Neb. 350, 47 Am. St. Rep. 707, 60 N. W. 589. See, also, Ballin v. Loeb, 78 Wis. 404, 10 L. R. A. 742, 47 N. W. 516.

67 Handley v. Stulz, 139 U. S. 417, 35 L. Ed. 227, 11 Sup. Ct. 530; Bidwell v. Huff, 103 Fed. 362; Alkire Grocery Co. v. Richesin, 91 Fed. 79; Cleveland Rolling Mill Co. v. Joliet Enterprise Co., 53 Fed. 683; Barnett v. East Tenn., V. & G. R. Co. (Tenn. Ch. App.), 48 S. W. 817.

- 68 Kudrna v. Ainsworth, 65 Neb. 711, 91 N. W. 711; North Hudson Mut. B. & L. Ass'n v. Childs, 86 Wis. 292, 56 N. W. 870.
- 69 Barnett v. East Tenn., V. & G. R. Co. (Tenn. Ch. App.), 48 S. W. 817.

70 To the effect that relief may be granted, see City of Cincinnati v. Hafer, 49 Ohio St. 60, 30 N. E. 197. Contra, Miller v. Mclone, 11 Okl. 241, 56 L. R. A. 620, 67 Pac. 479.

is not sufficient to sustain the bill, and relief will be denied.<sup>71</sup>

§ 2307. (§ 884.) When Judgment may be Dispensed With.—To the rule requiring a judgment as a prerequisite to a creditor's bill, a few exceptions are allowed in some jurisdictions. Thus, it is sometimes held that a creditor need not obtain judgment before resorting to equity to reach assets of a deceased debtor.<sup>72</sup> A few states allow a resident general creditor to maintain a bill to reach property of a non-resident debtor within the state.<sup>73</sup> Likewise, exceptions have been made when the

71 To the effect that the judgment cannot be collaterally attacked, see Mattingly v. Nye, 75 U. S. 370, 19 L. Ed. 380; Tilton v. Goodwin, 183 Mass. 236, 66 N. E. 802; Le Herisse v. Hess (N. J. Eq.), 57 Atl. 808; Bank of Wooster v. Stevens, 1 Ohio St. 233, 59 Am. Dec. 619; Millard v. Parsell, 57 Neb. 178, 77 N. W. 390. See, also, Schley v. Dixon, 24 Ga. 273, 71 Am. Dec. 121. But see Gregory v. Lamb, 101 Ky. 727, 42 S. W. 339 (grantee in conveyance attacked as fraudulent may attack the judgment). To the effect that a void judgment will not support a creditor's bill, see Epstein v. Ferst. 35 Fla. 498, 17 South. 414; Wilhelm v. Locklar, 46 Fla. 575, 110 Am. St. Rep. 111, 35 South. 6. To the effect that the defendant may attack the judgment for fraud in obtaining it, see Faris v. Durham, 21 Ky. (5 T. B. Mon.) 397, 17 Am. Dec. 77. See, also, Weaver v. Haviland, 142 N. Y. 534, 40 Am. St. Rep. 631, 37 N. E. 641 (in the absence of fraud or collusion, defendant cannot question the judgment).

72 Mallow v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Kipper v. Glancy, 2 Blackf. 356. See, also, National Tradesmen's Bank v. Wetmore, 124 N. Y. 248, 26 N. E. 548. See, on the subject of such bills, 3 Pom. Eq. Jur., § 1154, notes.

73 First Nat. Bank v. Eastman, 144 Cal. 487, 103 Am. St. Rep. 95, 77 Pac. 1043; Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 Pac. 236; Williams v. Adler-Goldman Commission Co., 227 Fed. 374, 142 C. C. A. 70 (defendant non-resident and insolvent); De Field v. Harding Dredge Co., 180 Mo. App. 563, 167 S. W. 593 (same); Patchen v. Rofkar, 52 App. Div. 367, 65 N. Y. Supp. 367; Quarl v. Abbott, 102 Ind. 234, 52 Am. Rep. 662, 1 N. E. 476. In Hess v. Horton, 2 App. D. C. 81, it was held that there is no exception

debtor has absconded and cannot be found within the state;<sup>74</sup> and when the debtor is insolvent and the claim is undisputed.<sup>75</sup> It has been held that a trustee in bankruptcy may maintain a bill to set aside a fraudulent conveyance without first obtaining judgment at law.<sup>76</sup> A general creditor, whose claim is recognized, has been allowed to attack a general assignment for the benefit of creditors;<sup>77</sup> and where there has been such an assign-

where complainant is also a non-resident, if it does not appear that defendant has not sufficient property to satisfy plaintiff's claim in the jurisdiction of defendant's residence; but in Supplee Hardware Co. v. Driggs, 13 App. D. C. 272, where a resident defendant was insolvent and the only property of the non-resident was within the jurisdiction of the court, it was held that judgment was unnecessary. See cases cited in Pom. Eq. Jur., § 1415, note.

74 Kipper v. Glancy, 2 Blackf. 356; Livingston v. Swofford Bros. Dry Goods Co., 12 Colo. App. 320, 56 Pac. 351; Merchants' Nat. Bank v. Paine, 13 R. I. 592. See, also, Fraser v. Cole, 214 Fed. 556, 131 C. C. A. 102 (debtor has fled from state and is insolvent). Contra: Detroit Copper & Brass Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751.

75 Springfield Grocery Co. v. Thomas, 3 Ind. Ter. 330, 58 S. W. 557 (trust deed sought to be set aside expressly recognized plaintiff's claim); Tally v. Curtain, 54 Fed. 43, 8 U. S. App. 347; American Brake Shoe & Foundry Co. v. Pere Marquette R. Co., 205 Fed. 14, 123 C. C. A. 322; Burnham v. Smith, 82 Mo. App. 35; Austin v. Morris, 23 S. C. 393. In this last case the court said: "As we understand it, however, there is no law requiring such preliminary proceedings as an indispensable prerequisite to seeking equitable relief, but it has been adopted by the courts as the most satisfactory manner of proving that which is indispensable to such relief, viz., the fact that the party has no adequate remedy at law, that the debtor is insolvent, and, outside of the property in controversy. has not the means from which payment may be made. This is the very purpose of requiring judgment and a return of nulla bona. If that is shown by other proof, I never could see why judgments should be insisted on as an indispensable prerequisite." See, however, Austin v. Bruner, 65 Ill. App. 301.

76 Beasley v. Coggins, 48 Fla. 215, 5 Ann. Cas. 801, 37 South. 213. 77 Wyman v. Mathews, 53 Fed. 678 (unpreferred creditor may sue to obtain pro rata); Talley v. Curtain, 54 Fed. 43, 4 C. C. A. 177.

ment, and the assignee refuses to sue to set aside a fraudulent conveyance, some courts allow a general creditor to bring the suit, upon the theory that he is a beneficiary seeking to enforce a trust.78

(§ 885.) Is an Attachment Lien Sufficient to Support a Creditor's Bill?—It is established by perhaps the weight of authority that an attachment which creates a lien upon real property may be the foundation of a creditor's bill to set aside a fraudulent conveyance. 79 This lien is entitled to protection by courts of equity, so that there may be no fraudulent obstructions to the due execution of the process. Accordingly, it has been held that one who has obtained a judgment in another state may obtain relief upon an attachment issued within the

It is generally said that mere insolvency will not warrant relief: Ginn v. Brown, 14 R. I. 524.

78 Kalmus v. Ballin, 52 N. J. Eq. 290, 46 Am. St. Rep. 520, 28 Atl. 791; Spelman v. Freedman, 130 N. Y. 421, 29 N. E. 765; Burnham v. Dillon, 100 Mich. 352, 59 N. W. 176 (by virtue of statute).

79 See 4 Pom. Eq. Jur., § 1415, note 8, and cases cited; Chicago & A. Bridge Co. v. Anglo-American etc. Co., 46 Fed. 584; Taylor v. Branscombe, 74 Iowa, 534, 38 N. W. 400; Little v. Ragan, 83 Ky. 321; Barton v. Barton, 80 Ky. 212; Coulson v. Saltsman, 71 Neb. 495, 98 N. W. 1055; Hargreaves v. Tennis, 63 Neb. 356, 88 N. W. 486 (dictum); Stone v. Anderson, 26 N. H. 506; Perham v. Haverhill Fiber Co., 64 N. H. 2, 3 Atl. 312; Hunt v. Field, 9 N. J. Eq. 36, 57 Am. Dec. 365; Bainbridge v. Allen, 70 N. J. Eq. 355, 61 Atl. 706; Bliss v. Hornthal, 33 App. Div. 225, 53 N. Y. Supp. 493; Bates v. Plonsky, 62 How. Pr. 429; Falconer v. Freeman, 4 Sand. Ch. 565; Dawson v. Sims, 14 Or. 561, 13 Pac. 506; Fleischner v. Bank of McMinnville, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345; Ryckman v. Manerud, 68 Or. 350, Ann. Cas. 1915C, 522, 136 Pac. 826, quoting Pom. Eq. Jur., § 1415; Johnson v. Heidenheimer, 65 Tex. 263; Evans v. Laughton, 69 Wis. 138, 33 N. W. 573 (by statute). In People v. Van Buren, 136 N. Y. 252, 32 N. E. 775, 33 N. E. 743, attaching creditors were allowed an injunction in aid of their attachment suit before judgment.

jurisdiction;<sup>80</sup> and that a resident creditor may resort to equity immediately upon obtaining an attachment against the property of a non-resident.<sup>81</sup> Where, for any reason, the attachment creates no lien, it would seem that the bill should not be maintainable.<sup>82</sup> The authorities are not unanimous, however, in supporting bills resting upon attachments. Many courts of the highest character refuse to recognize such liens as the basis for equitable interference; and much reason seems to favor their view.<sup>83</sup>

§ 2309. (§ 886.) Steps Beyond Judgment—In Suits to Reach Assets not Subject to Execution.—What steps, if any, must a judgment creditor take before filing a creditor's bill? In determining this question, many courts have distinguished between two classes of cases. "The first—a creditor's suit, strictly so called—is where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor which cannot be reached on execution. Generally in that class of cases the action

<sup>80</sup> Curry v. Glass, 25 N. J. Eq. 108; Taylor v. Branscombe, 74 Iowa, 534, 38 N. W. 400; Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261.

<sup>81</sup> Little v. Ragan, 83 Ky. 321.

<sup>82</sup> Clark v. Raymond, 84 Iowa, 251, 50 N. W. 1068.

<sup>83</sup> Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669 (quoting Pom. Eq. Jur., § 1415); Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 Pac. 236; Nordlinger v. Ostatag, 66 Ill. App. 661; Detroit Copper & Brass Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751 (affirming 58 Ill. App. 351); Thurber v. Blanck, 50 N. Y. 80. See, also, cases cited in Pom. Eq. Jur., § 1415, note. The reasons for this view are well stated in Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669. "Though the attachment is a specific lien, it is a lien of very uncertain tenure. It may be defeated by a dissolution on motion, or by a judgment in favor of defendants on the merits of the claim. Suits by attachment are common, and the writ issues without any order of the court and on affidavit of the creditor alone, alleging any one of the statutory grounds. No advantage would inure to the creditor, except in the mere matter of time, in sustaining the equitable action."

cannot be brought until the creditor has exhausted his remedy at law by the issue of an execution, and its return unsatisfied. This is required because equity will not aid the creditor to collect his debt until the legal assets are exhausted, for until this is done he may have an adequate remedy at law." A return of execution unsatisfied is accepted by the courts as proof of insolvency—that is, insolvency so far as assets which can be reached at law are concerned. In some jurisdictions

84 State Bank of Ceresco v. Belk, 68 Neb. 517, 94 N. W. 617, per Duffie, C. See the following cases distinguishing between the classes: National Tube Works Co. v. Ballou, 146 U. S. 523, 36 L. Ed. 1070, 13 Sup. Ct. 165; Schofield v. Ute Coal & Coke Co., 92 Fed. 269, 34 C. C. A. 334; Logan v. Logan, 22 Fla. 561, 1 Am. St. Rep. 212; Wisconsin Granite Co. v. Gerrity, 144 Ill. 77, 33 N. E. 31; French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252; Detroit Copper & Brass Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751; Schelowski v. Pawlowski, 168 Mich. 664, 134 N. W. 997; Parish v. Lewis, Freem. (Miss.) 299; Fleming v. Grafton, 54 Miss. 79; Geery v. Geery, 63 N. Y. 252. To the effect that execution must be returned nulla bona, see Kittel v. Augusta, T. & G. R. Co., 65 Fed. 859; Vandegraff v. Medlock, 3 Port. 389, 29 Am. Dec. 256; Herrlich v. Kaufmann, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857 (citing Pom. Eq. Jur., § 1415); Clark v. Bert, 2 Kan. App. 407, 42 Pac. 733; Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783; Eames v. Manley, 121 Mich. 300, 80 N. W. 15; Grenell v. Ferry, 110 Mich. 262, 68 N. W. 144; Albright v. Texas, S. F. & N. R. Co., 8 N. M. 422, 46 Pac. 448; Brown v. Barker, 74 N. Y. Supp. 43, 68 App. Div. 592; Trotter v. Lisman, 199 N. Y. 497, 92 N. E. 1052; Menkler v. United States Sheep Co., 4 N. D. 507, 33 L. R. A. 546, 62 N. W. 594; Stone v. Westcott, 18 R. I. 517, 28 Atl. 662; Grays Harbor Commercial Co. v. Fifer, 97 Wash. 380, 166 Pac. 770 (allegations of insolvency do not affect the rule). See, also, cases cited in Pom. Eq. Jur., § 1415, note.

85 The fact that the debtor may have property in another county is no defense: Thompson v. La Rue, 59 Neb. 614, 81 N. W. 612. See, also, Whiteside v. Hoskins, 20 Mont. 361, 51 Pac. 739 (unnecessary to find that debtor is insolvent when execution returned unsatisfied); Wade v. Ringo, 62 Mo. App. 414; Fryberger v. Berven, 88 Minn. 311, 92 N. W. 1125; Dimond v. Rogers, 203 Ill. 464, 67 N. E. 968. See, however, Fuller v. Brown, 76 Hun; 557, 28 N. Y. Supp. 189.

it is held that a return of execution is not the only evidence of insolvency that will be received; that insolvency is a fact which may be proved by any competent evidence. There would seem to be strong reasons in favor of this view, although it has not been generally adopted.

§ 2310. (§ 887.) Same—In Suits to Remove Fraudulent Obstructions.—"The second class of cases is where property legally liable to execution has been fraudulently conveyed or encumbered by the debtor, and the creditor brings the action to set aside the conveyance or encumbrance as an obstruction to the enforcement of his lien: for, though the property might be sold on execution notwithstanding the fraudulent conveyance, the creditor will not be required to sell a doubtful or obstructed title. In the latter class of cases the prevailing doctrine is that it is not necessary to allege that an execution has been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to grant relief in such cases, but upon the theory that the fraudulent conveyance is an obstruction which prevents the creditor's lien from being efficiently enforced upon the property. As to the creditor the conveyance is void, and he has a right to have himself placed in the same position as if it had not been made. The fact that other property has been retained by the debtor may be evidence that the conveyance is not fraudulent, but, if the grantee's title be tainted with fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he shall be

<sup>86</sup> Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Tittman v. Thornton, 107 Mo. 500, 16 L. R. A. 410, 17 S. W. 979; Ryan v. Spieth, 18 Mont. 45, 44 Pac. 403. See, also, cases cited *pro* and *con*, in Pom. Eq. Jur., § 1415, note.

disturbed."<sup>87</sup> In most jurisdictions, the docketing of a judgment creates a lien upon the debtor's realty within the county. It is generally held that the judgment must be a lien upon the property in order to warrant relief, and accordingly a judgment without execution is not sufficient to authorize a court to set aside a fraudulent

87 State Bank of Ceresco v. Belk, 68 Neb. 517, 94 N. W. 617, per Duffre, C. See, also, National Tube Works Co. v. Ballou, 146 U. S. 523, 13 Sup. Ct. 165; Schofield v. Ute Coal & Coke Co., 92, Fed. 269, 34 C. C. A. 334; Detroit Copper & Brass Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751; Wisconsin Granite Co. v. Gerrity, 144 Ill. 77, 33 N. E. 31; Parish v. Lewis, Freem. (Miss.) 299; Fleming v. Grafton, 54 Miss. 79; Geery v. Geery, 63 N. Y. 252. "It is the inadequacy and not the utter futility of the remedy at law, which contains the jurisdiction in this class of cases; and the return of an execution unsatisfied is neither the sole nor the best evidence of this inadequacy. In many cases this inadequacy cannot be shown at all by the return of the execution, because it is possible to levy the same upon the property upon which the lien is fastened, and to sell this property thereunder, notwithstanding the fraudulent encumbrance or conveyance. The difficulty is that the fraudulent mortgage, trust deed, or other obstruction compels the purchaser under the execution to buy a lawsuit, and so depreciates the value of the property at the sale that the creditor's remedy is rendered insufficient, and sometimes without any practical value. . . . Moreover, the inadequacy of the remedy is generally measured by the value of the property upon which the lien has attached or in which the right is vested, and the depreciation in the value of this lien or right, caused by the fraudulent obstruction. The issue and return of an execution unsatisfied have no tendency to establish either of these facts": Schofield v. Ute Coal & Coke Co., 92 Fed. 269, 34 C. C. A. 334, per Sanborn, Cir. J. To the effect that return of execution is not necessary in cases of this class, see in addition to cases already cited, Lazarus Jewelry Co. v. Steinhardt, 112 Fed. 614, 50 C. C. A. 393; Jenner v. Murphy, 6 Cal. App. 434, 92 Pac. 405; Dillman v. Nadelhoffer, 162 Ill. 625, 45 N. E. 680; Scott v. Aultman Co., 211 Ill. 612, 103 Am. St. Rep. 215, 71 N. E. 112; Quinn v. People, 45 Ill. App. 547; Stone v. Manning, 2 Scam. 534, 35 Am. Dec. 119; Miller v. Davidson, 3 Gilm. 522, 44 Am. Dec. 715; Greenway v. Thomas, 14 Ill. 271; Weightman v. Hatch, 17 Ill. 286; Shufeldt v. Boehm, 96 Ill. 563: Austin v. First Nat. Bank, 47 Ill. App. 224; French v. Commercial Nat. Bank, 79 Ill. App. 110; affirmed, 199 Ill. 213, 65

transfer of personal property.<sup>88</sup> On the other hand, it is held in some states, in regard to realty, that it is not necessary that the judgment should be a lien.<sup>89</sup> Some states require a return of execution *nulla bona* in all cases, including cases of fraudulent conveyances.<sup>90</sup>

N. E. 252; Rankin v. Schultz, 141 Iowa, 681, 118 N. W. 383; Metzger v. Burnett, 5 Kan. App. 374, 48 Pac. 599; Cress v. Belknap Hardware & Mfg. Co. (Ky.), 113 S. W. 93; Gibbons v. Pemberton, 101 Mich. 397, 45 Am. St. Rep. 417, 59 N. W. 663; Wilson v. Addison, 127 Mich. 680, 8 Detroit Leg. N. 575, 87 N. W. 109; Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390; Grandin v. First Nat. Bank, 70 Neb. 730, 98 N. W. 70; Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460; Ziska v. Ziska, 20 Okl. 634, 23 L. R. A. (N. S.) 1, 95 Pac. 254 (attachment lien on land, and judgment, sufficient); Multnomah St. R. Co. v. Harris, 13 Or. 198, 9 Pac. 402; Cornell v. Radway, 22 Wis. 260; Level Land Co. v. Sivyer, 112 Wis. 442, 88 N. W. 317 (not necessary when judgment is a lien); Hyman v. Landry, 135 Wis. 598, 128 Am. St. Rep. 1044, 116 N. W. 236 (judgment creditor must show that he is remediless at law). See, also, Miller v. Dayton, 47 Iowa, 312. In Michigan, the execution must, in cases of fraudulent conveyances, be levied on the property, but need not be returned unsatisfied: Eames v. Manley, 121 Mich. 300, .80 N. W. 15. To the effect that execution must issue, but need not be returned, see Kittel v. Augusta, T. & G. R. Co., 65 Fed. 859. See, also, cases cited in Pom. Eq. Jur., § 1415, note.

88 Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Brinkerhoff v. Brown, 4 Johns. Ch. 671; Chandler v. Colcord, 1 Okl. 260, 32 Pac. 330; Chamberlayne v. Temple, 2 Rand. 384, 14 Am. Dec. 786. But see Hall v. Nash, 58 N. J. Eq. 554, 43 Atl. 683; affirming 39 Atl. 374 (delivery of writ to sheriff is sufficient; statute makes writ bind goods from such time); Falker v. Linehan, 88 Iowa, 641, 55 N. W. 503 (not necessary that there be a lien when execution has been returned unsatisfied); Matlock v. Babb, 31 Or. 516, 49 Pac. 873 (if execution is issued so that there is a lien on the property, there need be no return nulla bona).

89 Wiltse v. Flack, 115 Iowa, 51, 87 N. W. 729; Lanahan v. Caffrey, 57 N. Y. Supp. 724, 40 App. Div. 124. Contra: Gilbert v. Stockman, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045 (judgment is not a lien on property fraudulently conveyed). See, also, cases collected in Pom. Eq. Jur., § 1415, note.

90 "For if there is other property sufficient for that purpose it is an act of capricious intermeddling with the contracts of others

§ 2311. (§ 888.) What is a Sufficient Return of Execution.—An execution, in order to form part of the basis for a creditor's bill, should be directed to and returned from either the county where the judgment was obtained or where the debtor resides. A return of an execution issued to another county is not sufficient. A return made by the sheriff before the return day named in the writ, at the order of the plaintiff's attorney, is sufficient if it appears that the sheriff has made demand and has been unable to find any property; otherwise, such a return is insufficient. It has been held that a return

to permit him to interfere to set it aside": Meux v. Anthony, 11 Ark. (6 Eng.) 411, 52 Am. Dec. 274. See, also, Brown v. John V. Farwell Co., 74 Fed. 764; Beswick v. Dorris, 174 Fed. 502; Halbert v. Grant, 4 T. B. Mon. 581; Spooner v. Travelers' Ins. Co., 76 Minn. 311, 77 Am. St. Rep. 651, 79 N. W. 305 (plaintiff must prove that he has no legal remedy, that the debtor is insolvent, and has no other property from which the debt might be satisfied; the "best, and as a rule, the only, evidence of these facts, is the return of an execution nulla bona"). It has been held that the return of the execution unsatisfied is necessary when the conveyance is assailed as merely voluntary, for in such case it cannot appear that any wrong has been done until it is shown that the debtor has not the means of paying the debt with property other than that covered by the contested conveyance: National Bank v. Kinard, 28 S. C. 101, 112, 5 S. E. 464; Compton v. Patterson, 28 S. C. 152, 5 S. E. 470.

- 91 Nashville, C. & St. L. R. Co. v. Mattingly, 101 Ky. 219, 40 S. W. 673; Proctor v. Bell's Adm'r, 97 Ky. 98, 30 S. W. 15; Minkler v. United States Sheep Co., 4 N. D. 507, 33 L. R. A. 546, 62 N. W. 594. To the effect that a return from the county of residence is sufficient, see Martin v. Byrd, 19 Ky. Law Rep. 1030, 42 S. W. 1112; Minneapolis Threshing Machine Co. v. Hanrahan, 9 S. D. 520, 70 N. W. 656. See, also, cases cited in Pom. Eq. Jur., § 1415, note. See, however, Durand v. Gray, 129 III. 9, 129 N. E. 610.
- 92 Illinois Malleable Iron Co. v. Graham, 55 Ill. App. 266; Howe v. Babcock, 72 Ill. App. 68; Mehler v. Cornwell, 3 App. D. C. 92.
- 93 Scheubert v. Honel, 50 Ill. App. 597 (affirmed 152 Ill. 313, 38 N. E. 913); Dunderdale v. Westinghouse Electric Co., 51 Ill. App. 407; Hartley v. Atkins, 64 Ill. App. 502.

showing merely that there is no personal property is not sufficient;<sup>94</sup> and for this reason, a return of a constable who has no authority to levy on realty, will not support a creditor's bill.<sup>95</sup>

(§ 889.) Limitations and Laches.—Under the reformed system of procedure in many of the states, the statute of limitations is made to apply to equitable actions, and accordingly, creditors' suits come within its provisions. Cases where the question generally arises are those in which the creditor seeks to set aside a fraudulent conveyance. The general form of statute as to fraud is that the action is barred after a certain named time from the discovery of the fraud.96 Even in a case where the fraud is discovered, however, it is generally held that time does not begin to run until the right to maintain a creditor's bill accrues.97 As to when the right does accrue there is not unanimity of opinion, but most courts hold that, at least, a judgment must be obtained at law. This question has been fully discussed

<sup>94</sup> Bayley v. Bayley, 66 N. J. Eq. 84, 57 Atl. 271 (for the reason that plaintiff has not exhausted his legal remedy).

<sup>95</sup> Stuckwisch v. Holmes, 29 Ind. App. 512, 64 N. E. 894.

<sup>96</sup> Farrar v. Bernheim, 75 Fed. 136, 21 C. C. A. 264; Arnett v. Coffey, 5 Colo. App. 560, 39 Pac. 894; Fox v. Lipe, 14 Colo. App. 258, 59 Pac. 850; Finch v. Kent, 24 Mont. 268, 61 Pac. 653; Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302; Vodrie v. Tynan (Tex. Civ. App.), 57 S. W. 680.

<sup>97</sup> Washington v. Norwood, 128 Ala. 383, 30 South. 405; Ohm v. Superior Court, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244; Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433; Mc-Mannomy v. Chicago etc. R. Co., 167 Ill. 497, 47 N. E. 712; Gans v. Marx, 25 Tex. Civ. App. 497, 61 S. W. 527; Brundage v. Cheneworth, 101 Iowa, 256, 63 Am. St. Rep. 382, 70 N. W. 211; Gates v. Andrews, 37 N. Y. 657, 97 Am. Dec. 764; Weaver v. Haviland, 142 N. Y. 534, 40 Am. St. Rep. 631, 37 N. E. 641; Blackwell v. Hatch, 13 Okl. 169, 73 Pac. 933. See, also, Ainsworth v. Roubal, 74 Neb. 723, 2 L. R. A. (N. S.) 988, 105 N. W. 248.

in the preceding paragraphs. In some states it is held that the recording of the deed is sufficient notice of the fraud.<sup>98</sup> As stated in a recent case, "the statute runs from the time the mistake, by ordinary diligence, ought to have been discovered." In some jurisdictions it is held that a creditor, having notice of a fraud, must reduce his claim to judgment within a reasonable time and then bring the creditor's bill.<sup>100</sup> The statute begins

98 Thus, in Mickle v. Walraven, 92 Iowa, 423, 60 N. W. 633, it was held that where a deed which is fraudulent as against creditors is spread upon the records, notice to the world is given of its character, or at least sufficient information is conveyed thereby, in the absence of special circumstances, to put the creditor on inquiry as to its contents and character. To the same effect, see Sims v. Gray, 93 Iowa, 38, 61 N. W. 171; Vashon v. Barrett, 99 Va. 344, 38 S. E. 200. Compare Jones v. Danforth, 71 Neb. 722, 99 N. W. 495. It is incumbent upon plaintiff to show, not only that he did not discover the fraud, but that the exercise of ordinary diligence on his part would not have led to the discovery: Poynter v. Mallory, 20 Ky. Law Rep. 284, 45 S. W. 1042; Green v. Salmon, 23 Ky. Law Rep. 517, 63 S. W. 270; Vodrie v. Tynan (Tex. Civ. App.), 57 S. W. 680. In Howell v. Thompson, 95 Tenn. 396, 32 S. W. 309, it was held that the right of action accrues from the time the conveyance is made. In McCue v. McCue, 41 W. Va. 151, 23 S. E. 689, it was held that a creditor must bring suit within five years from the conveyance, unless he shows that it was fraudulent in fact—that is, procured to be made with some dishonest intention; it is not enough to show it to be fraudulent in law, under the statute, by reason of being voluntary. As to the statutory bar to right to set aside a preferential assignment, see Smith v. Smith, 48 W. Va. 51, 35 S. E. '876. In Daniel v. Palmer, 124 Mich. 335, 82 N. W. 1067, it was held that a creditor must sue within a year from the time of levy.

99 Green v. Salmon, 23 Ky. Law Rep. 517, 63 S. W. 270. See, also, Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 94 Am. St. Rep. 709, 92 N. W. 340.

100 Stubblefield v. Gadd, 112 Iowa, 681, 84 N. W. 917. In this case the court, speaking of the time of the discovery of the fraud, said: "Ordinarily, the statute would begin to run at that time. But plaintiff had not reduced his claim to judgment, and consequently could not attack the conveyance. Having notice of the fraud, it

to run at the expiration of this reasonable time. Of course, in states where it is not necessary to reduce a claim to judgment before maintaining the creditor's bill, the statute begins to run from the time of the discovery. 101 The circumstances which prevent the running of the statute are the same as those which apply generally. The mere fact that a debtor has fought an action at law so persistently that the creditor has not filed a bill, is not sufficient excuse. 102 If an action is brought by one creditor in time, it is immaterial, so far as the statute of limitations is concerned, at what time the intervening creditors become parties; for, as each creditor appears and proves his claim, he has a right to be considered a party complainant from the beginning.<sup>103</sup> Of course a creditor whose claim is barred by the statute of limitations cannot maintain a bill to set aside a fraudulent conveyance. 104

It is generally held that the extension of the statute of limitations to equitable remedies does not abolish the equitable doctrine of laches. Professor Pomeroy, in his Code Remedies, 105 says: "Not a provision is to be found in the code of any state adopting the new system which requires, suggests, or even intimates an abrogation of equitable primary rights, or equitable remedies and remedial rights. . . . The change provided for is not in primary rights, nor in remedies, but in the methods, means, and instruments by which these primary rights are to be maintained and these remedies se-

was his duty to do so, however, in a reasonable time, and to bring a creditor's bill to subject the land to the payment of his judgment."

- 101 Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302.
- 102 State v. Osborne, 143 Ind. 671, 42 N. E. 921.
- 103 Dunne v. Portland St. R'y Co., 40 Or. 295, 65 Pac. 1052.
- 104 Grimmett v. Midgett (Tenn. Ch. App.), 57 S. W. 399; Mc-Clenney v. McClenney, 3 Tex. 192, 49 Am. Dec. 738.
  - 105 Pomeroy, Code Remedies, § 56.

cured." Mere delay does not always, in and of itself, constitute laches. As stated in a recent case, the effect of the statute of limitations is to eliminate "the requirement of excusatory facts in a bill purely equitable of mere delay in time when the suit is commenced within a period fixed by the statute." The result is that the right to maintain a creditor's bill may be barred by laches although the statutory time has not run. 107 Thus, it has been held that where a party has slept upon his rights for a period of nine years, with knowledge of the fraudulent character of the deed sought to be invalidated, and has allowed the opposite party to spend his money, or waits until the lands have greatly increased in value, either from such expenditure or otherwise, a court of equity might properly refuse to interfere, although the statute of limitations has not run. 108 the foregoing it would seem that the rule is that lapse of time coupled with circumstances which would render it inequitable to grant relief by a creditor's bill, will be a bar, whether the statutory period has elapsed or not. 109

<sup>106</sup> Gay v. Havermale, 27 Wash. 390, 67 Pac. 804.

<sup>107</sup> Wall v. Beedy, 161 Mo. 625, 61 S. W. 864; Neppach v. Jones, 20 Or. 491, 23 Am. St. Rep. 145, 26 Pac. 569, 849; Kinmouth v. Walling (N. J.), 36 Atl. 891. See, also, Beswick v. Dorris, 174 Fed. 502. But in Burne v. Partridge, 61 N. J. Eq. 434, 48 Atl. 770, where, fifteen years after obtaining a judgment a creditor filed a bill to set aside a conveyance of land made pending the suit in which the judgment was obtained, it was held that the delay was no bar to the right to set the conveyance aside; the bill being one for equitable aid to enforce a legal right, which was not barred.

<sup>108</sup> Wall v. Beedy, 161 Mo. 625, 61 S. W. 864. See, also, Hamilton v. Menominee Falls Quarry Co., 106 Wis. 352, 81 N. W. 876.

<sup>109</sup> In many of the cases no reference is made to the statute. In the following cases relief was refused because of laches; Strutton v. Young, 15 Ky. Law Rep. 657, 25 S. W. 109; Frenche v. Kitchen, 53 N. J. Eq. 37, 30 Atl. 815; Coyne v. Sayre, 54 N. J. Eq. 702, 36 Atl. 96; Call v. Cozart (Tenn. Ch. App.), 48 S. W. 312; Herold v. Barlow, 47 W. Va. 750, 36 S. E. 8; Mickel v. Walraven, 92 Iowa, 423, 60

§ 2313. (§ 890.) Who may Bring Suit.—Primarily, a creditor's suit must be brought by a creditor who has fulfilled the requirements described in the preceding sections.<sup>110</sup> An assignee of such a creditor is also allowed

N. W. 633; Stacker v. Wilson (Tenn. Ch. App.), 52 S. W. 709. In Fosdick v. Lowell Machine Shop, 58 Fed. 817, a discovery was sought in aid of an attachment. The complainant had lived in the same town with the debtor for nine years, and took no steps until after his death. It was held that there was such gross laches as to prevent relief-that when plaintiff is guilty of gross laches, equity will decline to interfere under a bill of discovery, as under a bill for relief. Where for three years the complainant had affirmed transfers, and had attempted to have them declared to be assignments for benefit of creditors, and had known all the facts for two years, it was held that he was barred from maintaining a creditor's bill: Hildebrand v. Tarbell, 97 Wis. 446, 73 N. W. 53. In Bumgardner v. Harris, 92 Va. 188, 23 S. E. 229, it was held that a creditor is not guilty of laches in failing to assert a claim so long as he has a judgment recognizing his rights. A bill filed by a judgment creditor seeking to reach property fraudulently conveyed, which discloses a constant and successful effort on the part of defendants to cover up and withhold from complainant any information with respect to the actual consideration of the conveyances, sufficiently excuses complainant's delay in bringing suit: Lant v. Manley, 75 Fed. 627, 21 C. C. A. 457. It must appear that complainant had notice of the fraud: Bank of Charleston N. B. A. v. Dowling, 52 S. C. 345, 29 S. E. 788. In the following cases it was held that there was no laches: Applegate v. Applegate, 107 Iowa, 312, 78 N. W. 34; Newlove v. Pennock, 123 Mich. 260, 82 N. W. 54.

110 See ante, §§ 882-888. Therefore one who has no enforceable claim against a married woman for goods cannot maintain a bill to have persons to whom she has sold the goods pay plaintiff: Levis Zukoski Mercantile Co. v. Bowers, 105 Tenn. 138, 58 S. W. 287.

However, a purchaser on execution may maintain a bill to cancel a fraudulent conveyance as a cloud on title. It is obvious that such suits have little in common with creditors' bills. For examples of such suits, see Farrar v. Bernheim, 74 Fed. 435, 20 C. C. A. 496, 41 U. S. App. 172; Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082; Wagner v. Law, 3 Wash. St. 500, 28 Am. St. Rep. 56, 15 L. R. A. 784, 28 Pac. 1109; Hager v. Shindler, 29 Cal. 48; Lindell Real Estate Co. v. Lindell, 133 Mo. 386, 33 S. W. 466; Watson v. Mead, 98 Mich.

to sue;<sup>111</sup> and his right to set aside a fraudulent conveyance is unaffected by the principle that causes of action for fraud are not assignable.<sup>112</sup> In some jurisdictions it is held that after a valid assignment for the benefit of creditors, such assignee is the only party who can sue;<sup>113</sup> although if he refuses, a bill may be filed by any creditor. A trustee in bankruptcy may, likewise, bring the suit.<sup>114</sup> A surety who pays a judgment has a right to maintain a bill without obtaining judgment himself, for he succeeds to the rights of the judgment creditor.<sup>115</sup> Before payment, however, he is not entitled to sue.<sup>116</sup>

§ 2314. (§ 891.) Parties Defendant.—The courts are not agreed as to who are necessary parties to the bill.

330, 57 N. W. 181; Phillips v. Kesterson, 154 Ill. 572, 39 N. E. 599. And he may have this relief although he bought the land for a small sum on account of the conveyance: Wagner v. Law, supra.

- 111 Wehrman v. Conklin, 155 U. S. 314, 39 L. Ed. 167, 15 Sup. Ct. 129; Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708; Rose v. Dunklee, 12 Colo. App. 403, 56 Pac. 342; Noble v. McKeith, 127 Mich. 163, 8 Detroit Leg. N. 281, 86 N. W. 526. It follows that an owner of a judgment who assigns it as collateral security cannot maintain a creditor's bill unless the assignee refuses to bring suit under circumstances calculated to prejudice the assignor's right: Andrews v. Kibbee, 12 Mich. 94, 83 Am. Dec. 766.
- 112 Howd v. Breckenridge, 97 Mich. 65, 56 N. W. 221; National Val. Bank v. Hancock, 100 Va. 101, 93 Am. St. Rep. 933, 40 S. E. 611.
- Valley Lumber Co. v. Hogan, 85 Wis. 366, 55 N. W. 415;
  McNaney v. Hall, 159 N. Y. 544, 54 N. E. 1093; Wimpfheimer v.
  Perrine, 67 N. J. Eq. 597, 50 Atl. 356. See, also, Taylor v. Seiter,
  199 Ill. 555, 65 N. E. 433.
- 114 Schmitt v. Dahl, 88 Minn. 506, 93 N. W. 665. Compare Stevenson v. Bird, 168 Ala. 422, 53 South. 93 (only when bill inures to benefit of all creditors).
- 115 Partlow v. Lane, 42 Ky. (3 B. Mon.) 424, 39 Am. Dec. 473; Shapira v. Paletz (Tenn. Ch. App.), 59 S. W. 774; Hawker v. Moore, 40 W. Va. 49, 20 S. E. 848; Lyon v. Bolling, 9 Ala. 463, 44 Am. Dec. 444. See, also, Smith v. Pitts, 167 Ala. 461, 52 South. 402, citing Pom. Eq. Jur., § 1417.
- 116 Williams v. Tipton, 24 Tenn. (5 Humph.) 66, 42 Am. Dec. 420. But see Thomson v. Crane, 73 Fed. 327.

The jurisdictions which require suit to be brought on behalf of all the creditors allow all creditors to be made parties; but it is doubtful if all are necessary parties in any jurisdiction. It would seem that the debtor should be made a party, for he is vitally interested in the outcome, and his rights are directly affected. The party who has possession of the property sought to be reached must be joined. It is a general, though not universal, proposition, that all who have interests which will be affected by the decree in the property sought to be reached must be made parties. It

In suits to set aside fraudulent conveyances, all whose interests will be prejudiced by a decree setting aside the conveyance must be made parties. As in the case of other creditors' bills, the debtor, who is either the fraudulent grantor or the party who secures the conveyance, should, it is generally held, be made a party. 120 In

<sup>117</sup> Ferguson v. Ann Arbor R. Co., 17 App. Div. 336, 45 N. Y. Supp. 172; United States v. Howland, 4 Wheat. (17 U. S.) 108, 4 L. Ed. 526.

<sup>118</sup> Dobbins v. Coles, 59 N. J. Eq. 80, 45 Atl. 444.

<sup>119</sup> Thus, in a suit by a creditor of an insured, after a loss, to restrain disposition of remainder and to subject funds due under a policy to payment of judgment, a prior assignee is a necessary party: State v. Superior Court, 14 Wash. 686, 45 Pac. 670. Beneficiaries of an implied trust known to creditor must be made parties: Marshall's Ex'r v. Hall, 42 W. Va. 641, 26 S. E. 300. In Massachusetts, under Stats. 1884, c. 285, § 1, it is not indispensable, however, to make trustees parties in actions to reach the interest of the beneficiaries. The court merely orders the cestui to convey his equitable interest: Russell v. Burke, 180 Mass. 543, 62 N. E. 963. A creditor who has compounded with one of several joint obligors may maintain a creditor's bill against the other obligors without making the released obligor a party: Penn v. Bahnson, 89 Va. 253, 15 S. E. 586.

<sup>120</sup> J. B. Brown Co. v. Henderson, 123 Ala. 623, 26 South. 199; Cedar Rapids Nat. Bank v. Lavery, 110 Iowa, 575, 80 Am. St. Rep. 328, 81 N. W. 775; Miller v. Wilkerson, 10 Kan. App. 576, 62 Pac. 253; Bevins v. Eisman, 21 Ky. Law Rep. 1772, 56 S. W. 410; First

addition, the fraudulent grantee must be joined, for his interests are usually the most important at stake. 121 Where there are several fraudulent conveyances, the several grantees may be joined as defendants in one action.<sup>122</sup> "The object and purpose of the suit is single, the satisfaction of the demands of the creditors from the property of the debtor, and all that can be said is, that different persons have, or claim to have, separate interests in distinct or independent questions connected with, or springing out of that common purpose."123 Where the grantor or grantee is dead, his executors, administrators, or heirs are necessary parties, according to the law of the jurisdiction as to what party is the representative of a deceased person in suits relating to his property.<sup>124</sup> A party in possession of the property. although he be the sheriff in case of a collusive attachment, must be joined.125 The trustees of all deeds of trust on property sought to be sold, and all the creditors

Nat. Bank v. Gibson, 69 Neb. 21, 94 N. W. 965; First Nat. Bank v. Shuler, 153 N. Y. 163, 60 Am. St. Rep. 601, 47 N. E. 262; Lawrence v. Bank of Republic, 35 N. Y. 320. But see First Nat. Bank v. Wright, 38 App. Div. 2, 56 N. Y. Supp. 308; Schneider v. Pattón, 175 Mo. 684, 75 S. W. 155; Homestead Min. Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422. In Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765, it was held that a fraudulent grantor is a proper but not a necessary party. For authorities pro and con, see Weightman v. Washington Critic Co., 4 App. D. C. 136.

121 Cook v. Lake, 50 App. Div. 92, 63 N. Y. Supp. 818; Adkins v. Loucks, 107 Wis. 587, 83 N. W. 934. But a grantee who has conveyed his interest is not a necessary party: Bomar v. Means, 37 S. C. 520, 34 Am. St. Rep. 772, 16 S. E. 537.

122 Gassenheimer v. Kellogg, 121 Ala. 109, 26 South. 29; Burke
 v. Morris, 121 Ala. 126, 25 South. 759.

123 Lehman v. Meyer, 67 Ala. 396.

124 Simon v. Sabb, 56 S. C. 38, 33 S. E. 799; Sloan v. Hunter, 56
S. C. 385, 76 Am. St. Rep. 551, 34 S. E. 658.

125 Plaster v. Throne-Franklin Shoe Co., 123 Ala. 360, 26 South.
225; Sloan v. Hunter, 56 S. C. 385, 76 Am. St. Rep. 551, 34 S. E. 658.

named therein, are necessary parties.<sup>126</sup> In some jurisdictions it is held that the *cestui* of a trust deed is not a necessary party, for the defense of the trustee is the defense of the *cestui*. The court may in its discretion, however, allow the *cestui* to become a party.<sup>127</sup> Where a fraudulent grantee assumes a mortgage on property, the mortgagee must be joined.<sup>128</sup> In all the cases the test seems to be whether one has an interest in the property which cannot be taken from him without giving him a chance to be heard.<sup>129</sup> It is not necessary to join those whose interests will not be affected by the decree.<sup>130</sup>

<sup>126</sup> Carnahan v. Ashworth (Va.), 31 S. E. 65.

<sup>127</sup> Winslow v. Minnesota & P. R. Co., 4 Minn. 313, 77 Am. Dec. 519.

<sup>128</sup> Smiser v. Stevens-Wolford Co.'s Assignee, 20 Ky. Law Rep. 501, 45 S. W. 357.

<sup>129</sup> Thus, a petition to cancel a chattel mortgage as a fraudulent preference must join as parties all the accepting creditors: Cleveland v. People's Nat. Bank (Tex. Civ. App.), 49 S. W. 523.

<sup>130</sup> Thus, a prior mortgagee need not be made a party to a bill to set aside a fraudulent conveyance, because his interest ordinarily is not affected: Freeman v. Stewart, 119 Ala. 158, 24 South. 31. In a suit to set aside conveyance by one co-tenant, other co-tenants need not be joined: Watts v. Burgess, 126 Ala. 170, 27 South. 763. Where an execution is levied on land of one judgment debtor, a creditor's bill to set aside a mortgage as fraudulent may be maintained against one without joining others: Hodge v. Gray, 110 Mich. 654, 68 N. W. 979. Where a bill seeks only an account from fraudulent grantees, all their grantees need not be made parties: Arnot v. Birch, 29 App. Div. 356, 51 N. Y. Supp. 491. Where no account for rents and profits is asked, it is not necessary to make a receiver of rents and profits, appointed long after the conveyance was made, a party: Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271. Where a firm creditor files a bill against one partner to set aside a fraudulent conveyance of property alleged to have been bought with partnership funds, the other partner is not a necessary party: Brooks v. Lowenstein, 124 Ala. 158, 27 South. 520. In Miller v. Wilkerson, 10 Kan. App. 576, 62 Pac. 253, the defendant, by cross-bill, alleged that the conveyance to plaintiff was fraudulent as to creditors. The grantor was not a party. The court said: "It was necessary that

§ 2315. (§ 892.) Joinder of Parties Plaintiff—One Creditor Suing in Behalf of Others. 131-Several and separate judgment creditors may unite in an action to remove a fraudulent conveyance made by their common debtor, since they have a common interest in the relief sought;132 and in those states where simple contract creditors are authorized by statute to sue, they may join as plaintiffs with judgment creditors. 133 If the plaintiff professes to sue both for himself and for such other creditors as may choose to come in and share in the expenses of the suit, it is obvious that he gains no priority over such creditors in the distribution of the proceeds of the suit.134 In such a case the question may arise as to the power of the creditor who files the bill to control the proceedings. If other creditors have come in, or if an interlocutory judgment has been rendered establishing the rights of the parties, the original complain-

she should be, before the court could grant affirmative relief, but it was not necessary that she should be before the court, that the defendants might show a want of equity in the plaintiff."

131 This paragraph is quoted in United States Fidelity & Guaranty Co. v. Rainey, 120 Tenn. 357, 113 S. W. 397, and cited in East Atlanta Land Co. v. Mower, 138 Ga. 380, 75 S. E. 418.

132 Gates v. Boomer, 17 Wis. 455; Clarkson v. Depeyster, 3 Paige, 320; Bomar v. Means, 37 S. C. 520, 34 Am. St. Rep. 772, 16 S. E. 537; Maynard v. Armour Fertilizer Works, 138 Ga. 549, 75 S. E. 582.

<sup>133</sup> Steiner v. Parker, 108 Ala. 357, 19 South. 386; Steiner Land & Lumber Co. v. King, 118 Ala. 546, 24 South. 35. See, also, Keystone Nat. Bank v. Palos Coal & Coke Co., 150 Ala. 245, 43 South. 570 (general creditors and bond creditors).

134 Younger v. Massey, 41 S. C. 50, 19 S. E. 125; Haskin Wood Vulcanizing Co. v. Cleveland Shipbuilding Co., 94 Va. 439, 26 S. E. 878. But even where the suit is brought on behalf of all, the complainants cannot compel the payment of more than the claims of the creditors who come in: McKissack v. Voorhees, 119 Ala. 101, 24 South. 523.

ant cannot of his own motion dismiss the bill. Where other creditors have not come in, however, it has been held that he may dismiss the bill. 136

In Alabama, a creditor is allowed to maintain a bill although other bills by other creditors on behalf of all are pending. "A creditor's bill filed to reach property fraudulently conveyed by a debtor on behalf of all other creditors who may see proper to come in and make themselves parties, will not preclude other creditors from proceeding in like manner by original bill, until there has been a decree upon the merits granting relief." 137

§ 2316. (§ 893.) Creditor Suing for Himself Obtains Priority.—It is the general rule that in a judgment creditor's suit a single creditor may file a bill on his own behalf; that he is entitled to retain the priority thereby

135 Salisbury v. Binghampton Pub. Co., 85 Hun, 99, 32 N. Y. Supp. 652; Hirshfield v. Bopp, 27 App. Div. 180, 50 N. Y. Supp. 676; Slusher v. Simpkinson, 101 Ky. 594, 40 S. W. 570, 43 S. W. 692; Lewis v. Laidley, 39 W. Va. 422, 19 S. E. 378. In Shumate's Ex'rs v. Crockett, 43 W. Va. 491, 27 S. E. 240, the court said: "The debt of the plaintiffs was paid, but the suit was expressly for all lienors, and others had appeared and become parties, and that payment could not defeat the decree. The decree belonged to all, not one, of the creditors, and any creditor yet unpaid had a right to enforce it. It could go on in the name of the original plaintiffs, or, if anybody so asked, the plaintiff's name could be stricken out, and another creditor's name substituted."

136 Salisbury v. Binghampton Pub. Co., 85 Hun, 99, 32 N. Y. Supp. 652 (dictum). In Schlagenhauf v. Craven, 61 N. J. Eq. 232, 47 Atl. 804, it was held that a party who has not reduced his claim to judgment cannot object to a dismissal of the bill. In Craig v. Hoge, 95 Va. 275, 28 S. E. 317, it was said that a complainant can dismiss until there has been a reference.

v. Alabama Terminal & Imp. Co., 109 Ala. 371, 19 South. 412; Hall v. Alabama Terminal & Imp. Co., 104 Ala. 577, 53 Am. St. Rep. 87, 16 South. 439; Talladega Mercantile Co. v. Jenifer Iron Co., 102 Ala. 259, 14 South. 743; American Pig-iron Storage Warrant Co. v. German, 126 Ala. 194, 85 Am. St. Rep. 21, 28 South. 603.

gained over other creditors, and cannot be forced to divide with them. 138 Three methods of proceeding are open to the creditor whose execution at law is returned unsatisfied, was the conclusion arrived at by Chancellor

138 Tissier v. Wailes (Ala.), 39 South. 924; Senter v. Williams, 61 Ark. 189, 54 Am. St. Rep. 200, 32 S. W. 490; Plummer v. School Dist., 90 Ark. 236, 134 Am. St. Rep. 28, 17 Ann. Cas. 508, 118 S. W. 1011; Elmore v. Spear, 27 Ga. 193, 73 Am. Dec. 729; Gordon v. Lowell, 21 Me. 251; Rioux v. Cronin, 222 Mass. 131, 109 N. E. 898; George v. Williamson, 26 Mo. 190, 72 Am. Dec. 203; Pullis v. Robison, 73 Mo. 201, 39 Am. Rep. 497; Sitley & Son v. Morris, 73 N. J. Eq. 197, 67 Atl. 789; McDermott v. Strong, 4 Johns. Ch. 687; Edmeston v. Lyde, 1 Paige Ch. 637, 19 Am. Dec. 454; Corning v. White, 2 Paige, 567, 22 Am. Dec. 659; Hammond v. Hudson R. I. & M. Co., 20 Barb. 378; Clark v. Figgins, 31 W. Va. 157, 13 Am. St. Rep. 860, 5 S. E. 643. In Edgell v. Haywood, 3 Atk. 357, it was said: "The person who first sues has an advantage by his legal diligence in all cases. The complainant, by his judgment and execution at law, and by his diligence in this court, has obtained a position which entitles him to a priority over the other creditors of the debtor." See, also, Lopez v. Campbell, 18 App. Div. 427, 46 N. Y. Supp. 91; Cole v. Marple, 98 Ill. 58, 38 Am. Rep. 83. But the filing of a creditor's bill gives no priority where it discovers no new assets nor avers facts which had not been sought to be taken advantage of by other parties previous to the filing of the bill: John Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794 (affirming 85 Ill. App. 223).

The mere filing of a creditor's bill does not put the property in custodia legis. Therefore a judgment creditor who files a bill to set aside a trust deed as fraudulent does not acquire such a lien on the trust property as to render void a sale by the trustee pending suit, where the charge of fraud is not sustained: McClurg v. McSpadden, 101 Tenn. 433, 47 S. W. 698.

If, under the bankruptcy law of 1898, a petition in bankruptcy is filed against the debtor more than four months after the judgment is obtained against him, the creditor may pursue any remedy for enforcement of the judgment, notwithstanding the adjudication of bankruptcy; his right to maintain an equitable action to set aside a fraudulent transfer by the debtor does not vest in the trustee in bankruptcy: Hillyer v. Le Roy, 179 N. Y. 369, 103 Am. St. Rep. 919, 72 N. E. 237; see Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 23 Sup. Ct. 67.

Walworth, in a leading case; that he "might file a bill to reach the equitable estate of the defendants, either in his own name and for his own benefit, or might join with others standing in the same situation in a joint suit for their joint benefit, in proportion to the amount due to each, . . . or that he might file a bill in the usual way, in behalf of himself and all others standing in the same situation, as judgment-creditors whose executions had been returned unsatisfied, and who might choose to come in under the decree, and contribute to the expenses of the suit. I can see no reasonable objection to either mode of proceeding. The latter, at the first blush, may appear the most equitable, but the two first are much more likely to insure a vigorous prosecution of the suit. And, on further examination, it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit."139

139 Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454. Further reasons for the rule that other creditors than the plaintiff in the judgment creditor's action cannot, as a matter of right, become parties thereto, are explained in a recent opinion: "A sixth class [of creditors' suits] is that now before the court, where a single judgment creditor of a living debtor obtains a lien upon real estate, or, by execution, on leviable chattels, and asks the aid of the court, either to perfect an equitable title already in the defendant in execution, or to set aside a fraudulent conveyance made by him to a third party. . . . [Pointing out distinction between this class and other so-called creditors' suits.] It is to be observed, in the first place, that no creditor can obtain any part of the proceeds of the sale of real estate of a living defendant, unless he has a judgment; or, of leviable chattels, unless he has an execution. In the next place, it is to be observed that, where a conveyance by the debtor is attacked as fraudulent and void as against a judgment creditor, an Since priority among different creditors' bills is gained by the creditor who first files his bill and serves process, it is said to be immaterial in what order the judgments which are the foundations of the different suits were recovered. The priority is not defeated by the death of the debtor before judgment in the creditor's suit. 141

A few courts, however, making an application of the maxim, "Equality is equity," hold that all creditors should be let in, upon reasonable and appropriate applications, even where the bill is filed on behalf of one creditor alone, and allowed to participate in the proceeds of property fraudulently conveyed. 142

adjudication that the conveyance is void as to the complainant judgment creditor is not necessarily an adjudication that it is void as to all other judgment creditors, since it may be void as to one, and not as to another," etc.: Pitney, V. C., in Iauch v. De Socarras, 56 N. J. Eq. 527, 39 Atl. 381.

140 Union Nat. Bank v. Lane, 177 Ill. 171, 69 Am. St. Rep. 216, 52 N. E. 361, affirming Lane v. Union Nat. Bank, 75 Ill. App. 299; Dey v. Allen, 77 N. J. Eq. 522, 78 Atl. 674; Corning v. White, 2 Paige, 567, 22 Am. Dec. 659; Bridgman v. McKissick, 15 Iowa, 260. But see Haleys v. Williams, 1 Leigh, 140, 19 Am. Dec. 743. As to priorities between judgment creditors and a simple contract creditor filing his bill, under statute, to set aside fraudulent conveyance, see Geiser Mfg. Co. v. Chewning, 52 W. Va. 523, 44 S. E. 193; Foley v. Ruley, 50 W. Va. 158, 55 L. R. A. 916, 40 S. E. 382; Gilbert v. Peppers, 65 W. Va. 355, 36 L. R. A. (N. S.) 1181, 64 S. E. 361.

141 Brown v. Nichols, 42 N. Y. 26; First National Bank v. Shuler, 153 N. Y. 163, 60 Am. St. Rep. 601, 47 N. E. 262; King v. Goodwin, 130 Ill. 102, 17 Am. St. Rep. 277, 22 N. E. 533.

142 Doherty v. Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907, and cases cited; City of St. Louis v. O'Neill Lumber Co., 114 Mo. 74, 21 S. W. 484; Craig v. Hoge, 95 Va. 275, 28 S. E. 317; Hunt v. Field, 9 N. J. Eq. 36, 57 Am. Dec. 365. This lack of uniformity in the decisions on this important question is thus accounted for in an opinion from which we have already quoted, and shall quote again: "An examination of the cases seems to me to show that some confusion has arisen in the minds of the profession from the circumstance that a rule different from what I have just stated pre-

§ 2317. (§ 894.) Except in Certain Suits, Where a Trust or Quasi-Trust Exists for All Creditors. 143—It is not to be understood, however, that it is possible, in every variety of creditors' suits, for the plaintiff to prosecute the suit for his exclusive benefit. The subject is well elucidated in a recent opinion delivered in the court of chancery of New Jersey, by Pitney, V. C.:144 "That class of creditors' bills in which the suit can properly be said to be necessarily brought for the benefit of other creditors besides the complainant are those which seek to reach, establish, and administer assets in the hands of a trustee, who holds them either voluntarily, or by force of circumstances, involuntarily, for the benefit of all the creditors. They may be classed as follows: First. Suits to administer the estate of a decedent, held by an executor or administrator, and apply the same to the payment of his debts. 145 Where a living debtor voluntarily assigns property to a

vailed for many years, and possibly still prevails, in England. There, by a long line of decisions, it was held, for many years, at least, that where a settlement of real estate was made, which was fraudulent under Stats. 13 Eliz., as to a then existing creditor, and was set aside, at the suit of that or any other creditor, as fraudulent on that account, the whole proceeds of the sale of such property became at once assets to be divided among all the creditors, both prior and subsequent, and whether judgment creditors or creditors at large, and whether there was any actual fraud or not. The fund once seized by the court, and turned into money, was treated precisely like that of the estate of a decedent or of an insolvent, and distributed among the creditors": Per Pitney, V. C., in Iauch v. De Socarras, 56 N. J. Eq. 524, 39 Atl. 381.

- 143 This paragraph is cited in Sprinkel v. McCord (Tex. Civ. App.), 129 S. W. 379.
  - 144 Iauch v. De Socarras, 56 N. J. Eq. 524, 39 Atl. 381.
- 145 For administration suits, see Pom. Eq. Jur., § 1154. The vice-chancellor mentions, as examples of such suits, Hazen v. Durling, 2 N. J. Eq. 133, 137, 138; Romaine v. Hendrickson's Ex'rs, 24 N. J. Eq. 231; Coddington v. Bispham, 36 N. J. Eq. 574.

trustee for the benefit of his creditors, and a creditor seeks to have that trust administered. 146 Third. Where there is an assignment by operation of law for the equal benefit of creditors, such as occurred in all instances of attachments against foreign or absconding debtors under our statute, until the recent change in that respect. 147 Fourth. Cases where a creditor of a corporation seeks to reach unpaid subscriptions of stock. 148 . . . Fifth. A creditor's bill under our chancery act (sections 88-94), in which equitable assets are reached by a receiver, and are all subject to the debts of the defendant, but not distributed pari passu, and the complainant is first paid. 149 . . . In all these cases the property reached becomes assets in the hands of the court, to be distributed among the creditors, either equally, or with certain priorities." To the classes thus enumerated should be added other exceptional cases where the creditor is allowed to pursue his remedy in equity without having first reduced his claim to judgment. "The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust his debtor on the faith of such lien, it would be unjust to give him a preference over other creditors, and thus defeat a pro rata distribution,

<sup>146</sup> The text is cited to this effect in McCord v. Nabours, 101 Tex. 494, 109 S. W. 913, 111 S. W. 144. As to assignments for benefit of creditors, see 3 Pom. Eq. Jur., §§ 993, 994.

<sup>147</sup> See Hunt v. Field, 9 N. J. Eq. 36, 57 Am. Dec. 365; Williams v. Michenor, 11 N. J. Eq. 520. Here may be classed the actions, common in some states, to have the debtor's fraudulent conveyance declared an assignment for the benefit of all his creditors: See Baker v. Kinnaird, 94 Ky. 5, 21 S. W. 237.

<sup>148 &</sup>quot;As in Wetherbee v. Baker, 35 N. J. Eq. 501. And see Mallory v. Kirkpatrick, 54 N. J. Eq. 50, 33 Atl. 205." See the next chapter following.

<sup>149 &</sup>quot;As to this class of cases, see Whitney v. Robbins, 17 N. J. Eq. 360."

which equity favors, unless prevented by the rules of law."150

Although all creditors may have the right to share in the proceeds of a suit, it is not essential that the plaintiff should allege in his complaint that the proceedings are for the benefit of all the creditors.<sup>151</sup>

§ 2318. (§ 895.) When the Lien of the Creditor's Bill Accrues.—As to property not liable to execution, the plaintiff obtains no lien by the issuing or return of execution. It is the filing of the bill, and service of process after the return of execution, which gives the plaintiff a specific lien. The filing of a creditor's bill and the service of process creates a lien in the nature of an "equitable levy" upon the effects of a judgment debtor,

150 Day v. Washburn, 24 How. 355, 16 L. Ed. 714; Talley v. Curtain, 54 Fed. 43, 8 U. S. App. 347, 4 C. C. A. 177; affirmed, 58 Fed. 4, 7 C. C. A. 1, 8 U. S. App. 424.

151 Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136, a creditor's action to compel subscribers to the capital stock of an insolvent corporation to pay in the unpaid portion of their subscriptions.

152 Beck v. Burdett, 1 Paige, 305, 19 Am. Dec. 436. See, also, Davidson v. Burke, 143 Ill. 139, 36 Am. St. Rep. 367, 32 N. E. 514; Holbrook v. Ford, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324, 39 N. E. 1091 (lien does not begin until service of process); Boorum & P. Co. v. Armstrong (Tenn. Ch. App.), 37 S. W. 1095 (by statute, lien dates from filing of the bill); Bragg v. Gaynor, 85 Wis. 468, 21 L. R. A. 161, 55 N. W. 919; Stix v. Chayton, 55 Ark. 122, 17 S. W. 708; Ware v. Purdy (Iowa), 60 N. W. 526; Newdigate v. Jacobs, 9 Dana, 18; Merchants' Nat. Bank v. McDonald, 63 Neb. 363, 88 N. W. 492, 89 N. W. 770 (lien dates from filing of bill); Hines v. Duncan, 79 Ala. 112, 58 Am. Rep. 580. But in Beith v. Porter, 119 Mich. 365, 75 Am. St. Rep. 402, 78 N. W. 336, it was held "that no lien arises upon the filing of the bill until the court takes possession or control of the property by virtue of its appointment of a receiver or the issuance of an injunction." In general, as to the time of beginning of lis pendens notice, see 2 Pom. Eq. Jur., 4th ed., § 634, notes 1 and (a).

including real property conveyed in fraud of creditors. 153 But in order thus to create a lis pendens, operating as constructive notice, as to any real estate, the bill must be so definite in the description, that anybody reading it can learn thereby what property is intended to be made the subject of litigation; 154 moreover, the fraudulent grantee must be made a party to the bill in order to charge with constructive notice a purchaser from him of the legal title pendente lite. 155 In respect to chattels, subject to be taken on execution, the rule in some states seems to be that unless the action is brought in aid of an execution, the mere commencement of the action creates no lien as against other creditors, and, if

153 Miller v. Sherry, 2 Wall. (69 U. S.) 237, 17 L. Ed. 827, citing Bayard v. Hoffman, 4 Johns. Ch. 450; Beck v. Burdett, 1 Paige, 308, 19 Am. Dec. 436; Storm v. Waddell, 2 Johns. Ch. 494; Corning v. White, 2 Paige, 567, 22 Am. Dec. 659; Edgell v. Haywood, 3 Atk. 352; Tilford v. Burnham, 7 Dana, 110. See, also, Union Nat. Bank v. Lane, 177 Ill. 171, 69 Am. St. Rep. 216, 52 N. E. 361; affirming Lane v. Union Nat. Bank, 75 Ill. App. 299; King v. Goodwin, 130 Ill. 102, 17-Am. St. Rep. 277, 22 N. E. 533; First Nat. Bank v. Gage, 93 Ill. 172; Roberts v. Albany etc. R. R. Co., 25 Barb. 662; Snyder v. Smith, 185 Mass. 58, 69 N. E. 1089; Hillyer v. Le Roy, 179 N. Y. 369, 103 Am. St. Rep. 919, 72 N. E. 237 (accountability of fraudulent transferee for rents and profits dates from the commencement of creditor's suit, not from the time of the fraudulent transfer). See, further, Stevenson v. Bird, 168 Ala. 422, 53 South. 93; Bradley v. United Wireless Telegraph Co., 79 N. J. Eq. 458, 81 Atl. 1107; Sitley & Son v. Morris, 73 N. J. Eq. 197, 67 Atl. 789. Compare Rioux v. Cronin, 222 Mass. 131, 109 N. E. 898 (filing of bill by creditor without judgment creates no lien under Massachusetts statute).

154 Miller v. Sherry, 2 Wall (69 U. S.) 237, 17 L. Ed. 827. In Tennessee it is held that in order to create the lien provided for by statute, a bill to reach the creditors' book accounts, choses in action, etc., is insufficient if it describes the property merely in general terms: Boorum & P. Co. v. Armstrong (Tenn. Ch. App.), 37 S. W. 1095. In general, see 2 Pom. Eq. Jur., 4th ed., § 634, notes 7 and (h).

155 Miller v. Sherry, 2 Wall. (69 U. S.) 237, 17 L. Ed. 827.

any lien whatever exists, it is so incomplete and imperfect that it is subject to be overreached by a subsequent levy in favor of other creditors, made before the appointment of a receiver. It is the appointment of the receiver in such a case which makes the lien effective and gives the plaintiff priority. Of course the lien acquired by a creditor's bill cannot displace a legal lien acquired before the bill is brought. 157

156 First National Bank v. Shuler, 153 N. Y. 163, 60 Am. St. Rep. 601, 47 N. E. 262, citing Lansing v. Easton, 7 Paige, 364; Becker v. Torrance, 31 N. Y. 631; Van Alstyne v. Cook, 25 N. Y. 489; Davenport v. Kelly, 42 N. Y. 193; Storm v. Waddell, 2 Sand. Ch. 494. In Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461, the court said: "The lien obtained by the commencement of an action in the nature of a creditors' bill creates a lien upon the choses in action and equitable assets of the debtor, but not upon his tangible personal property. If the latter is levied upon by execution or attachment prior to the appointment of a receiver, at which time the property first passes in custodia legis, it passes to the receiver subject to the lien of the levy; Davenport v. Kelly, 42 N. Y. 193; Knower v. Central Nat. Bank, 124 N. Y. 552, 21 Am. St. Rep. 700, 27 N. E. 247."

157 Thus, a creditor's bill to set aside a fraudulent conveyance does not affect the rights of a creditor who has garnished the property prior to the filing of the bill: Citizens' Bank of Wichita v. Farwell, 63 Fed. 117, 11 C. C. A. 108, 27 U. S. App. 268. See, also, Bradford v. Cooledge, 103 Ga. 753, 30 S. E. 579.

## CHAPTER XLVI.

### CREDITORS' BILLS AGAINST STOCKHOLDERS.

### ANALYSIS.

- § 896. The "trust-fund" theory.
- § 897. Objections to the theory.
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- § 2319. (§ 896.) The "Trust-fund" Theory.—At law the relation of creditors to the corporation is the ordinary relation of debtor and creditor, and in the absence of statute there is no relation between creditors and stockholders.¹ But in equity, in many cases, judgment

The author is indebted for the greater part of this chapter to Professor O. K. McMurray, of the Department of Jurisprudence, University of California.

<sup>1</sup> Catlin v. Eagle Bank, 6 Conn. 233; Pond v. Framingham etc. R. R. Co., 130 Mass. 194.

creditors are allowed to maintain bills against stock-holders in private corporations.

The so-called "trust fund" theory attempts to explain the jurisdiction of equity to enforce the liability of stockholders to the extent of the par value of their stock through a trust imposed on the capital stock of the corporation in favor of its creditors. In the words of Justice Story, the inventor of the doctrine, the capital stock is a "pledge or trust fund for the payment of the debts created by the" corporation. This view, propounded in 1824, seems to have been little questioned, until the first edition of the work of which the present treatise is a supplement. Subsequent criticisms of the doctrine by the supreme court of the United States and by other courts quote with approval the language of this section. And the best considered of the recent cases represent a complete recession from the earlier view.

- 2 Wood v. Dummer, 3 Mason, 308, 311, Fed. Cas. No. 17,944.
- 3 3 Pom. Eq. Jur., § 1046; see, also, note (d), in 4th edition.
- 4 Hollins v. Brierfield Coal etc. Co., 150 U. S. 371, 37 L. Ed. 1113, 14 Sup. Ct. 127; McDonald v. Williams, 174 U. S. 397, 43 L. Ed. 1022, 19 Sup. Ct. 743, where the court refused to entertain bill brought to recover dividends paid out of capital.
- 5 O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 54 Am. St. Rep. 31, 28 L. R. A. 707, 17 South. 525; cf. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.
- 6 See the following discussions of the trust-fund theory: 3 Clark & Marshall, Corporations, sec. 768; The Trust-fund Theory and Some Substitutes for It (E. S. Hunt), 12 Yale L. J. 63 (1902); The Trust-fund Theory (by E. A. Harriman), 3 Northwestern Law R. 115, 206; Recent Development of Corporation Law (Geo. Wharton Pepper), 34 Am. Law Reg., N. S., 448; Is Unpaid Capital a Trust Fund in any Proper Sense? (R. C. McMurtrie), 25 Am. Law Rev. 749; The Law of the United States Supreme Court as to Capital Stock not Fully Paid (Thomas Thacher), 25 Am. Law Rev. 940, criticising the doctrine. In defense, besides the standard works of Morawetz, Taylor and Thompson on Corporations, see Articles by Seymour D. Thompson in 27 Am. Law Rev. 846 and in 36 Am. Law Rev. 840; also an article entitled "The Equitable Liability of Stock-

(§ 897.) Objections to the Theory.—Aside from the fact that it is impossible to grasp the idea of a trust neither expressly declared, nor raised by the law either as a constructive or resulting trust, it will be found that the theory will not square with the decided cases, nor with the demands of commerce and corporate Thus, if the theory were strictly maintained, any creditor of a corporation could maintain a bill to recover assets constituting portions of the capital stock which have been divided among the stockholders or otherwise diverted, but no case has gone to the length of holding that anyone other than a judgment creditor whose legal remedies have been exhausted, or who is prevented by some reason from exhausting his remedies at law, may maintain the bill.7 And the mere fact of insolvency on the part of the corporation (the right to pursue legal remedies remaining) will not obviate the necessity of exhausting those remedies.8 This view alone, established by the universal trend of authority, shows that the plaintiff maintains his bill in such cases not upon the ground that he has an equitable right to enforce, but rather on account of the inadequacy of the legal remedy. Other instances where the trust-fund theory fails when brought to bear on the decided cases, may readily be found. For example, the prevailing view is that creditors who become such with notice that the

holders; the Grounds upon Which It Rests" (George B. Barrows), 13 Yale L. J. 66 (1903). See, also, notes in 9 Harv. Law Rev. 481 and 16 Harv. Law Rev. 382 (1903), criticising the doctrine.

<sup>7</sup> Hollins v. Brierfield Coal & I. Co., 150 U. S. 371, 37 L. Ed. 1113, 14 Sup. Ct. 127; 3 Clark & Marshall, Corporations, § 775.

<sup>8</sup> Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365; Case v. Beauregard, 101 U. S. 690, 25 L. Ed. 1004; National Tube Works v. Ballou, 146 U. S. 517, 36 L. Ed. 1070, 13 Sup. Ct. 165; Terry v. Tubman, 92 U. S. 156, 23 L. Ed. 537; Albany & Rensellaer I. & S. Co. v. Southern Agricultural Works, 76 Ga. 135, 2 Am. St. Rep. 26; 3 Clark & Marshall, Corporations, § 775c, p. 2352.

stock has been "watered," cannot complain as to the over-valuation.9 But if there were a trust in any proper sense, the creditor's knowledge would be immaterial; if a trust existed in his favor he could enforce it in the absence of laches, or bad faith, or some other defense. If the trust-fund theory be adopted other inconvenient results follow: For example, if a corporation does not hold its property upon the same title by which a natural person holds his property, it would result that it could not dispose of its property absolutely except to a bona fide purchaser for value and without notice. Persons, therefore, who had bought goods from a trading company would be liable to have the goods taken from them, if before payment of the price they learned that creditors had claims. And a corporation could not, under any circumstances, prefer a creditor in good faith or give him security, say, for an antecedent indebtedness. Yet some courts which profess to hold to the trust-fund theory allow the same right to corporations to make preferences, that natural persons have. 10 Upon con-

<sup>9</sup> Hospes v. Northwestern Mfg. etc. Co., 48 Minn. 174, 31 Am. St. Rep. 637, 15 L. R. A. 470, 50 N. W. 1117; Gogebic Ins. Co. v. Iron Chief Mfg. Co., 78 Wis. 427, 23 Am. St. Rep 417, 47 N. W. 726 (knowledge by creditor that stock has been watered is a defense); Graham v. La Crosse etc. R. R. Co., 102 U. S. 148, 26 L. Ed. 106; Coit v. North Carolina Amalgamating Co., 119 U. S. 347, 30 L. Ed. 420, 7 Sup. Ct. 231; Handley v. Stutz, 139 U. S. 435, 34 L. Ed. 706, 11 Sup. Ct. 530; First Nat. Bank of Deadwood v. Gustin etc. Min. Co., 42 Minn. 327, 18 Am. St. Rep. 510, 6 L. R. A. 676, 44 N. W. 198; 2 Morawetz, Corporations, §§ 827, 829, 832. See, also, Utica Fire Alarm Tel. Co. v. Waggoner Watchman C. Co., 166 Mich. 618, 132 N. W. 502; Johnson v. Tennessee Oil etc. Co., 74 N. J. Eq. 32, 69 Atl. 788.

<sup>10 3</sup> Clark & Marshall, Corporations, § 780a, p. 2366. See the question most elaborately considered in Corey v. Wadsworth, 118 Ala. 488, 44 L. R. A. 766, 25 South. 503; s. c., 99 Ala. 68, 42 Am. St. Rep. 29, 23 L. R. A. 618, 11 South. 350; and in Adams and Westlake Co. v. Deyette, 8 S. D. 137, 59 Am. St. Rep. 746, 31 L. R. A. 497, 65 N. W. 471.

siderations, such as these just enumerated, many courts have been substituting in place of the "trust-fund" theory as a basis for equitable jurisdiction, the "fraud or misrepresentation theory."

§ 2321. (§ 898.) The Fraud or Misrepresentation Theory.—While this theory received more or less support from the earlier cases—it is even suggested in the case of Wood v. Dummer, but the court was struggling there to support a bill stating acts constituting fraud, yet not charging fraud—the opinion which gave definite shape to the theory is that of Mr. Justice Mitchell in the case of Hospes v. Northwestern Manufacturing Com-

11 Many courts still maintain the trust-fund theory in an extreme form. Thus, in Washington, the courts have consistently carried out the doctrine that capital stock is a trust fund. An attaching creditor of an insolvent corporation, therefore, gets no preference because its assets are a trust fund for the benefit of all the creditors: Compton v. Schwabacher (1904), 15 Wash. 306, 46 Pac. 338. See, contra, 2 Morawetz, Corporations, § 864, though Mr. Morawetz elsewhere lends his important support to the trust-fund doctrine (2 Morawetz, §§ 780 et seq., and § 820). In a leading Nevada case the court held that a creditor need not prove a claim against the estate of a deceased stockholder, though the statutes providing for administration required all claims arising on contract to be filed and presented to the administrator, because this claim arose on a trust: Thompson v. Reno Sav. Bank, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68. The Utah court holds that the trust is an express trust, so that no statute of limitations would run until repudiation and notice to the creditor: Crofoot v. Thatcher, 19 Utah, 212, 75 Am. St. Rep. 725, 57 Pac. 171. See, also, Van Pelt v. Gardiner, 54 Neb. 701, 75 N. W. 874; Kilbreath v. Gaylord, 34 Ohio St. 305. the other hand, the Oregon court repudiates the doctrine of the Utah case, and holds that the statute begins to run against the creditor as soon as it begins to run against the corporation: Hawkins v. Donnerberg (1901), 40 Or. 108, 66 Pac. 691, 908. See, also, the following eases rejecting the trust fund theory: Wyman v. Bowman, 127 Fed. 276, 62 C. C. A. 189; Killen v. Barnes, 106 Wis. 546, 82 N. W. 536; Cameron v. Groveland Imp. Co., 72 Am. St. Rep. 52, note; Merced Bank v. Ivett, 127 Cal. 136, 59 Pac. 393.

pany.12 According to this view, the stockholder who pays less than par value for his stock which is issued to him as fully paid, or who pays for his stock in overvalued property, perpetrates a fraud upon those who subsequently deal with the corporation. While this suggestion avoids many of the difficulties raised by the older theory, it raises others. As, for example, why, if in fact the shareholder makes a misrepresentation which causes damage to the creditor, should not an action at law lie as well as a bill in equity? But no such action has ever been successfully maintained. Again, suppose that the creditor's claim arises not from any representation,suppose, for example, that the demand was originally for personal injuries sustained by the plaintiff by reason of the corporation's negligence,—it is plain that the theory breaks down. 13 And it is also apparent that this view will not explain the right of a judgment creditor to call in unpaid subscriptions—professedly, it applies only in cases where arrangements have been made between the corporation and the stockholders relieving the stockholders from the ordinary effects of a contract of subscription. Again, why is the transferee of stock ever liable on this theory—especially, a transferee who takes the stock after the plaintiff became a creditor? And lastly, in the matter of parties, why, under the "fraud" theory is it necessary to make the corporation a defendant to the bill? Yet it is perfectly settled that the cor-

<sup>12</sup> Hospes v. Northwestern Mfg. Co., 48 Minn. 174, 31 Am. St. Rep. 637, 15 L. R. A. 470, 50 N. W. 1117. See, also, Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

<sup>13</sup> Kelly v. Clark, 21 Mont. 291, 69 Am. St. Rep. 668, 42 L. R. A. 621, 53 Pac. 959; Cole v. Millerton I. Co., 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847; National etc. Co. v. Storey etc. Co., 111 Cal. 531, 539, 44 Pac. 157; 2 Morawetz, Corporations, § 828.

poration is a necessary party to the bill, and that the equitable remedy is enforced through the corporation.<sup>14</sup>

§ 2322. (§ 899.) Suggested Modification of the Fraud Theory.—The last objection might, it is true, be avoided by treating the representations as having been made by the corporation for its stockholders. In this view, the liability is contractual, so that as was held in Curran v. Arkansas, 15 the repeal of the liability of the stockholders would be a law impairing the obligation of the contract between the creditor and the corporation. If the liability of the stockholder rested wholly in tort, this result could not follow. But it must be confessed that, even with this modification, the representation theory is not wholly consistent with the decisions in the particulars pointed out in the last section.

(§ 900.) A Theory of Liability Based on Analogy to Partnership.—A theory to support the liability of stockholders in equity has been propounded by some authorities as follows: At common law, the liability of incorporators is that of partners. The charter enables them by statute to escape this liability by paying for the stock of the company in money or money's "Entire immunity from individual liability is worth. not invariably incidental to the grant of a charter or articles of corporate existence. If the legal conditions are complied with by the organizers of the corporation, the immunity follows as a matter of law; but if they are not, an individual liability of the shareholders arises, imposed by the same power which granted the right of cor-

<sup>14</sup> Wetherbee v. Baker, 35 N. J. Eq. 501; Potter v. Dear, 95 Cal. 578, 30 Pac. 777; Welch v. Sargent, 127 Cal. 72, 82, 59 Pac. 319; Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70.

<sup>15 15</sup> How. 304, 14 L. Ed. 705.

porate existence and whereby creditors may make their claims good."<sup>16</sup> The difficulty with this view is that it establishes too much. It might be questioned whether there is any common-law liability imposed on corporators. Aside from this, however, the doctrine leads to the inevitable conclusion that the liability should be enforced at law, not in equity. The stockholder, on this view, would plead in confession and avoidance the due payment of his subscription, amounting to a discharge of his liability.

§ 2324. (§ 901.) Public Policy Theory.—It has been said that the liability of stockholders to the creditors of the corporation is based on no consistent theory, but is simply "a more or less systematic judicial recognition of a demand of the commercial world. That demand is, in substance, that the liability of a stockholder shall be unlimited up to the par value of his shares and that he shall not be entitled to the benefit of any legal principle which would normally entitle him to an advantage against corporate creditors. This is not a legal theory. It is a commercial condition struggling for recognition in the courts."17 And Mr. Justice Temple, in a California case, says: "The corporation is supposed to have sought credit based upon its supposed capital. . . . Public policy requires that the fact whether a particular creditor did trust the corporation on that basis should not be inquired into."18 Adopting the same view of the origin of the liability, a recent writer declares that the

<sup>16</sup> Hunt, J., in Kelly v. Clark, 21 Mont. 291, 321, 69 Am. St. Rep. 668, 42 L. R. A. 621, 53 Pac. 959. See, also, note to Van Cleve v. Berkey, 42 L. R. A. 622, by H. P. Farnham, and a note by the editor of the American Law Review (Seymour D. Thompson), 32 Am. Law Rev. 291.

<sup>17</sup> Geo. Wharton Pepper in 34 Am. Law Reg., N. S., 456.

<sup>18</sup> Vermont Marble Co. v. De Clez Granite Co., 135 Cal. 579, 584, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057.

jurisdiction of courts of equity in such suits is based on no principle whatever and should be abandoned.<sup>19</sup>

(§ 902.) Six Distinct Classes of Creditors' Bills Against Stockholders.—The truth seems to be that all of the cases cannot be explained on any single principle, and the reason they cannot be so explained is, it is suggested, because several distinct things have usually been treated under one title. In fact, there would seem to be several distinct classes of cases where stockholders are held liable in equity at the suit of creditors, governable by different principles. The cases may be classified thus: (1) The stockholder may have subscribed for stock to be paid for in money, and, by the terms of his subscription, no call has to be made to render him liable, or the call has already been made. (2) Under the same contract of subscription, a call has to be made before the stockholder will be liable to pay. (3) The corporation has agreed that the stock issued to the stockholder for money, at less than par, shall be considered as fully paid. (4) The corporation has issued its stock as fully paid for property conveyed to it in lieu of money. (a) such property being grossly over-valued by the corporation, 20 or (b) being materially over-valued, but the corporation acting in good faith and in the exercise of its best judgment, or (c) the property being materially over-valued, and the corporation not acting in good faith, or (d) the difference between the valuation assigned and the true value being immaterial. This class of cases sometimes involves statutory and constitutional

<sup>19</sup> E. S. Hunt in 12 Yale L. J. 74. See, also, Christensen v. Eno, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; Van Cott v. Van Brunt, 82 N. Y. 535.

<sup>20</sup> The cases regard the bad faith of the directors, rather than that of the stockholder, indicating that the "misrepresentation" theory should be modified as stated in the text.

provisions against "watered" stock, giving rise to further distinctions. (5) A fifth class of cases, often treated under the "trust-fund" doctrine, to the obscuration of the subject, is that where the corporation has conveyed the assets representing its capital to stockholders or others in fraud of creditors. (6) Lastly, in certain cases, the corporation having been dissolved, the directors or trustees in liquidation have had the duties of trustees imposed on them by statute. The case of Wood v. Dummer on which the trust-fund doctrine was based was really a case of this kind.

§ 2326. (§ 903.) Cases of the First Class—Money Subscription; No Call Required.—In the first class of cases, under modern systems of procedure, the debt from the stockholder to the corporation, being a legal debt, is garnishable.21 But though statutes have adopted equitable remedies in ordinary legal proceedings, it is usually held that the jurisdiction of equity is not, by reason of such extension of equitable doctrines and practice to actions at law, abridged or destroyed. Generally, it is held that where statutes permit garnishments in actions at law, the remedy by judgment creditor's bill is unaffected.<sup>22</sup> At least one court, however, adopts the view that, in cases of this class, garnishment is the sole remedy.<sup>23</sup> In those states which allow a judgment creditor's bill to be maintained for the purpose of reaching choses in action of the debtor, the bills of the first class are plainly based upon the ground that the debt is a chose in action which, from its nature, was not the sub-

<sup>21 3</sup> Clark & Marshall, Corporations, sec. 798b; 2 Michigan L. Rev. 271.

 <sup>22</sup> Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac.
 674, 30 Pac. 776; Harmon v. Page, 62 Cal. 448.

<sup>23 3</sup> Clark & Marshall, Corporations, § 798, e (2); Henderson v. Hall, 134 Ala. 455, 32 South. 840; Enslen v. Nathan, 136 Ala. 412, 34 South. 929.

ject of execution at common law. In other words, the jurisdiction, in this class of cases, is based on the inadequacy of legal remedies.<sup>24</sup>

(§ 904.) Cases of the Second Class-Money Subscription; Call Necessary.—Where the formality of a call is necessary to create a legal obligation on the stockholder, the court of equity will entertain the bill upon the ground that the debt of the stockholder is an equitable asset of the corporation,—that the directors have omitted to perform a formality which they should have performed, and equity, regarding that as done which should have been done, will treat the call as having been made, and proceed as in the first class of cases; or (though there would seem to be theoretical difficulties in the practice), will order a call to be made by its receiver, and the fund to be collected by him in actions at The proceeding by a judgment creditor to collect unpaid subscriptions has been called an "equitable garnishment."26

# § 2328. (§ 905.) Cases of the Third Class—Money Subscriptions; Underpaid Stock Issued as Fully Paid.—

24 The doctrine of Hadden v. Spader, 20 Johns. 554, has not been adopted in all the American states, e. g., in Alabama (O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 54 Am. St. Rep. 31, 28 L. R. A. 707, 17 South. 525). See ante, § 877. In these states, therefore, no such bill should be entertained.

25 The court, in the Glenn cases and in the Upton cases, made a call and authorized its receiver to begin actions at law based on these calls. (See the Glenn cases enumerated in argument of Hawkins v. Glenn, 131 U. S. 319, 33 L. Ed. 184, 9 Sup. Ct. 739, and the Upton cases in 3 Clark & Marshall, Corporations, p. 2469.) See, also, Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70; Knight & Wall Co. v. Tampa Sand Lime Brick Co., 55 Fla. 728, 46 South. 285; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618.

26 Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885.

In this class of cases we approach a new principle. The stockholder has paid less than par for the stock, but the corporation has agreed that the stock shall be considered as fully paid. The release is binding as between the corporation and the stockholder.<sup>27</sup> And the creditor also is bound by the agreement until it is set aside. However, he may have it set aside as in effect a fraud upon him.<sup>28</sup>

§ 2329. (§ 906.) Cases of the Fourth Class—Subscription Paid in Over-valued Property.—(a) Where the property for which stock has been issued is taken by the corporation at a gross over-valuation, or where the stock is issued as a "bonus" without any consideration, the case is like the third class of cases just mentioned. The fraud may be inferred as a matter of law, and hence need not be alleged.<sup>29</sup> The relief is somewhat peculiar, for equity does not demand the restoration of the property conveyed, but charges the stockholder with the difference between the value of the property conveyed and the par value of the stock. (b) and (c) In these cases, the bill should not only show the material over-valuation, but should affirmatively charge fraud.<sup>30</sup> The inference

<sup>27</sup> Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Helliwell on Stock and Stockholders, § 419, p. 802 (1903).

Bickley v. Schlag, 46 N. J. Eq. 533, 20 Atl. 250; Bruner v. Brown, 139 Ind. 600, 38 N. E. 318; Vaughn v. Alabama Nat. Bank, 143 Ala. 572, 5 Ann. Cas. 665, 42 South. 64.

<sup>29</sup> Hastings Malting Co. v. Iron Range Brewing etc. Co., 65 Minn. 28, 67 N. W. 652; Coleman v. Howe, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; Lester v. Bemis Lumber Co., 71 Ark. 379, 74 S. W. 518. See, further, on the subject of this paragraph, Johnson v. Tennessee Oil etc. Co., 74 N. J. Eq. 32, 69 Atl. 788, and review of cases; Bellview Cemetery Co. v. Faulks (Ala.), 73 South. 927; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618.

<sup>30</sup> Bank v. Alden, 129 U. S. 372, 32 L. Ed. 725, 9 Sup. Ct. 332; Turner v. Bailey, 12 Wash. 634, 42 Pac. 115; Bickley v Schlag, 46 N. J. Eq. 533, 20 Atl. 250; Bruner v. Brown, 139 Ind. 600, 38 N. E.

of fraud that might arise from the proofs that the property was over-valued, would, in any event, be rebuttable by proof that the officers of the corporation acted in good faith and in the exercise of their best judgment, though it must be admitted that there are cases which disregard these elements. In determining the question whether or not the officers of the corporation did act in good faith, the character of the property is, of course, an important element. If the stock was issued to a stockholder in return for an untried patent or an undeveloped mining location, for example, the directors would have greater discretion in the matter of fixing values than if the stock were issued in return for the conveyance to the corporation of improved real estate or of an established business.31 (d) If the difference in value is inconsiderable, equity will not interfere with the arrangement into which the corporation and the stockholder have entered.

Authority may be found denying relief under this fourth class (which is the most frequent in practice),

318; Northwestern Mutual Life Ins. Co. v. Cotton Exchange R. E. Co., 70 Fed. 155; Taylor v. Walker, 117 Fed. 737, and note to said case in 17 Am. & Eng. Corp. Cas. 326. But see Kelly v. Clark, 21 Mont. 291, 69 Am. St. Rep. 668, 42 L. R. A. 621, 53 Pac. 959; Vermont Marble Co. v. Dealey Granite Co., 135 Cal. 574, 87 Am. St. Rep. 143, 67 Pac. 1057; Easton Nat. Bank v. American Brick & Tile Co., 69 N. J. Eq. 326, 60 Atl. 54. The presumption, of course, in the absence of evidence or allegation is that the value was adequate: American Tube & Iron Co. v. Hayes, 165 Pa. St. 489, 30 Atl. 936; Davis v. Montgomery Furnace etc. Co., 101 Ala. 127, 8 South. 496. See, also, Taylor v. Cummings, 127 Fed. 108, 62 C. C. A. 108; Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189; Merrill v. Prescott, 67 Kan. 767, 74 Pac. 259; Flour City Nat. Bank v. Shire, 179 N. Y. 587, 72 N. E. 1141; Cunningham v. Halley etc. Co., 121 Fed. 720, 58 C. C. A. 140; Macbeth v. Banfield, 45 Or. 553, 106 Am. St. Rep. 670, 78 Pac. 693. See, also, Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538.

31 Frost on Incorporation, pp. 122-130, §§ 105, 106. But see Van Cleve v. Berkey, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; cf., Iron Co. v. Hayes, 165 Pa. St. 489, 30 Atl. 936.

proceeding upon the ground that the stock is not property until issued and has no value, and therefore, in the absence of statute, it may be given away, without giving cause to the creditors to complain. But this view overlooks a fundamental proposition—namely, that in addition to the charter, a corporation is made up of a series of contracts of subscription.<sup>32</sup> Of course, in all cases, the question is as to the value as it appeared to the directors when the property was taken.<sup>33</sup>

§ 2330. (§ 907.) Cases of the Fifth Class—Conveyance of Corporate Assets in Fraud of Creditors.—This is the ordinary case of fraudulent conveyances of property by a failing debtor, and the bill rests upon the two elements of fraud and inadequacy of legal remedies.<sup>34</sup>

§ 2331. (§ 908.) Cases of the Sixth Class—Corporation Dissolved; Directors Liquidating as Statutory Trustees.—In this class of cases, where proceedings are brought by creditors for the purpose of winding up a corporation, or administering the estate of a dissolved corporation, we approach the case of a real trust. Upon dissolution the corporation ceases to exist—at common law, for all purposes, so that its debts were extinguished. Equity, however, required the trustees in liquidation to pay the claims of creditors before paying those of the stockholders,—the nominal beneficiaries.<sup>35</sup> It will be noted that in the ordinary administration proceeding the jurisdiction of the court depends upon a trust exist-

<sup>32</sup> Christensen v. Eno, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648.

<sup>33</sup> Clark v. Bever, 139 U. S. 96, 35 L. Ed. 88, 11 Sup. Ct. 468; Handley v. Stutz, 139 U. S. 417, 35 L. Ed. 227, 11 Sup. Ct. 530.

<sup>34 3</sup> Clark & Marshall, Corporations, p. 2354, § 777. See Belleview Cemetery Co. v. Faulks (Ala.), 73 South. 927; Garetson Lumber Co. v. Hinson, 69 Or. 605, 140 Pac. 633.

<sup>35 3</sup> Clark & Marshall, Corporations, p. 2393, § 783.

ing in favor of the stockholders, but equity having obtained control of the fund administers it upon equitable principles. Even in this case, therefore, in the absence of statute, there is no trust in favor of creditors—though statutes, at the present day, very often give creditors the right to file bills for a winding up of the affairs of the corporation.<sup>36</sup>

§ 2332. (§ 909.) Questions of Pleading and Practice in Connection With Such Bills.—The allegations of the bill, questions of parties and other matters of practice arising in connection with bills by creditors may be determined by considering under which class the bill should be placed. Though there has been some confusion as to whether all of the stockholders are necessary parties to the bill or whether it is sufficient to proceed against a single stockholder, it would seem plain that only in the last class of cases is it necessary to make all the stockholders parties.<sup>37</sup> Other stockholders may, if the de-

36 Worthen v. Griffith, 59 Ark. 577, 43 Am. St. Rep. 58, 28 S. W. 286 (corporate assets a trust fund only from time that court of equity takes possession); Wilkinson v. Bertock etc. Co., 111 Ga. 187, 36 S. E. 623; Jacobs v. Mexican Sugar Co., 130 Fed. 589. For enforcement of stockholders' liability in these cases, see Wyman v. Wallace, 201 U. S. 230, 50 L. Ed. 738, 26 Sup. Ct. 495; George v. Wallace, 135 Fed. 286, 68 C. C. A. 40; Lewisohn v. Stoddard, 78 Conn. 575, 63 Atl. 621; Knight & Wall Co. v. Tampa Sand Lime Brick Co., 55 Fla. 728, 46 South. 285; Williams's Ex'r v. Chamberlain, 123 Ky. 150, 94 S. W. 29.

37 Brundage v. Monumental G. & S. M. Co., 12 Or. 322, 7 Pac. 314; Lumpkin, P. J., in Wilkinson v. Bertock etc. Co., 111 Ga. 187, 195, 36 S. E. 623; Singer v. Hutchinson, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388 (the creditor dismissed the bill as to certain stockholders and proceeded only as to remainder); Cooper v. Adel Security Co., 127 N. C. 219, 37 S. E. 216; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 29 Pac. 674, 30 Pac. 776; 2 Morawetz, Corporations, § 863, note 1;

fendant thinks their presence necessary for his protection, be brought in by a cross-bill, but it is not indispensable that such cross-bill be filed. should be filed for the benefit of all creditors who desire to become parties; but even though not expressly filed for the benefit of such other creditors, any creditor may nevertheless establish his claim in the suit.38 action is brought to set aside fraudulent conveyances made to the stockholders, only those participating in the fraud or benefiting thereby should be joined. As the equitable remedy is enforced through the corporation, it is, of course, necessary, where the case is under any of the first five classes, to make the corporation a defendant.39 The plaintiff should allege a judgment and the return of execution unsatisfied in all cases where it is possible to pursue such remedies<sup>40</sup>—in those cases which are equitable garnishments, for the sole purpose of showing the exhaustion of legal remedies, in the cases

Crawford v. Rohrer, 59 Md. 599; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885. See, also, in support of the text, Williams's Ex'r v. Chamberlain, 123 Ky. 150, 94 S. W. 29.

38 Turnbull v. Prentiss Lumber Co., 8 Am. & Eng. Corp. Cas. 257 (Mich. 1884); Braun's Appeal, 105 Pa. St. 414, 3 Am. & Eng. Corp. Cas. 1. See, also, George W. Signor Tie Co. v. Monett & S. W. Construction Co., 198 Fed. 412 (bill will not lie in behalf of single creditor); City of Montesano v. Carr, 80 Wash. 384, 141 Pac. 894. But only judgment creditors can join as parties: Baines v. West Coast L. Co., 104 Cal. 1, 37 Pac. 767; cf. Handley v. Stutz, 137 U. S. 706, 34 L. Ed. 706, 11 Sup. Ct. 117. See, also, Dickinson v. Traphagan, 147 Ala. 442, 41 South. 272; but see Lehr v. Murphy, 136 Wis. 92, 116 N. W. 893.

39 Wetherbee v. Baker, 35 N. J. Eq. 501; Potter v. Dear, 95 Cal. 578, 30 Pac. 777; Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70.

40 Case v. Beauregard, 101 U. S. 690, 25 L. Ed. 1004. See, also, Merchants' Mut. Adjusting Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091, citing Pom. Eq. Jur., § 1415; McKee v. City Garbage Co., 140 Mich. 497, 103 N. W. 906.

based on fraud, to show the damage as well as the inadequacy of the legal relief. A judgment rendered in a sister state is not a sufficient exhaustion of legal remedies, upon which to base a bill in equity, though in the Glenn cases, before referred to, the decree of the court of equity in Virginia making the call was held sufficient to warrant the receiver in bringing actions at law in other jurisdictions.41 The judgment against the corporation is conclusive against the stockholder, and the merits of the creditor's original claim cannot be relitigated.42 If the bill shows that the creditor had notice of the fraudulent arrangements between the stockholders and the corporation, as stated under the discussion of cases of the fourth class supra, it is demurrable; but on principle, it would seem that, in cases under the first and second classes the question of notice should be immaterial, and no cases have been noted where knowledge or notice has affected the creditor's right to file a bill to collect unpaid subscriptions. If, for example, the court of equity orders a call, the fund produced as a result thereof should inure equally to the benefit of all creditors; and so of property which has been fraudulently conveyed and is recovered,-it should inure to the benefit of future as well as existing creditors. 43 So as re-

<sup>41</sup> National Tube Works v. Ballou, 146 U. S. 517, 36 L. Ed. 1070, 13 Sup. Ct. 165; Rule v. Omega Stove etc. Co., 64 Minn. 326, 67 N. W. 60; Barber v. International Co. of Mexico, 73 Conn. 587, 48 Atl. 758; Glenn v. Williams, 60 Md. 93. See, also, Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220, and the other Upton cases cited, 3 Clark & Marshall, Corporations, p. 2469.

<sup>42</sup> Marsh v. Burroughs, 1 Wood, 463, Fed. Cas. No. 9112; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776 (stockholder cannot show that debt was *ultra vires*); Thompson v. Reno Bank of Savings, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68; Wetherbee v. Baker, 35 N. J. Eq. 501, 507; Singer v. Hutchinson, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388.

<sup>43 2</sup> Morawetz, Corporations, §§ 827, 832.

gards the stockholders who are to be made parties defendant in such bills. If the stock is unpaid and is not represented to be paid up, any transferee of the stock is liable, and, if the original stockholder has transferred the stock while the corporation is solvent and without any intent to escape liability, he is released from liability. But where the equitable jurisdiction is based on fraud, it is apparent that the participants in the fraud cannot be released by any transfer of their stock, and on the other hand, that the transferee will not be liable if he be a bona fide purchaser of the stock for value and without notice.<sup>44</sup> In truth, there is a theoretical difficulty in holding any transferee of the stock on the ground of fraud.<sup>45</sup>

Of course, when the court, under whatever head of equity, acquires jurisdiction of the parties and of the subject-matter, it will apply equitable principles to the administration of the fund that comes under its control. Accordingly, it will not permit a stockholder to plead, as a set-off against the creditor's claim, a debt owing by the corporation to the stockholder. But it is not neces-

<sup>44 2</sup> Clark & Marshall, Corporations, p. 1266, § 401; 2 Morawetz, Corporations, § 858; Garden City Sand Co. v. Am. Refuse Crematory Co., 205 Ill. 42, 68 N. E. 724; People's Home Savings Bank v. Rickard, 139 Cal. 285, 73 Pac. 858; Allen v. Grant, 122 Ga. 552, 50 S. E. 494; Easton National Bank v. American B. & T. Co., 69 N. J. Eq. 326, 60 Atl. 54. See, also, Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S. E. 751. Liability is not avoided because the stock has always stood in the name of a mere "dummy": American Alkali Co. v. Kurtz (1905), 134 Fed. 663.

<sup>45 16</sup> Harv. Law Rev. 382 (1903).

<sup>46</sup> Colorado T. & I. Co. v. Sedalia Smelting Co., 13 Colo. App. 474, 59 Pac. 222; Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Gilchrist v. Helena etc. Co., 49 Fed. 519; Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015; Boulton Carbon Co. v. Mills, 78 Iowa, 460, 5 L. R. A. 649, 43 N. W. 290; 3 Clark & Marshall, Corporations, § 801; 2 Morawetz, Corporations, § 862; Worthen v. Griffith, 59 Ark. 562, 43 Am. St. Rep. 50, 28 S. W. 286. Compare Austin Powder Co. v. Commercial Lead Co., 134 Mo. App. 183, 114 S. W. 67.

sary to invoke the trust-fund theory to support this doctrine, which is simply the application of the principles of chancery practice to a matter already in the court's jurisdiction.

The plea of the statute of limitations will also be governed by the nature of the bill. If the assets were legal,—an unpaid subscription, after a call was made, the creditor should be barred when the corporation is barred. Where a call is necessary, no statute should run until the call is made (or what is the same thing, until equity disregards the formality of the call and makes the proper order). In cases of fraudulent conveyances the statute should run against the creditor from the time he has notice; in cases of arrangements whereby the stockholder has been released by the corporation, binding the corporation though voidable at the instance of creditors, the right of action would seem not to arise until the creditor exhausts his legal remedies.<sup>47</sup> The decree in all cases will be framed on equitable principles; the court may or may not require the whole balance to be paid, according as it is necessary or not; and all creditors who choose to come in and prove their debts must be protected by the decree.48

§ 2333. (§ 910.) Statutory Liability of Stockholders in Equity.—Statutes imposing an individual liability upon shareholders in a corporation are usually held, on familiar principles, not to oust the equitable jurisdiction, unless the statutes expressly require such interpretation.<sup>49</sup> Some of these statutes impose a liability en-

<sup>47 3</sup> Clark & Marshall, Corporations, pp. 2473 et seq., § 802; Sco-will v. Thayer, 105 U. S. 143, 26 L. Ed. 968. See, also, note in 96 Am. St. Rep. 972; Bennett v. Thorne, 36 Wash. 253, 68 L. R. A. 113, 78 Pac. 936.

<sup>48</sup> Morgan v. N. Y. etc. R. R., 10 Paige, 290; Thompson v. Reno Sav. Bank, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

<sup>49</sup> Harmon v. Page, 62 Cal. 448.

forceable in courts of law. But where the statute provides in general terms for a proportionate liability on the part of stockholders for the debts of the corporation, it is usually held that the remedy for enforcement lies with the court of equity.<sup>50</sup> In such cases it is plain that the machinery of a court of law is unsuited to determine the proportion. It is necessary to have the corporation and all the stockholders parties to the suit, in order to ascertain what the amount of the deficiency is and how much has to be contributed by each stockholder. Of course, if the proportionate liability is unlimited by the par value of the stock, no such necessity of a resort to equity exists. The bill in equity to enforce such statutory liability should be framed so as to enable all creditors who desire to do so to come in, and by sharing in the expenses of the suit, to participate in the fund.<sup>51</sup> The chief difference between the equitable liability and the statutory liability in equity is, that in the former the 'shareholder's debt is sought to be collected, in the latter, the corporation's debt for which he is made liable by the 'statute.<sup>52</sup> It therefore happens that the judgment

<sup>50</sup> The text is cited in Rutenbeck v. Hohn, 143 Iowa, 13, 136 Am. St. Rep. 731, 121 N. W. 698. See Pollard v. Bailey, 20 Wall. 520; Terry v. Little, 101 U. S. 216, 25 L. Ed. 864; Patterson v. Lynde, 106 U. S. 519, 27 L. Ed. 265, 1 Sup. Ct. 432. See, also, Way v. Barney, 116 Minn. 285, Ann. Cas. 1913A, 719, 38 L. R. A. (N. S.) 648, 133 N. W. 801 (if for any reason it is impossible to enforce the liability under the statutory procedure, equity will take jurisdiction); Conway v. Owensboro Savings Bank & Trust Co., 185 Fed. 950 (under Kentucky statutes).

<sup>51 2</sup> Morawetz, § 902; Smith v. Huckabee, 53 Ala. 191 (there can be but one suit). It must be for the benefit of all the creditors, against all of the stockholders: Clark v. Knowles (1904), 187 Mass. 35, 105 Am. St. Rep. 376, 72 N. E. 352; Miller v. Smith, 26 R. I. 146, 106 Am. St. Rep. 699, 66 L. R. A. 473, 58 Atl. 634.

<sup>52</sup> Lumpkin, P. J., in Wilkinson v. Bertock etc. Co., 111 Ga. 187, 195, 36 S. E. 623; Welch v. Sargent, 127 Cal. 72, 82, 59 Pac. 319; Patterson v. Lynde, 106 U. S. 520, 27 L. Ed. 265, 1 Sup. Ct. 432. See,

against the corporation, which is always conclusive against the stockholders in the equitable suit, may not be conclusive on the merits of the claim in the statutory suit.

also, Patterson v. Lynde, 12 Ill. 196; Hickling v. Wilson, 104 Ill. 54; Palmer v. Woods, 149 Ill. 146, 155, 35 N. E. 1122; 2 Columbia L. Rev. 338; 39 Am. Law Reg., N. S., 586.

### CHAPTER XLVII.

## SUITS FOR REIMBURSEMENT; CONTRIBUTION, EXONERATION, AND SUBROGATION.

#### ANALYSIS.

- § 911. In general.
- §§ 912-914. Reimbursement.
  - § 912. Parties entitled thereto.
  - § 913. Conditions of recovery.
  - § 914. Amount of recovery-Incidents of right.
- §§ 915-918. Contribution.
  - § 915. Statement of doctrine-Jurisdiction in equity.
  - § 916. Parties entitled to contribution.
  - § 917. Conditions under which equitable action is maintainable.
  - § 918. Amount of recovery—Incidents of the right.
  - § 919. Exoneration.
- §§ 920-925. Subrogation.
  - § 921. Parties entitled to subrogation.
  - § 921a. First. Party who discharged obligation in performance of a legal duty.
  - § 921b. Second. Party who pays debt in self-protection.
  - § 921c. Third. Party who pays on request or by public invitation.
  - § 921d. Volunteers.
  - § 922. Nature of the right, purely equitable.
  - § 923. Conditions upon which subrogation is allowed—Payment—Other security.
  - § 924. Rights upon which subrogation operates.
  - § 925. Subrogation of creditor or co-surety to securities given to indemnify a surety.
- § 2334. (§ 911.) In General.—Under the early jurisdiction at law, in the absence of express contracts for indemnity or exoneration, it was left to the caprice of the creditor to determine upon which of several parties bound for the same obligation the burden should fall, the loss being left wherever the creditor, by his choice of a

defendant, might put it. This inadequacy of remedy on the part of the victim, and consequent failure of justice, became, however, a ground for the interposition of equity, and the proper readjustment of such burdens was, at an early day, an important field of equitable jurisdiction. The efforts of courts of equity have been directed toward placing the loss, as far as possible, on the parties ultimately liable,—or as between two or more not ultimately liable, on the party whose liability is prior—and, as between parties equally liable, toward distributing the loss equally among them. The former result is reached by an action for reimbursement, and the latter by an action for contribution. Both of these results are assisted by the action for exoneration, and the remedial process of subrogation.<sup>1</sup>

# § 2335. (§ 912.) Reimbursement — Parties Entitled Thereto.<sup>2</sup>—When a party only subsequently liable for an

1 Suits by a surety against the principal debtor are ordinarily grouped together under the head of "exoneration," whether the suit be before or after payment; Pom. Eq. Jur., § 1417. An action by a surety to reimburse himself for money expended, however, often falls very far short of a complete exoneration, using the word in an accurate sense, for the temporary withdrawal of the surety's funds may have wrecked his business and done other damage for which he has no redress: See Powell v. Smith, 8 Johns. 249; Hayden v. Cabot, 17 Mass. 169. Moreover, there is a substantial difference between a suit for reimbursement merely, and a suit brought by the surety before payment, for what is truly exoneration, the latter being exclusively equitable. To avoid confusion, therefore, some different nomenclature seems of advantage, and actions for exoneration strictly, whether by a surety, for exoneration from his principal's debt, or by a co-surety, for exoneration from liability for the share of his co-surety, are treated under a distinct heading.

The author is indebted for the greater part of this chapter to Mr. F. G. Dorety, lately instructor in the Department of Jurisprudence, University of California.

<sup>&</sup>lt;sup>2</sup> This paragraph is cited in Wallace v. Jones, 110 Md. 143, 72 Atl. 769.

obligation, performs any part of it, he is entitled in equity<sup>3</sup> to be reimbursed or indemnified to the amount of his loss, by any other party to the obligation whose liability is prior to his own.<sup>4</sup> This right is given not

- 3 While an action of assumpsit for the purpose is now everywhere entertained, and ordinarily employed, the equitable jurisdiction still remains: Wesley Church v. Moore, 10 Pa. St. 273; Baxter v. Moore, 5 Leigh, 219; Butler v. Butler's Adm'r, 8 W. Va. 677. There is ordinarily no advantage in the equitable action, however, unless in cases involving complication of parties: Mountjoy v. Bank's Ex'rs, 6 Munf. (Va.) 387. See, however, § 919, post.
- 4 The question of priority and subsequence of liability among parties to the same obligation is the same in cases of indemnity, contribution, exoneration, and subrogation, and consequently may be treated of here, once for all. Who is the principal debtor, or party primarily liable, is ordinarily determined from the agreement, express or implied, or the understanding of the parties. The party receiving the benefit of the transaction will, in the absence of other evidence, be considered the principal. In cases involving both tort and contract liability, as where an insurance policy calls upon a company to pay for a loss caused by the negligence of another, the party whose liability arises ex delicto is primarily liable: See § 921, note 77, post. As between two parties liable in tort, one of whom may be nevertheless entitled to contribution or reimbursement from the other, as in the case of a wrongful suit, brought by one party for the benefit of another, the party receiving the benefit, and at whose request the action was brought, is the principal debtor: Culmer v. Wilson, 13 Utah, 129, 57 Am. St. Rep. 713, 44 Pac. 833. And the liability of a party assisting in the default of the principal is prior to that of a surety on the principal's bond: See § 923, note 69, post. In the absence of some reason to the contrary, all parties secondarily liable on the same obligation are liable in the same degree, even though bound by different instruments, executed at different times, and unknown to each other: See Deering v. Earl of Winchelsea, 2 Bos. & P. 270, 1 Cox, 318; Thompson v. Dekum, 32 Or. 506, 52 Pac. 517, 755; Kellar v. Williams, 10 Bush (Ky), 216; Bosley v. Taylor, 5 Dana (Ky.), 157, 30 Am. Dec. 677; Norton v. Coons. 3 Denio, 130; Armitage v. Pulver, 37 N. Y. 494; Moore v. Hanscom (Tex. Civ. App.), 103 S. W. 665; Fidelity & Deposit Co. v. Phillips, 235 Pa. 469, 84 Atl. 432; and even although they may justify for different amounts: Board of Davidson County Comm'rs v. Dorsett,

only to the strict surety and to one who mortgages prop-

151 N. C. 307, 18 Ann. Cas. 852, 66 S. E. 132. But this arrangement may be altered by an agreement between two or more of the secondary parties, by which, as between themselves, the liability of one becomes prior and that of the other subsequent. An agreement by one to exonerate another, or to hold him harmless, has this effect: Hayden v. Thrasher, 18 Fla. 795. Or the surety last becoming bound may stipulate that his liability shall be subsequent to that of a prior surety, and this stipulation will be given effect: Harrison v. Lane, 5 Leigh (Va.), 414, 27 Am. Dec. 607; Harris v. Warner, 13 Wend. (N. Y.) 400. Where one surety consents to be substituted for another, as where, by order of court, one set of sureties on a fidelity bond is replaced by another, the former still remaining bound, the liability of the new sureties is considered prior to that of the old: Glenn v. Wallace, 4 Strob. Eq. (S. C.) 149, 53 Am. Dec. 657; Bobo v. Vaiden, 20 S. C. 271; Morris v. Morris, 9 Heisk. (Tenn.) 814. It has been held that the liability of a surety signing at the request of another is subsequent to that of the latter: Byers v. McClanahan, 6 Gill & J. (Md.) 250; Burnett v. Millsaps, 59 Miss. 333; contra, Bishop v. Smith (N. J.), 57 Atl. 874; and see Chappell v. John, 45 Colo. 45, 132 Am. St. Rep. 134, 16 Ann. Cas. 854, 99 Pac. 44. A surety, later in point of time, who, by his interposition, has prevented immediate satisfaction of the creditor's demand against the principal debtor, as in the case of a surety on a bail bond or an appeal bond, is subject to a liability prior to that of a surety on the original obligation: Opp v. Ward et al., 125 Ind. 241, 21 Am. St. Rep. 220, 24 N. E. 974; March v. Barnet, 121 Cal. 419, 66 Am. St. Rep. 44, 53 Pac. 933. And so, in the case of bonds by different sureties, given in successive stages of a legal proceeding, it has been held that the liability of each surety is prior to that of sureties on earlier bonds, and subsequent to that of sureties on later bonds: Cullifford v. Walser, 158 N. Y. 65, 70 Am. St. Rep. 437, 52 N. E. 648; Hinckley v. Kreitz, 58 N. Y. 583. The same rule does not apply, however, to cumulative fidelity bonds, as where an administrator files a bond on obtaining his letters, and another on the sale of real estate. such a case, the sureties on both bonds are equally liable: Cobb v. Haynes, 8 B. Mon. (Ky.) 137; Thompson v. Dekum, 32 Or. 506, 52 Pac. 517, 755; Pickens v. Miller, 83 N. C. 543; Powell v. Powell, 48 Cal. 234. See, also, Jones v. Hays, 3 Ired. Eq. (38 N. C.) 502, 44 Am. Dec. 78; Loring v. Bacon, 3 Cush. (Mass.) 465; Ketter v. Thompson, 13 Bush (Ky.), 287; Cherry v. Wilson, 78 N. C. 164.

erty to secure the debt of another,<sup>5</sup> but to a guarantor,<sup>6</sup> a sub-surety, suing the principal debtor,<sup>7</sup> or a party not a strict surety, but merely secondarily liable for the debt, even ex delicto, in certain cases.<sup>8</sup> And a party appearing on the face of the obligation as principal may prove himself a surety by parol.<sup>9</sup> It is held in many cases, however, that the obligation must have been incurred at the request of the principal debtor.<sup>10</sup> A mere stranger or volunteer paying the debt of another without request or subsequent ratification is not entitled to indemnity from the latter.<sup>11</sup>

- 5 Wesley Church v. Moore, 10 Pa. St. 273; Baxter v. Moore, 5 Leigh (Va.), 219; Butler v. Butler's Adm'r, 8 W. Va. 674.
  - 6 Hamilton v. Johnston, 82 Ill. 39.
  - 7 Hall v. Smith, 5 How. (U. S.) 96, 12 L. Ed. 66.
- 8 Culmer v. Wilson, 13 Utah, 129, 57 Am. St. Rep. 713, 44 Pac. 833.
- 9 Dickey v. Rogers, 7 Mart. (La.), N. S., 588; Apgar's Adm'r v. Hiler, 4 Zab. (24 N. J. L.) 812; Williams v. Lewis, 158 N. C. 571, 74 S. E. 17.
- 10 Executors of White v. White, 30 Vt. 338; McPherson v. Meek, 30 Mo. 345; Carter v. Black, 4 Dev. & B. (N. C.) 425.
- 11 McShirley v. Birt, 44 Ind. 382; Montgomery v. Gibbs, 40 Iowa, 652; Richardson v. Williams, 49 Me. 558; Winsor v. Savage, 9 Met. (Mass.) 346; Watkins v. Richmond College, 41 Mo. 302.

It has been held, however, that an implied assumpsit may be based upon a subsequent ratification, and that if the debtor, in a suit by the creditor, set up such payment as a defense, that is a sufficient ratification: Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794; Crumlish v. Central Imp. Co., 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456; Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162. It would seem that payment by a stranger is not a discharge by performance, but rather in the nature of a contract between the stranger and the creditor, for the discharge of the debtor. Such a contract would not become irrevocable by the parties to it, and therefore not an absolute defense for the debtor, until accepted by him: See Gifford v. Corrigan, 117 N. Y. 257, 15 Am. St. Rep. 508, 6 L. R. A. 610, 22 N. E. 756. A ratification must be presumed, therefore, from the setting up of the defense, and the decisions cited above, therefore, seem well founded.

- § 2336. (§ 913.) Conditions of Recovery.—The action being for reimbursement, some payment must first have been made by the plaintiff. 12 It may, however, have been only a partial payment.<sup>13</sup> The debt may be paid before it is due, but there can be no recovery from the principal debtor, of course, until his obligation to the creditor has matured.14 A cash payment is not necessary, provided there be a total or partial satisfaction of the obligation, at the surety's expense. If payment has been exacted from his property, that is sufficient.<sup>15</sup> if he has given his note, which the creditor has accepted in satisfaction.16 The surety party need not actually But he must have been under at least have been sued.<sup>17</sup> a prima facie liability to pay, and have made the payment in ignorance of any valid and meritorious defense.18
- 12 Covey v. Neff, 63 Ind. 391; Estate of Hill, 67 Cal. 238, 7 Pac. 664.
- 13 A surety is entitled to separate reimbursement for every partial payment made: Bullock v. Campbell, 9 Gill (Md.), 182; Hall v. Hall, 10 Humph. (Tenn.) 352.
- 14 White v. Miller, 47 Ind. 385; Ross v. Menefee, 125 Ind. 432, 25 N. E. 545.
  - 15 Lord v. Staples, 23 N. H. 448; Bonney v. Seely, 2 Wend. 481.
- 16 Doolittle v. Dwight, 2 Met. (Mass.) 561; Mims v. McDowell, 4 Ga. 182; Pearson v. Parker, 3 N. H. 366. It would seem, however, that the surety should be required to show that he can be compelled to pay the note: See Stone v. Hammell, 83 Cal. 547, 17 Am. St. Rep. 772, 23 Pac. 703. See, also, Bennett v. Buchanan, 3 Ind. 47.
  - 17 Mauri v. Heffernan, 13 Johns. 58.
- 18 Payment by a surety with knowledge of a good defense will not entitle him to reimbursement: Noble v. Blount, 77 Mo. 235; Kimble v. Cummins, 3 Met. (Ky.) 327. A surety is not bound, however, to rely on the statute of frauds, as a defense: Beal v. Brown, 13 Allen, 114. A surety who pays a matured note, without knowledge of a failure of the consideration therefor, is entitled to reimbursement: Gasquet v. Oakey, 19 La. 76.

§ 2337. (§ 914.) Amount of Recovery—Incidents of Right.—The action being for reimbursement, the surety can recover only what he has actually paid out, even though he has thereby compromised and satisfied a debt of a larger amount.<sup>19</sup> Costs reasonably incurred in the defense of an action brought by the creditor are regarded as part of the damages for which the surety is entitled to compensation.<sup>20</sup>

The right to sue for actual reimbursement does not arise until some payment has been made by the surety, and the period of limitation for each payment begins to run when the payment is made, provided the obligation is then due. And as the action is based on an implied promise, the period applying to such actions governs.<sup>21</sup> So, also, the fact that the principal debtor has received a discharge in bankruptcy is no defense to an action by the surety for reimbursement, on account of a payment made after the discharge, at least where the bankruptcy statute makes no provision for proof, by sureties, of their contingent claims.<sup>22</sup>

- 19 "He is entitled to recover the amount paid, and not the amount extinguished by that payment": Bonney v. Seely, 2 Wend. 481, per Savage, C. J. See, also, Caton v. Lambert, 1 Neb. 339; Pickett v. Bates, 3 La. Ann. 627; Delaware etc. R. R. Co. v. Oxford Iron Co., 38 N. J. Eq. 151. Where a surety pays a debt in depreciated bank notes, he is entitled to recover from the principal debtor only the value of the notes: Butler v. Butler's Adm'r, 8 W. Va. 674.
- 20 Hulett v. Soulard, 26 Vt. 295; Downer v. Baxter, 30 Vt. 467; Bennett v. Dowling, 22 Tex. 660; Butler v. Butler's Adm'r, 8 W. Va. 674. The rule is to the contrary where the costs were unreasonably incurred: Cranmer v. McSwords, 26 W. Va. 412; Beckley v. Munson, 22 Conn. 299.
- 21 Thayer v. Daniels, 110 Mass. 345; Scott v. Nichols, 27 Miss. 94, 61 Am. Dec. 503; Shepard v. Ogden, 2 Scam. (Ill.) 257; Wesley Church v. Moore, 10 Pa. St. 273; Bullock v. Campbell, 9 Gill (Md.), 182; Reid v. Flippen, 47 Ga. 273.

22 McMullen v. Bank of Penn Township, 2 Pa. St. 343; Cake v. Lewis, 8 Pa. St. 493. See, however, Mace v. Wells, 7 How. (U. S.) 272, 12 L. Éd. 698.

But while the right to reimbursement does not arise until payment by the surety, he is nevertheless, for some purposes, regarded as a creditor from the time he first became bound as a surety, and so can set aside a fraudulent conveyance or homestead made between that time and the time of payment.<sup>23</sup>

§ 2338. (§ 915.) Contribution — Statement of Doctrine—Jurisdiction in Equity.—When there are two or more parties bound in the same degree by a common burden, equity demands, as between themselves, that each shall discharge a proportionate share, and when one of such parties has actually paid or satisfied more than his fair share of the burden, he is entitled to a contribution from each and all of the others similarly bound, in order to reimburse him for the excess paid over his share, and thus to equalize their common burden.

' This right to contribution, after payment, while originally a matter for the exclusive cognizance of courts of

23 Choteau v. Jones, 11 Ill., 300; Hatfield v. Merod, 82 Ill. 113. "It is clear that the contract of a principal with his surety, to indemnify him for any payment which the latter may make to the creditor, in consequence of the liability assumed, takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied promise or contract of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into, by which the liability to pay was in-The payment only fixes the amount of damages for which the principal was liable, under his original agreement to indemnify the surety": Rice v. Southgate, 16 Gray, 142, per Bigelow, J., in a case testing the principal's right to a homestead. To the effect that a surety cannot bring his action to set aside the fraudulent conveyance, until he has paid the debt, and exhausted his remedies at law, see Ellis v. Southwestern Land Co., 108 Wis. 313, 81 Am. St. Rep. 909, 84 N. W. 417.

A surety, where the principal debtor is insolvent, may retain, for his own indemnity, any funds of the principal debtor which he has in his possession: Abbey v. Van Campen, 1 Freem. Ch. (Miss.) 273. equity, was long ago adopted and enforced by courts of law, but the equitable action still remains,<sup>24</sup> and in some cases, has distinct advantages. The legal action, except under the reformed procedure, would seem to be confined to a separate suit against each surety, for an aliquot part of the loss.<sup>25</sup> And in most jurisdictions, the recovery at law seems to be confined to a sum based upon the whole number of sureties originally liable, while in equity it is based upon the number of solvent sureties within the jurisdiction of the court.<sup>26</sup> In the equitable action, the principal and all co-sureties may be joined, and as full indemnity as possible obtained from the principal, the balance of the debt being distributed equally among the solvent sureties.<sup>27</sup>

§ 2339. (§ 916.) Parties Entitled to Contribution.— The most conspicuous and numerous examples of contribution arise in cases where one of two or more co-

27 McClintock v. Fontaine, 119 Fed. 448; Hudson v. Aman, 158 N. C. 429, 74 S. E. 97; Comstock v. Potter, 191 Mich. 629, 158 N. W. 102 (indorser who has paid may sue maker and other indorsers in one suit).

<sup>24</sup> Even though there is an ample remedy at law: Briggs etc. v. Barnett, 108 Va. 404, 61 S. E. 797.

Thompson v. Hibbs, 45 Or. 141, 76 Pac. 778; Weimer v. Talbot,
 W. Va. 257, 49 S. E. 372.

<sup>26</sup> Williams v. Riehl, 127 Cal. 365, 78 Am. St. Rep. 60, 59 Pac. 762; Sloan v. Gibbs, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408; Gross v. Davis, 87 Tenn. 226, 10 Am. St. Rep. 635, 11 S. W. 92; Fischer v. Gaither, 32 Or. 161, 51 Pac. 736; Weimer v. Talbot, 56 W. Va. 257, 49 S. E. 372. See, also, Gaddy v. Witt (Tex. Civ. App.), 142 S. W. 926; Sailsberry v. Sailsberry, 140 Ky. 731, 131 S. W. 802; Fowle v. McLean, 168 N. C. 537, 84 S. E. 852; United States Fidelity & Guaranty Co. v. Naylor, 237 Fed. 314, 151 C. C. A. 20, citing Pom. Eq. Jur., § 1418; Comstock v. Potter, 191 Mich. 629, 158 N. W. 102, quoting Pom. Eq. Jur., § 1418. This distinction seems without reason, however, and, accordingly a number of courts of law have adopted the equitable rule in full: Henderson v. McDuffee, 5 N. H. 38, 20 Am. Dec. 557; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177; Harris v. Ferguson, 2 Bail. (S. C.) 397.

sureties, having discharged more than his fair share of the debt or obligation, is held entitled to contribution from the rest.<sup>28</sup> In these cases, the parties must be true co-sureties, liable in the same degree, and not one liable subsequently to, or as surety for, another.<sup>29</sup> But this being so, it is immaterial that their liability depends upon different instruments, or arose at different times, or exists for different amounts, so long as they are sureties for the same debt or obligation of the same principal

28 As illustrations of this doctrine, see Dering v. Earl of Winchelsea, 1 Cox, 318, 1 Lead. Cas. Eq. 120, 124, 134; Craythorne v. Swinburne, 14 Ves. 160; Primrose v. Bromley, 1 Atk. 89; Stirling v. Forrester, 3 Bligh, 575; Young v. Reynell, 9 Hare, 809; Hitchman v. Stewart, 3 Drew. 271; Mayor of Berwick v. Murray, 7 De Gex, M. & G. 497; Whiting v. Burke, L. R. 6 Ch. 342; Wolmershausen v. Gullick, [1893] 2 Ch. 514; Broughton v. Wimberly, 65 Ala. 549; White v. Banks, 21 Ala. 705, 56 Am, Dec. 283; McDavid v. McLean. 202 Ill. 354, 66 N. E. 1075; Morgan v. Smith, 70 N. Y. 537; Johnson v. Harvey, 84 N. Y. 363, 38 Am. Rep. 515; Smith v. State, 46 Ind. 617; Bright v. Lennon, 83 N. C. 183; Stephens v. Meek, 6 Lea (Tenn.), 226; Powell v. Powell, 48 Cal. 234; Dussol v. Bruguiere, 50 Cal. 456; Strong v. Mitchell, 19 Vt. 644; Wayland v. Tucker, 4 Gratt. 267, 50 Am. Dec. 76; Moore v. Baker, 34 Fed. 1; Bishop v. Smith (N. J.), 57 Atl. 874; Fischer v. Gaither, 32 Or. 161, 51 Pac. 736; Culliford v. Walser, 158 N. Y. 65, 70 Am. St. Rep. 437, 52 N. E. 648; Sloan v. Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408; Boardman v. Paige, 11 N. H. 431; Graves v. Smith, 4 Tex. Civ. App. 537, 23 S. W. 603; Sanders and Walker v. Herndon, 128 Ky. 437, 108 S. W. 908.

29 Robertson v. Deatherage, 82 Ill. 511. That two persons signing same promissory note with principal may be co-sureties as between themselves and payee of note and no such relation exist between themselves, see Harris v. Jones, 23 N. D. 488, 136 N. W. 1080. As to when the liability of one surety or set of sureties will be considered prior or subsequent to that of another, see § 912, note 4. As against parties whose liability is prior to that of the surety discharging the debt, the latter has a right to complete indemnity: See § 912. As against parties only subsequently liable, he cannot, of course, recover at all: Wells v. Miller, 66 N. Y. 255; Oldham v. Broom, 28 Ohio St. 41.

debtor.<sup>30</sup> It has been held that parties who have become bound without their consent, and through the fraud of a common agent, are nevertheless entitled to contribution among themselves.<sup>31</sup> And where the suretyship obligation is imposed by operation of law, as in the case of individual liability of corporate stockholders, the rule is the same.<sup>32</sup>

The right to contribution exists also among joint principal debtors, where one has paid more than his just proportion of the principal debt.<sup>33</sup> So, with joint co-contractors of any sort, whether the principal obligation call for the payment of money or the performance of an act, one who performs the act, or discharges more

- 30 Powell v. Powell, 48 Cal. 234; Sloan v. Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408. Fuller v. Insurance Co., 36 Fed. 469, 1 L. R. A. 891, illustrates the application of this doctrine to the case of several fire insurance companies, bound by separate policies, taken out at different times, for different amounts. It was held that a company paying the entire loss was entitled to contribution from the others, in proportion to the amounts named in their respective policies.
- 31 McBride v. Potter-Lovell Co., 169 Mass. 7, 61 Am. St. Rep. 265,
   47 N. E. 242. See, however, Grubb v. Cottrell, 62 Pa. St. 23.
- 32 Wolters v. Hemingway, 114 Cal. 433, 46 Pac. 277; Shurlow v. Lewis, 170 Mich. 493, 41 L. R. A. (N. S.) 975, 136 N. W. 484; even although the liability was enforced in a state other than where the action was taken: Putnam v. Misochi, 189 Mass. 421, 109 Am. St. Rep. 648, 75 N. E. 956.
- 33 Fletcher v. Grover, 11 N. H. 368, 35 Am. Dec. 497; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177; Chenault v. Bush, 84 Ky. 528, 2 S. W. 160; Chipman v. Morrill, 20 Cal. 130; Van Petten v. Richardson, 68 Mo. 379; Kimball v. Williams, 65 N. Y. Supp. 69, 51 App. Div. 616; Hodgson v. Baldwin, 65 Ill. 532; Hill v. Fuller, 188 Mass. 195, 74 N. E. 361. The rule is the same in the case of a joint judgment debtor paying more than his share of the judgment: Thomas v. Hearn, 2 Port. (Ala.) 262; Dent. v. King, 1 Ga. 200, 44 Am. Dec. 638; Power v. Rees, 189 Pa. St. 496, 42 Atl. 26.

than his fair share of the expense, is entitled to recover the excess from the others.<sup>34</sup>

In the case of joint tort-feasors, equity ordinarily leaves the burden of compensation for the wrong wherever it may happen to be, as no one will be permitted to show his own wrong, in asking assistance of equity. 35. But where several are jointly responsible for an act not necessarily nor ordinarily unlawful, one who acted without moral guilt or wrongful intent in the commission of the act, and who has paid the damages caused thereby, may recover contribution from the other wrongdoers. 36

- 34 Joint covenant to warrant and defend title: Hickman v. Searcy, 17 Tenn. (9 Yerg.) 47; agreement for care and support of others: Jacobsmeyer v. Jacobsmeyer, 88 Mo. App. 102; Odiorne v. Moulton, 64 N. H. 211, 9 Atl. 625; two persons jointly liable to maintain a dam: Webb v. Laird, 62 Vt. 448, 22 Am. St. Rep. 121, 20 Atl. 599.
- 35 Johnson v. Torpy, 35 Neb. 604, 37 Am. St. Rep. 447, 53 N. W. 575; Minnis v. Johnson, 1 Duvall, 171; Rhea v. White, 3 Head, 121; Becker v. Farwell, 25 Ill. App. 432; Boyer v. Bolender, 129 Pa. St. 324, 15 Am. St. Rep. 723, 18 Atl. 127. See, also, Wanack v. Michels, 215 Ill. 87, 74 N. E. 84, citing Section 1418, Pom. Eq. Jur.; Avery v. Central Bank of Kansas City, 221 Mo. 71, 119 S. W. 1106.
- 36 Cf. § 912, note 4, supra, as to indemnity. This doctrine is well illustrated in cases of a levy of attachment or execution by several creditors simultaneously, which turns out to have been wrongful, because of a mistake as to the ownership of the goods or the jurisdiction of the court: Farwell v. Becker, 129 Ill. 261, 16 Am. St. Rep. 267, 6 L. R. A. 400, 21 N. E. 792; Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118, 19 South. 180. So where several co-trustees are jointly bound for the default of one of their number, which is made good by another and innocent trustee, he is entitled to contribution from the others: Marsh v. Harrington, 18 Vt. 150. See, generally, as to contribution among co-trustees, Pom. Eq. Jur., § 1081. The same principle has been applied where one partner has paid damages for the tort of an employee of the firm: Bailey v. Bussing, 28 Conn. 455; Horback's Adm'r v. Elder, 18 Pa. St. 33; and also where a surety has consented to improper investment of trust funds; Fidelity & Deposit Co. v. Phillips, 235 Pa. 469, 84 Atl. 432. Some courts allow contribution as between parties who are under a joint obligation to repair, and whose failure to do so has caused damage

Joint or joint and several liability is of the essence in the cases mentioned above, and where a number of parties are each severally bound for a specific portion of a debt, either as principals or as sureties, and one pays more than he was bound for, he is entitled to no contribution from the others for such excess.<sup>37</sup> As among themselves, each party is considered a principal debtor for his own share of the obligation, and a surety for the remainder.<sup>38</sup>

The doctrine of contribution is also applied in cases where an encumbrance, binding several pieces of property equally, is paid off by the owner of one of them. In these cases, aside from any right of contribution arising from the personal liability of the parties, under the doctrine as already stated, the party making the payment is entitled to a lien upon the property of the others, to secure contribution from the latter for their share of the expense.<sup>39</sup> Here, as in cases of personal liability, how-

for which one of them has settled: Ankenny v. Moffitt, 37 Minn. 109, 33 N. W. 320; Armstrong County v. Clarion County, 66 Pa. St. 218, 5 Am. Rep. 368.

37 Curtis v. Parks, 55 Cal. 106; Briggs etc. v. Barnett, 108 Va. 404, 61 S. E. 797, citing text. See, however, City of Deering v. Moore, 86 Me. 181, 41 Am. St. Rep. 534, 28 Atl. 988, where contribution was allowed among several sureties bound "severally and not jointly," in the sum of five thousand dollars each, where the whole loss was paid by one of them.

38 See Crafts v. Mott, 4 N. Y. 604. This comparison suggests an analogy between contribution and indemnity. Following out the suggestion that the joint debtor is, as to payments above the amount of his own share, a surety, it follows that, as to such payments, he must be entitled to indemnity from the principals.

39 See, for a full treatment of this subject, 3 Pom. Eq. Jur., §§ 1221-1226. The rule is illustrated in cases where land is devised or descends subject to a charge for debts, which one devises or heir discharges: Falley v. Gribling, 128 Ind. 110, 22 N. E. 723, 26 N. E. 794; Swaine v. Perrine, 5 Johns. Ch. 482, 9 Am. Dec. 318; where such a charge is discharged by the widow claiming dower: Danforth v. Smith, 23 Vt. 247; where portions of land subject to the

ever, the various properties must be liable in the same degree.<sup>40</sup> And, there being no personal liability to a common creditor, there should be none to the party discharging the encumbrance, and the latter, in enforcing contribution, should be confined to rights against the

same mortgage are granted to two different parties at the same time, and the mortgage is discharged by one of them: Briscoe v. Power, 85 Ill. 420; Taylor v. Porter, 7 Mass. 355 (in such a case neither can, by purchasing the mortgage, enforce it in full against the other: Aiken v. Gale, 37 N. H. 501); where one of several beneficiaries of a life insurance policy has paid the premiums thereon: Stockwell v. Mutual Life Ins. Co., 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833; where a co-tenant has discharged a mortgage or other lien on the common property: Oliver v. Montgomery, 42 Iowa, 36; Moon v. Jennings, 119 Ind. 130, 12 Am. St. Rep. 383, 20 N. E. 748, 21 N. E. 471; Calkins v. Steinbach, 66 Cal. 117, 4 Pac. 1103; Packard v. King, 3 Cal. 214; McClintock v. Fontaine, 119 Fed. 448. A charge for dower is regarded as an encumbrance within this rule: Eliason v. Eliason, 3 Del. Ch. 260.

As to liability to contribution where lands had been divided in a partition suit which made all the lands subject to a lien to protect the title to any portion thereof and title failed as to one portion, and also as to remedy of purchaser of part of such portion, see Eck v. Tate; 152 Ala. 327, 44 South. 384.

40 See 3 Pom. Eq. Jur., §§ 1224-1226. Where the owner of two lots, both subject to a judgment lien, conveys one of them by warranty deed, the liability of the lot sold in equity, subsequent to that of the other, even as against a subsequent purchaser of the latter and the latter purchaser, upon payment of the lien, is not entitled to contribution: Jenkins v. Craig, 22 Ind. App. 192, 52 N. E. 423, 53 N. E. 427. And similarly, where different portions of mortgaged premises are sold by the mortgagor, with warranty, to successive purchasers with notice, the liability of the portions is in the inverse order of their alienation: Niles v. Harmon, 80 Ill. 396; Brown v. Simons, 44 N. H. 475; Hill v. McCarter, 27 N. J. Eq. 41; Cary v. Folsom, 14 Ohio, 365. Even in this case, however, in Kentucky and Iowa, equal contribution is the rule; Massie v. Wilson, 16 Iowa, 390; Dickey v. Thompson, 8 B. Mon. 313. But this is not so as to a portion retained by the mortgagor himself: Bates v. Ruddick. 2 Iowa, 423, 65 Am. Dec. 774.

property itself.<sup>41</sup> The right of one of two co-tenants who has made necessary repairs, to contribution from the other, is recognized in equity.<sup>42</sup>

- § 2340. (§ 917.) Conditions Under Which Equitable Action is Maintainable.—No right to reimbursement arises until one party has discharged more than his proportion of the common obligation, even though his codebtor has paid nothing.<sup>43</sup> This discharge may have been effected either by a cash payment, or in some other way, as by a new note.<sup>44</sup> And it is not necessary that
- 41 Cases cited in note 39, supra. Contrary statements are sometimes met with. These are perhaps due to confusion with cases of subrogation, or cases where there is a common personal liability in addition to the collateral security. Under such circumstances, of course, the party discharging the encumbrance should have both the personal right of action and the lien.
- 42 See 3 Pom. Eq. Jur., § 1240, for the implied lien in such cases. In Hill v. Crocker, 87 Me. 208, 47 Am. St. Rep. 321, 32 Atl. 878, a part owner of a vessel who paid for necessary repairs in a foreign port, was allowed a personal action in equity, against other owners, for contribution. See, also, Schmidt v. Constans, 82 Minn. 347, 83 Am. St. Rep. 437, 85 N. W. 173; Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 475. That the right of contribution between co-tenants for cost of necessary repairs is not generally recognized at law, see Cooper v. Brown, 143 Iowa, 482, 136 Am. St. Rep. 768, 422 N. W. 144. Where a co-tenant claims exclusive right, he cannot obtain contribution in respect of taxes paid by him during period he claimed such right, but being in possession and not claiming such right, he will be allowed contribution in respect of amount paid in excess of benefits he received: Victoria Copper Mining Co. v. Rich, 193 Fed. 314, 113 C. C. A. 238.
- 43 As to what is the fair share of each party, see § 918. See Sawyer v. Lyons, 10 Johns. 32. Payment of the interest due upon a joint obligation will entitle the party making the payment to contribution from the others for their share of the interest: McCready v. Van Antwerp, 24 Hun, 322. It is not necessary that the whole debt be discharged: Pixley v. Gould, 13 Ill. App. 565.
- 44 Greene v. Anderson, 102 Ky. 216, 19 Ky. Law Rep. 1187, 43
  S. W. 195; Chandler v. Brainard, 31 Mass. (14 Pick.) 285. See, also,

the payment should have been made under actual compulsion, or that the party making the payment should actually have been sued or the debt actually matured.<sup>45</sup> There must, however, have been an actual liability to pay, on the part of the person making the payment.<sup>46</sup> The other parties, however, may be compelled to contribute, even though, as against the original creditor, they would have a valid defense.<sup>47</sup>

Like every other party seeking the assistance of equity, a party seeking contribution must himself do equity, and any showing of bad faith, or negligence on

Bishop v. Smith (N. J.), 57 Atl. 874; Hill v. Fuller, 188 Mass. 195, 74 N. E. 361; Hotham v. Berry, 82 Kan. 412, 108 Pac. 801.

- 45 Pixley v. Gould, 13 Ill. App. 565; Jenkins v. Lockard's Adm'r, 66 Ala. 377; A. Guckenheimer & Bros. Co. v. Kann, 243 Pa. 75, 89 Atl. 807; Hotham v. Berry, 82 Kan. 412, 108 Pac. 801.
- · 46 Where payment was made in good faith, under a prima facie liability, contribution is allowed, although there was a good defense, of which plaintiff was ignorant: Hichborn v. Fletcher, 66 Me. 209, 22 Am. Rep. 562. Where the debt is barred by the statute of limitations, ordinarily payment will not give rise to a right to contribution: Buck v. Spofford, 40 Me. 328; Elliott v. Nichols, 7 Gill (Md.), 85, 48 Am. Dec. 546; Wheat Field v. Brush Valley Trop., 25 Pa. St. 112; McLin v. Harvey, 8 Ga. App. 360, 69 S. E. 123. In some cases, however, since a part payment or acknowledgment by one joint debtor revives the debt as to both, a party paying a barred debt is allowed contribution: Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Peaslee v. Breed, 10 N. H. 489, 34 Am. Dec. 178.
- 47 Boardman v. Paige, 11 N. H. 431. Where the liability of a joint debtor (surety) is discharged, as to the creditor, by the death of the former, a co-surety paying the debt is nevertheless sometimes held entitled to contribution: Conover v. Hill, 76 Ill. 342. See, also, Bachelder v. Fiske, 17 Mass. 464; Aiken v. Peay, 5 Strob. 15, 53 Am. Dec. 181; Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416. Contra, see Pom. Eq. Jur., § 409, last note. The rule is the same where one party has been discharged by the statute of limitations, which has not yet run against the party making the payment: Aldrich v. Aldrich, 56 Vt. 324, 48 Am. Rep. 791; Glascock v. Hamilton, 62 Tex. 143. So, also, where the creditor's claim against the defendant has been discharged in bankruptcy before payment by

the part of the person making the payment will defeat his right to contribution from the others.<sup>48</sup>

In cases of co-suretyship, as a further condition to recovery, some courts insist that the party asking contribution shall first exhaust his remedies against the principal debtor, or show that the latter is insolvent.<sup>49</sup> This is considered unnecessary, however, in most states.<sup>50</sup>

§ 2341. (§ 918.) Amount of Recovery—Incidents of the Right.—A party who has made a partial payment is not entitled to contribution, even though the others have paid nothing, until his own payment exceeds his proportionate share of the whole debt, and he is then entitled to collect a proportionate share only of the excess, from each party, the proportionate share in each case being determined by dividing the total sum in question among the number of solvent parties within the jurisdiction of the court.<sup>51</sup> Whether a party is also entitled

the plaintiff: Dole v. Warren, 32 Me. 94, 52 Am. Dec. 640; Dunn v. Sparks, 1 Ind. 397, 50 Am. Dec. 473.

- 48 Where one party has wasted security given by the creditor, or failed to keep an agreement with his co-contractor, or misled the latter into entering the contract, no contribution will be allowed. For illustrations of this general doctrine, see Labenelle v. Deconet, 2 La. Ann. 545; Hunt v. Hunt, 45 N. J. Eq. 360, 13 Atl. 248, 19 Atl. 623; P. Dougherty Co. v. Gring, 89 Md. 535, 43 Atl. 912; Rollins v. Taber, 25 Me. 144; Flanagan v. Duncan, 133 Pa. St. 373, 7 L. R. A. 412, 19 Atl. 405. See, also, In re Koch's Estate, 148 Wis. 548, 134 N. W. 663.
- 49 Fischer v. Gaither, 32 Or. 161, 51 Pac. 736; Allen v. Wood, 3 Ired. Eq. 386; Morrison v. Poyntz, 7 Dana, 307, 32 Am. Dec. 92. See, also, Kelley v. Ramsey, 176 Ky. 584, 195 S. W. 1111.
- 50 Taylor v. Reynolds, 53 Cal. 686; Buckner v. Stewart, 34 Ala. 529; Sloo v. Pool, 15 Ill. 47; Rankin v. Collins, 50 Ind. 158; Boyer v. Marshall, 44 Hun, 623.
- 51 See § 915, note 26, ante. A co-obligor beyond the jurisdiction of the court has been considered as though insolvent, for purposes of contribution: McKenna v. George, 2 Rich. Eq. (S. C.) 15. See, also, Fuselier v. Baineau, 14 La. Ann. 764; O'Brien v. Drexiluis, 7

to contribution for reasonable costs spent in defending a suit, is a matter upon which authorities disagree.<sup>52</sup> When there are several distinct obligations with different penalties, to secure the same act, contribution between the different sureties is in proportion to the amount of the obligations signed by them, respectively.<sup>53</sup>

The right to a cash recovery arises when one party makes his first payment in excess of his fair proportion, and the statute of limitations, accordingly, runs from

Ky. Law Rep. 519. In this reckoning, the total loss or burden is the total amount for which the parties are actually liable, and not, necessarily, the aggregate amount of the obligations that they have given.

52 That a party is entitled to contribution for reasonable costs and attorney's fees, where not expended foolishly, see Gross v. Davis, 87 Tenn. 226, 10 Am. St. Rep. 635, 11 S. W. 92; Conolly v. Dolan, 22 R. I. 60, 84 Am. St. Rep. 816, 46 Atl. 36; Carter v. Fidelity & D. Co., 134 Ala. 369, 92 Am. St. Rep. 41, 32 South \ 632; Van Petten v. Richardson, 68 Mo. 379; Wagenseller v. Prettyman, 7 Ill. App. 192. See, also, United States Fidelity & Guaranty Co. v. Naylor, 237 Fed. 314, 151 C. C. A. 20. Contra, Newcomb v. Gibson, 127 Mass. 396; Knight v. Hughes, 3 Car. & P. 467; John v. Jones, 16 Ala. 454. Where the defense was authorized by the other parties, or where the costs were incurred in a suit against all of them, contribution is allowed: Boardman v. Paige, 11 N. H. 431; Davis v. Emerson, 17 Me. 64; Newcomb v. Gibson, 127 Mass. 396. Where proceedings were taken to enforce a judgment upon which an attorney had a lien, it was held that he was liable for a share of the necessary costs of the proceedings: Fisher v. Mylius et al., 62 W. Va. 19, 57 S. E. 276.

53 Where the plaintiff signed a sheriff's bond for two thousand dollars, and the defendants another for eighteen thousand dollars, and the loss paid by plaintiff was one thousand and fifty-two dollars and ninety-two cents, the loss was apportioned in the ratio of two thousand to eighteen thousand: Armitage v. Pulver, 37 N. Y. 494. See, also, Young v. Shunk, 30 Minn. 503, 16 N. W. 402; Burnett v. Millsaps, 59 Miss. 333; Moore v. Hanscom (Tex. Civ. App.), 103 S. W. 665; Fidelity & Deposit Co. v. Phillips, 235 Pa. 469, 84 Atl. 432; United States Fidelity & Guaranty Co. v. Naylor, 237 Fed. 314, 151 C. C. A. 20.

that time.<sup>54</sup> The action is considered as based upon an implied contract, and the period of limitation applying to actions of this nature governs.<sup>55</sup> And since the liability to contribute is not complete until this payment, it follows that a discharge of one party, in bankruptcy, before payment by the other, is no defense to an action for contribution.<sup>56</sup>

The right to contribution is assignable.<sup>57</sup>

§ 2342. (§ 919.) Exoneration.—One who is bound by an obligation upon which another is primarily liable, may, if the obligation becomes due and remains unpaid, bring an action in equity, to compel the principal debtor to pay, and the creditor to receive payment of, the obligation, and thus to exonerate the party suing from his liability, and protect him from the unnecessary withdrawal of capital involved in making payment and suing for reimbursement.<sup>58</sup> And one who, without assuming

- 54 Sherwood v. Dunbar, 6 Cal. 53; Richter v. Henningsan, 110 Cal. 530. See Richter v. Blasingame, 42 Pac. 1077; Singleton v. Townsend, 45 Mo. 379; Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Durbin v. Kuney, 19 Or. 71, 23 Pac. 661; Singleton v. Moore, Rice Eq. (S. C.) 110; Culmer v. Wilson, 13 Utah, 129, 57 Am. St. Rep. 713, 44 Pac. 833. See, also, Frew v. Scoular, 101 Neb. 131, 162 N. W. 496. Where payment is made before the maturity of the debt, however, no right of action accrues until maturity, and the period of limitation does not begin to run until then: Truss v. Miller, 116 Ala. 494, 22 South. 863.
- 55 Sexton v. Sexton, 35 Ind. 88; Faires v. Cockerell, 88 Tex. 428,
   28 L. R. A. 528, 31 S. W. 190, 639.
- 56 Ransom v. Keyes, 9 Cow. 128; Penn v. Bahnson, 89 Va. 253, 15
   S. E. 586. See, also, note 47, § 917, ante.
- <sup>57</sup> Pine Hill Coal Co. v. Harris, 7 Ky. Law Rep. 519; Pulley v. Pass, 123 N. C. 168, 31 S. E. 478.
- 58 This action is analogous to a quia timet action: See Pom. Eq. Jur., § 1417, and note; Stephenson v. Taverners, 9 Gratt. (Va.) 398; The Fame Ins. Co.'s Appeal, 83 Pa. St. 396; Ardesco Oil Co. v. N. A. etc. Oil Co., 66 Pa. St. 381; Bishop v. Day, 13 Vt. 81, 37 Am. Dec. 582; King v. Baldwin, 2 Johns. Ch. 554, 17 Johns. 384, 8 Am. Dec.

any personal liability, has mortgaged property for the security of another's debt, may likewise maintain an action to compel the principal debtor to exonerate his property.<sup>59</sup> And since several co-sureties, as among them-

415; Norton v. Reid, 11 S. C. 593; Gilliam v. Esselman, 5 Sneed (Tenn.), 86; Irick v. Black, 17 N. J. Eq. 189; Rice v. Downing, 12 B. Mon. 44; Delaware, L. & W. R. R. Co. v. Oxford Iron Co., 38 N. J. Eq. 151. Cited to this effect in Pom. Eq. Jur., § 1417, is Holcombe v. Fetter, 70 N. J. Eq. 300, 67 Atl. 1078; St. Croix Timber Co. v. Joseph, 142 Wis. 55, 124 N. W. 1049 (but it is inconsistent in such suit to assert that creditor has no claim against principal debtor); Pavarini & Wyne., Inc., v. Title Guaranty & Surety Co., 36 App. Cas. (D. C.) 348, Ann. Cas. 1912C, 367. "It seems to be well settled that a surety against whom a judgment has been rendered, may, without making payment himself, proceed in equity against his principal, to subject the estate of the latter to the payment of the debt, in exoneration of the surety": Dobie v. Fidelity & Casualty Co. of New York, 95 Wis. 540, 60 Am. St. Rep. 135, 70 N. W. 482, citing Pom. Eq. Jur., § 1417; Holcombe v. Fetter, 70 N. J. Eq. 300, 67 Atl. 1078 (though principal not in danger of becoming insolvent); Southwestern Surety Ins. Co. v. Wells, 217 Fed. 294; Tillis v. Folmar, 145 Ala. 176, 117 Am. St. Rep. 31, 8 Ann. Cas. 78, 39 South. 913; West Huntsville Cotton Mills Co. v. Allen, 164 Ala. 305, 51 South. 338; Cooper v. National Fertilizer Co., 132 Ga. 529, 64 S. E. 650; Columbia Bank & Trust Co. v. United States Fidelity etc. Co., 33 Okl. 535, 126 Pac. 556, citing Pom. Eq. Jur., § 1417; Guernsey v. Marks, 55 Or. 323, 106 Pac. 334; Hutchinson Wholesale Grocer Co. v. Brand, 79 Kan. 340, 99 Pac. 592; Browne v. Bixby, 190 Mass. 69, 5 Ann. Cas. 642, 76 N. E. 454 (surety's administrator may bring the suit). See, however, White v. Schurer, 4 Baxt. 23.

Where a principal debtor seeks by fraud to escape payment of the obligation, a surety has an immediate right of action, notwithstanding the obligation has not matured: Hutchinson Wholesale Grocers Co. v. Brand, 79 Kan. 340, 99 Pac. 592. Where the amount of a surety's liability can only be ascertained on the happening of a contingency, he cannot obtain exoneration until actually damnified: Guernsey v. Marks, 55 Or. 323, 106 Pac. 334.

59 Savage v. Winchester, 15 Gray, 453. See, also, Gresham v. Ware, 79 Ala. 192; Bell v. McConkey, 82 Va. 176. See, also, Bearse v. Lebowich, 212 Mass. 344, 99 N. E. 175; citing Pom. Eq. Jur., §§ 1417, 1419.

selves, are considered each as principal debtor for his own share, and as surety for the others, it is held that a surety, against whom judgment has been obtained for the full amount, but who has, as yet, paid nothing, may compel his co-sureties to contribute their shares, and so to exonerate him from liability to that extent.60 The inadequacy of the remedy at law, in failing to provide compensation for damages which may be caused by even a temporary withdrawal of a large amount of capital, seems to be the basis of this action, and should, it is submitted, permit of a similar action by any party to an obligation, against another whose liability is equal with, or prior to his own. The language of the court and cases cited in Wolmershausen v. Gullick<sup>60</sup> would seem to bear this out.61 Similarly, if a mortgage has been given to a party subsequently liable, for his indemnity, he may, even before payment, secure a foreclosure of the mortgage, and application of the proceeds to the payment of the principal debt. 62 Since this is an action to compel payment to be made, not to the surety himself, but to the creditor, the latter must be made a party. Otherwise the decree can be only conditional.63

- 60 See Wolmershausen v. Gullick, [1893] 2 Ch. 514, reviewing the English decisions. See, also, Davis v. First Nat. Bank, 86 Or. 474, 161 Pac. 93, 168 Pac. 929 (where the amount for which the surety would be liable is fixed and certain, it is not necessary to pay before suing for contribution), citing Pom. Eq. Jur., § 1417, and note, § 1418.
- 61 That one surety may maintain an action for exoncration against another surety subsequently liable, see Hayden v. Thrasher, 18 Fla. 795.
- 62 Hellams v. Abercrombie, 15 S. C. 110, 40 Am. Rep. 684; Lewis, Hubbard & Co. v. Toney, 76 W. Va. 80, 85 S. E. 30. The surety may, at the same time, compel the principal debtor to pay any deficiency remaining due: Call v. Scott, 4 Call (Va.), 402.
- 63 Call v. Scott, 4 Call (Va.), 402; Wolmershausen v. Gullick, [1893] 2 Ch. 514. Some cases holding that no action can be maintained before payment, seem to be based upon difficulties arising

§ 2343. (§ 920.) Subrogation. 64—When an obligation is discharged by one not primarily liable for it, but who believes himself to be acting either in performance of a legal duty, or for the protection of a legal right, or at the request of the party ultimately bound, and even in certain other cases, favored by public policy, where none of the above circumstances may be present, the party thus discharging the obligation is entitled in equity to demand, for his reimbursement, and subject to any superior equities, the performance of the original obligation, and the application thereto of all securities and collateral rights held by the creditor. The same equity which seeks to prevent the unearned enrichment of one party, at the expense of another,65 by actions for reimbursement, contribution, and exoneration, operates here, by creating a relation somewhat analogous to a constructive trust, in favor of the subrogee, or party making the payment, in all legal rights held by the creditor, and the subrogee may proceed to enforce the trust.66

from the fact that the creditor is not a party: See Strother's Adm'r v. Mitchell's Ex'r, 80 Va. 149; Gourdin v. Trenholm, 25 S. C. 362.

- 64 This paragraph is cited in Vasser v. City of Liberty, 50 Tex. Civ. App. 111, 110 S. W. 119.
- 65 The text is cited in Berry v. Stigall, 253 Mo. 690, Ann. Cas. 1915C, 118, 50 L. R. A. (N. S.) 489, 162 S. W. 126.
- an additional right, and may exist concurrently with, and as a further security to, the right to a simple action for reimbursement or exoneration. The fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, seems often to be overlooked, to the confusion of both doctrines. For examples of this see cases on the statute of limitations, note 118, post. As will be seen, however, the right to subrogation often exists where the simple action for reimbursement or contribution could not be maintained. For a kind of subrogation depending upon another principle, see § 925, post. The term is also used to designate the transfer of the rights of attaching creditors to a trustee in bankruptcy, by order of court: See In re Sentenne v. Green Co., 120

§ 2344. (§ 921.) Parties Entitled to Subrogation.—Payment of the debt of another, as by a mere volunteer, will not, of itself, entitle the party making the payment to subrogation. Equity will relieve, in general, only those who could not well have relieved themselves, and these may be divided roughly into the three classes already suggested, that is: first, those who act in performance of a legal duty, arising either by express agreement or by operation of law; second, those who act under the necessity of self-protection; third, those who act at the request of the debtor, directly or indirectly, or upon invitation of the public, and whose payments are favored by public policy. 67

§ 2345. (§ 921a.) First. Party Who Discharged Obligation in Performance of a Legal Duty.—Whenever a party discharges an obligation in performance of a legal duty—that is, an obligation for the performance of which he was legally bound—but for which his liability was subsequent to that of another party, he is entitled to be subrogated to, and to have the benefit of, all rights of the creditor and all securities which may at any time have been put into the creditor's hands by a party whose liability is prior to his own, or which the creditor may

Fed. 436; and the transfer, by garnishment, of a judgment debtor's right against his debtor: See Hazelton v. Douglas, 97 Wis. 214, 65 Am. St. Rep. 122, 72 N. W. 637; and the right of the beneficiary of a promise, who is not a party to it, to enforce it for his own penefit: See Riggins v. Hilliard, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402.

67 The text is quoted in Lewis's Adm'r v. United States Fidelity & Guaranty Co., 144 Ky. 425, Ann. Cas. 1913A, 564, 138 S. W. 305; Berry v. Stigall, 253 Mo. 690, Ann. Cas. 1915C, 118, 50 L. R. A. (N. S.) 489, 162 S. W. 126. This paragraph is cited in Wallace v. Jones, 110 Md. 143, 72 Atl. 769. Sections 921-924 are cited in Singletary v. Goeman, 58 Tex. Civ. App. 5, 123 S. W. 436.

have obtained from such party.<sup>68</sup> The most conspicuous example of this class is the ordinary surety on an obligation for the payment of money, who has become such at the request of the principal debtor.<sup>69</sup> Such a party

68 The text is quoted in Lewis's Adm'r v. United States Fidelity & Guaranty Co., 144 Ky. 425, Ann. Cas. 1913A, 564, 138 S. W. 305. For a discussion of questions of priority and subsequence of liability, see § 912, note 4, ante.

69 4 Pom. Eq. Jur., § 1419. For examples of this class of subrogation, see Mahew v. Crickett, 2 Swanst. 185; Hodson v. Shaw, 3 Mylne & K. 183; Pearl v. Deacon, 24 Beav. 186, 1 De Gex & J. 461; Irick v. Black, 17 N. J. Eq. 189; Kelly v. Herrick, 131 Mass. 373; Storms v. Storms, 3 Bush, 77; Lewis v. Palmer, 28 N. Y. 71; Keith v. Hudson, 74 Ind. 333; Hayes v. Ward, 4 Johns. Ch. 123; Forrest's Ex'rs v. Luddington, 68 Ala. 1; Lochenmeyer' v. Fogarty, 112 Ill. 572; Penn v. Ingles, 82 Va. 65; Ward's Appeal, 100 Pa. St. 289; Taylor v. Tarr, 84 Mo. 420. See, also, the recent cases: Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 52 L. Ed. 547, 28 Sup. Ct. 389; Hardaway v. National Surety Co., 211 U. S. 552, 53 L. Ed. 321, 29 Sup. Ct. 202; Moody v. Huntley, 149 Fed. 797; Central Trust Co. of New York v. Third Ave. R'y Co., 180 Fed. 710, 103 C. C. A. 492; Title Guaranty & Surety Co. v. Dutcher, 203 Fed. 167; American Bonding Co. of Baltimore, Md., v. Reynolds, 203 Fed. 356; Baldwin v. Alexander, 145 Ala. 186, 40 South. 391, quoting Pom. Eq. Jur., § 1419; Bechtel v. Wier, 152 Cal. 443, 15 L. R. A. (N. S.) 549, 93 Pac. 75; Worthy v. Battle, 125 Ga. 415, 54 S. E. 667; Southern R'y Co. v. Bretz, 181 Ind. 504, 104 N. E. 19; Bankers' Surety Co. v. Linder, 156 Iowa, 486, 137 N. W. 496; Honce v. Schram, 73 Kan. 368, 85 Pac. 535; Fidelity & Deposit Co. v. City of Stafford, 93 Kan. 539, 144 Pac. 852; Dine v. Donnelly, 134 Ky. 776, 121 S. W. 685; Lewis's Adm'r v. United States Fidelity & Guaranty Co., 144 Ky. 425, Ann. Cas. 1913A, 564, and note, 138 S. W. 305 (rule applies to compensated or paid sureties); State ex rel. Stewart v. Reid, 122 La. 590, 47 South. 912; Union Stone Co. v. Board of Chosen Freeholders, 71 N. J. Eq. 657, 65 Atl. 466; Mc-Kenna v. Corcoran, 70 N. J. Eq. 627, 61 Atl. 1026; Tripp v. Harris, 154 N. C. 296, 35 L. R. A. (N. S.) 1348, 70 S. E. 470; Watson v. McLench, 57 Or. 446, 110 Pac. 482, 112 Pac. 416.

This class includes guarantors of negotiable paper: Conner v. Howe, 35 Minn. 518, 29 N. W. 314; Havens v. Willis, 100 N. Y. 488, 3 N. E. 313. See, also, Opp v. Ward et al., 125 Ind. 241, 21 Am.

is entitled to subrogation, though he appear on the principal obligation, not as a surety, but as a joint maker, with the principal, and apparently himself a principal, 70 or though he be bound by a separate instrument. 71 And one who becomes surety, not on an obligation to pay a certain sum, but on a penal obligation, conditioned on the performance of some act by the principal, may likewise become entitled to subrogation. 72 And all this is true, not only of a surety for the principal debtor, but of one who, as surety for, or indemnitor of a surety, is compelled to pay the obligation of the principal debtor. 73

St. Rep. 220, 24 N. E. 974; Peebles v. Gray, 115 N. C. 38, 44 Am. St. Rep. 429, 20 S. E. 173.

It is not necessary that there be a personal obligation. One who mortgages property to secure the debt of another may become entitled to subrogation: Van Orden v. Durham, 35 Cal. 136; Snook v. Munday, 96 Md. 514, 54 Atl. 77.

70 4 Pom. Eq. Jur., § 1419, note; Snook v. Munday, 96 Md. 514, 54 Atl. 77, and see Smith v. Folsom, 80 Ohio St. 218, 88 N. E. 546; Wolford v. Bias, 79 W. Va. 349, 90 S. E. 875. An accommodation acceptor may be entitled to subrogation against the drawer: Bank of Toronto v. Hunter, 4 Bosw. (N. Y.) 646.

71 Hevener v. Berry, 17 W. Va. 474.

72 This applies to a surety on a contractor's bond as for the conveyance of property: Freeman v. Mebane, 2 Jones Eq. (N. C.) 44; to a surety on a fidelity bond, as for a guardian: Browne et al. v. Fidelity & I. Co., 98 Tex. 55, 80 S. W. 593; or an administrator's bond: Townsend v. Whitney, 75 N. Y. 425, 15 Hun, 93; to a surety on a court bond, such as an injunction bond: Darrow v. Summerhill, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680; or an appeal bond, the surety in this case being subrogated to the lien of the very judgment appealed from: Pierce v. Higgins, 101 Ind. 178. See, also, March v. Barnet, 121 Cal. 419, 66 Am. St. Rep. 44, 53 Pac. 933; a surety on the appeal bond of a tort-feasor is as well entitled to subrogation as any other: Kolb v. National Surety Co. et al., 176 N. Y. 233, 68 N. E. 247.

73 Rittenhouse v. Levering, 6 Watts & S. (Pa.) 190; Hackensack Brick Co. v. Borough of Bogota, 86 N. J. Eq. 143, 97 Atl. 725, citing the text.

It seems immaterial, moreover, whether or not the debtor has requested, or consented to, the assumption of the surety's obligation, and the latter may be entitled to subrogation though he assumed his obligation without the knowledge, or even against the will, of the principal debtor. Nor is it material whether the principal obligation arises ex contractu or ex delicto. Thus, one responsible, by bond, for a breach of trust or neglect of duty of another, may be entitled to subrogation. And a fire insurance company bound by its policy to make good a loss caused by fire resulting from the negligence of a third party stands in the position of a surety for the latter, and, upon payment, is entitled to subrogation to the rights of the insured against such party.

- 74 Nettleton v. Ramsey County Land & Loan Co., 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128. This is more forcibly illustrated by the insurance cases cited below, note 77, the insurance companies there being subrogated to the policy-holder's right against a party who, at the time of the issuance of the policy, was perhaps entirely unknown to them.
- 75 A surety on the appeal bond of a tort-feasor may be entitled to subrogation: Kolb v. National Surety Co. et al., 176 N. Y. 233, 68 N. E. 247.
- 76 See Browne et al. v. Fidelity & D. Co., 98 Tex. 55, 80 S. W.
   593; Townsend v. Whitney, 75 N. Y. 425, 15 Hun, 93.
- effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company, by his right at law, or to the insurance company, in virtue of his contract. But if he applies first to the railroad company, who pay him, he thereby diminishes his loss by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance. And it follows as a necessary consequence that if he first applies to the insurer, and receives his whole loss, he holds the claim against the railroad company in trust for the insurer. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do

Coming also within the class of payments made in performance of legal duty are payments made by parties whose obligation is imposed, not directly by contract, but by operation of law. Payments by a stockholder in discharge of an individual liability for corporate debts, or by a partner for debts of the firm, are within this class, and in both cases, the party making the payment is entitled to subrogation.<sup>78</sup>

so, the cestui que trust may sue in the name of the trustee, and his equity interest will be protected": Per Shaw, C. J., in Hart v. Western R. R. Co., 13 Met. (Mass.) 99, 46 Am. Dec. 719. See, also, Philadelphia Underwriters et al. v. Fort Worth & D. C. R'y Co., 31 Tex. Civ. App. 104, 71 S. W. 419; Mobile Ins. Co. v. Columbia & Greenville R. R. Co., 41 S. C. 408, 44 Am. St. Rep. 725, 19 S. E. 858; Home Mutual Ins. Co. v. Oregon R'y & Nav. Co., 20 Or. 569, 23 Am. St. Rep. 151, 26 Pac. 857; Regan v. N. Y. & New Eng. R. R. Co., 60 Conn. 124, 25 Am. St. Rep. 306, 22 Atl. 503; Packham v. German Fire Ins. Co., 91 Md. 515, 80 Am. St. Rep. 461, 50 L. R. A. 828, 46 Atl. 1066; Garrison v. Memphis Ins. Co., 19 How. (60 U. S.) 312, 15 L. Ed. 656; Hamburg-Bremen Fire Ins. Co. v. Atlantic Coast Line R. R. Co., 132 N. C. 75, 43 S. E. 548.

An accident or life insurance company, however, is held not entitled to subrogation to the rights of the insured against a party whose negligence caused the accident or loss of life; Aetna Life Ins. Co. v. J. B. Parker & Co., 96 Tex. 287, 72 S. W. 168; 30 Tex. Civ. App. 521, 72 S. W. 621. These cases cite and rely on Mobile Ins. Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580, and Connecticut etc. Ins. Co. v. New York etc. R'y Co., 25 Conn. 265, 65 Am. Dec. 571, both holding that no action will lie at law, by a life insurance company, to recover indemnity from one whose wrong caused the loss of life for which the company had to pay. This sound distinction, however, is drawn between a life and accident policy, on the one hand, and a fire policy on the other, that while the latter is an obligation to pay just what the wrongdoer should pay, no more and no less, and is therefore really parallel with the principal obligation, the former call for stated sums, which may be more or less than the actual damage, and the obligation is therefore not parallel with that. of the wrongdoer. Quære, whether the same reasoning should be applied in case of a valued fire or marine policy.

78 The text is quoted in Brinckerhoff v. Holland Trust Co., 159 Fed. 191; Corporate stockholder: Redington v. Cornwell, 90 Cal. 49,

Other cases where the liability of a party making a payment is considered subsequent to that of some other party to the obligation, and in which, therefore, the former is entitled to subrogation, are cases of payment of more than his fair share by one of several joint debtors<sup>79</sup> or co-sureties.<sup>80</sup> In these cases, each party is considered, as against the others, as primarily liable for his own proportionate share of the obligation, and as subsequently liable for the shares of the others. And similarly, where a mortgage debtor assigns the mortgaged property to one who assumes the debt, the liability of the former, though originally primary, is considered as subsequent to that of the assignee, and the former is entitled to subrogation against the latter.<sup>81</sup>

27 Pac. 40; First Nat. Bank of Merkel v. Armstrong (Tex. Civ. App.), 108 S. W. 873. Contra, Trindade v. Atwater Canning & Packing Co. (Cal. App.), 128 Pac. 756 (holding the stockholder's liability, under the statute, to be primary). Partners: Harter v. Songer, 138 Ind. 161, 37 N. E. 595; Frow, Jacobs & Co.'s Estate, 73 Pa. St. 459.

An agent who reimbursed his principal for moneys of the latter stolen from the agent was subrogated to the right of the principal to recover these moneys, in Fitzpatrick v. Letten, 123 La. 748, 17 Ann. Cas. 197, 49 South. 494.

79 Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.), 264, 37 Am. Dec. 654. See, also, Gooch v. Gooch, 70 W. Va. 38, 37 L. R. A. (N. S.) 930, 73 S. E. 56. This, of course, does not include joint tort-feasors: Gilbert v. Finch, 173 N. Y. 455, 93 Am. St. Rep. 623, 66 N. E. 133.

80 4 Pom. Eq. Jur., § 1419; Blanton v. Bostic, 126 N. C. 418, 35
S. E. 1035; Pace v. Pace's Adm'r, 95 Va. 792, 44 L. R. A. 459, 30
S. E. 361; Pond v. Dougherty, 6 Cal. App. 686, 92 Pac. 1035; Honce v. Schram, 73 Kan. 368, 85 Pac. 535. See, also, Elden v. Commonwealth, 55 Pa. St. 485.

81 See 3 Pom. Eq. Jur., §§ 1206, 1207; Marsh v. Pike, 10 Paige Ch. 595; Willard v. Wood, 1 App. Cas. (D. C.) 44. The case would seem to be contrary, however, where the assignee does not assume the mortgage: Fuller v. John S. Davis Sons Co., 184 Ill. 505, 56 N. E. 791; affirming 84 Ill. App. 295. See, however, McLure v.

It would seem that in the classes of cases above treated, it is sufficient that the payment be made in performance of a supposed legal duty, and in good faith, even though the party making the payment were not really bound.<sup>82</sup>

§ 2346. (§ 921b.) Second. Party Who Pays Debt in Self-protection.—The second class of parties entitled to subrogation consists of those who, while not legally bound to pay, yet might suffer loss if the obligation is not discharged, and so pay the debt in self-protection. In this class are included subsequent encumbrancers paying off a prior encumbrance, <sup>83</sup> and owners of property, or of equities or partial interests therein, paying off prior encumbrances. <sup>84</sup> It would seem here, as in the

Melton, 34 S. C. 377, 27 Am. St. Rep. 820, 13 L. R. A. 723, 13 S. E. 615. One who assumes, absolutely, an unsecured debt of another is likewise treated as the principal, and is not entitled to subrogation: Darrow v. Summerhill, 93 Tex. 92, 77 Am. St. Rep. 833, at 840, 53 S. W. 680.

82 See Nord-Deutscher Lloyd v. President etc. Ins. Co. of North America, 110 Fed. 420, 49 C. C. A. 1, and cases cited. See, also, Merrill v. Comestock, 154 Wis. 434, 143 N. W. 313 (widow paying claims against estate out of her own pocket).

83 A mortgagee of a leasehold, upon payment of the rent, has been held subrogated to the lessor's right of re-entry: Dunlap v. James, 174 N. Y. 411, 67 N. E. 60; a cestui que trust under a trust deed, furnishing his trustee with money to use, and which actually is used, in paying a debt secured by a prior trust deed, is subrogated to the rights of the creditors under the latter: Davison v. Gregory, 132 N. C. 389, 43 S. E. 916. See, also, Backer v. Pyne et al., 130 Ind. 288, 30 Am. St. Rep. 231, 30 N. E. 21.

84 The text is cited to this point in Murray v. O'Brien, 56 Wash. 361, 28 L. R. A. (N. S.) 998, 105 Pac. 840. An owner of one part of a tract subject, with others, to a single mortgage: Fort Jefferson Imp. Co. v. Dupoyster, 112 Ky. 792, 23 Ky. Law Rep. 1501, 66 S. W. 1048 (no official report); Hazle v. Bondy, 173 Ill. 302, 50 N. E. 671; a life tenant or tenant in common: Keller v. Fenske, 123 Wis. 435, 101 N. W. 378, 1055; Kinkead v. Ryan, 64 N. J. Eq. 454, 53 Atl.

first class of cases, that one acting in good faith in making his payment, and under a reasonable belief that it is necessary to his protection, is entitled to subrogation, even though it turns out that he had no interest to protect.<sup>85</sup>

§ 2347. (§ 921c.) Third. Party Who Pays on Request or by Public Invitation.—Cases coming third in the classification suggested above are those in which payment is made by a stranger to the obligation, acting neither under compulsion nor for self-protection, but at the request of some party liable for the debt. In these cases, perhaps upon the ground of an implied promise, the party making the payment is usually held subrogated to the rights of him who is paid.<sup>86</sup> Whether one

1053; Foster v. Williams, 144 Mo. App. 219, 128 S. W. 797; a legatee, devisee, or heir of property subject to claims of creditors: Cole v. Malcolm, 66 N. Y. 363; Pease v. Christman, 158 Ind. 642, 64 N. E. 90; Suydam v. Voorhees, 58 N. J. Eq. 157, 43 Atl. 4; Pease v. Egan, 131 N. Y. 262, 30 N. E. 102; Fullerton v. Bailey, 17 Utah, 85, 53 Pac. 1020, citing 3 Pom. Eq. Jur., § 1419; Owen Creek Presbyterian Church v. Taggart, 44 Ind. App. 393, 89 N. E. 406; Chamness v. Chamness, 53 Ind. App. 225, 101 N. E. 323; Fitcher v. Griffiths, 216 Mass. 174, 103 N. E. 471 (wife who has released dower). The interest to be protected in such cases may be merely a contingent one: Pease v. Egan, supra.

Cases of the second class are considered in 3 Pom. Eq. Jur., §§ 1211-1213.

85 Spaulding v. Harvey, 129 Ind. 106, 28 Am. St. Rep. 176, 13 L. R. A. 619, 28 N. E. 323; Milburn v. Phillips, 143 Ind. 93, 52 Am. St. Rep. 403, 42 N. E. 461; Taylor v. Girard Life Ins. Co., 1 App. Cas. (D. C.) 209. See, also, Sinning v. Sumpter, 86 Kan. 454, 121 Pac. 332; Journal Publishing Co. v. Barber, 165 N. C. 478, 81 S. E. 694; Lee v. Newell, 96 Neb. 209, 147 N. W. 684; Babcock v. Orcutt (Okl.), 160 Pac. 729. Contra, Campbell v. Foster Home Ass'n, 163 Pa. St. 609, 43 Am. St. Rep. 818, 26 L. R. A. 117, 30 Atl. 222.

86 The text is cited in Davies v. Pugh, 81 Ark. 253, 99 S. W. 78.

not himself paying the debt, but loaning money to the debtor upon his personal security, but with the understanding that it is to be used in removing an encumbrance, is thereby entitled to claim the benefit of the encumbrance removed, is a matter of doubt.<sup>87</sup>

The subject of this paragraph is considered at some length in Pom. Eq. Jur., § 1212, notes. At request of the principal debtor: Demeter v. Wilcox, 115 Mo. 634, 37 Am. St. Rep. 422, 22 S. W. 613; Clark v. Marlow, 149 Ind. 41, 48 N. E. 359; Warford v. Hankins, 150 Ind. 489, 50 N. E. 468; Straman v. Rechtine, 58 Ohio St. 443, 51 N. E. 44; MacGreal v. Taylor, 167 U. S. 688, 42 L. Ed. 326, 17 Sup. Ct. 961. At the request of another party to the obligation: Martin v. Martin, 164 Ill. 640, 56 Am. St. Rep. 219, 45 N. E. 1007; Warford v. Hankins, 150 Ind. 489, 50 N. E. 468, eiting 3 Pom. Eq. Jur., § 1212.

A state of facts somewhat peculiar is presented when the debt of one man is paid with money or property of another, which is either taken from the latter wrongfully and without his consent or which, being in the possession of the debtor, is wrongfully applied by him in payment of his debt. Reasoning a fortiori from cases where the owner consents to the application of the money by the debtor, it would seem that subrogation should be allowed, especially as the element of compulsion is also present: Colton v. Dacy, 61 Fed. 481; and see Reddington v. Francy, 131 Wis. 518, 111 N. W. 725; Heller Aller Co. v. Ries, 164 Mich. 501, 129 N. W. 724; Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137, 115 N. E. 465 (citing Pom. Eq. Jur., § 1419, note). See, however, Wilkins v. Gibson, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374; Green v. Western Nat. Bank, 86 Md. 279, 38 Atl. 131. In Liles v. Rogers, 113 N. C. 197, 37 Am. St. Rep. 627, 18 S. E. 104, it was held that when money, the proper application of which was secured by one set of sureties, and in which they therefore had an equity, was wrongfully used in discharge of another obligation, the former sureties were not subrogated to the rights of the creditor against the sureties on the latter obligation.

87 A subsequent encumbrancer loaning money to pay off a prior encumbrance has been held subrogated to the latter: Davison v. Gregory, 132 N. C. 389, 43 S. E. 916; so, also, where the money was loaned by a stranger: McWilliams v. Bones, 84 Ga. 203, 10 S. E.

Persons who attempt, in good faith, to purchase property at a void judicial sale, and whose purchase-money is used to satisfy valid claims against the property, while they act neither by compulsion nor request of the debtor,<sup>88</sup> nor for self-protection, are nevertheless warranted in their payment by public invitation, and are held subrogated to the rights of the parties receiving the

724. See, also, First Nat. Bank of Merkel v. Armstrong (Tex. Civ. App.), 168 S. W. 873, citing this paragraph of the text. Contra, Kleiman v. Geiselman, 114 Mo. 437, 35 Am. St. Rep. 761, 21 S. W. Other cases hold that the loan must have been made under an agreement that the lender should be subrogated: Wilkins v. Gibson, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374; McCowan v. Brooks, 113 Ga. 532, 39 S. E. 115. See, also, J. P. Browder & Co. v. Hill, 136 Fed. 821, 69 C. C. C. 499. If the loan was made by one who took a security from the borrower, which, however, turns out to be invalid, subrogation is generally allowed: Straman v. Rechtine, 58 Ohio St. 443, 51 N. E. 44; State Nat. Bank v. Vicroy, 24 Ky. Law Rep. 892, 70 S. W. 183; Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437; Kalschener v. Upton, 6 Dak. Ter. 449, 43 N. W. 816. See, also, Davies v. Pugh, 81 Ark. 253, 99 S. W. 78, citing this paragraph of the text; Helm v. Lynchburg Trust & Savings Bank, 106 Va. 603, 56 S. E. 598; Hughes v. Thomas, 131 Wis. 315, 11 Ann. Cas. 673, 11 L. R. A. (N. S.) 744, 111 N. W. 474. Contra, see Capen v. Garrison, 193 Mo. 335, 5 L. R. A. (N. S.) 838, 92 S. W. 368. So in the case of money loaned on void bonds: Coffin v. Board of Commissioners, 114 Fed. 518. So, where the money was paid to the debtor by a purchaser believing that he was getting title, and the title proved bad, the purchaser was held subrogated to encumbrances paid off with his money: Joyce v. Dauntz, 55 Ohio St. 538, 45 N. E. 900.

88 A somewhat strained invitation from the debtor may perhaps be implied from the fact that he is allowing his property to be sold in that way. Probably a better ground for the equity in this class of cases is the invitation issued by the public, and favored by public policy, and the fact that such sales are matters of public necessity, and must be favored.

money.<sup>89</sup> The same rule has been applied in the case of a void sale by a mortgagee under a power.<sup>90</sup>

89 Where one purchases land at a void administrator's sale, and his money is applied in payment of debts charged on the land, he is subrogated to the rights of the creditors: Hunter v. Hunter, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33; Bond v. Montgomery, 56 Ark. 563, 35 Am. St. Rep. 119, 20 S. W. 525; Hull's Adm'r v. Hull's Heirs, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. 49; also, Lanier v. Heilig, 149 N. C. 384, 63 S. E. 69. In Chambers v. Jones, 72 Ill. 275, it was held that such a party cannot actively enforce the creditor's rights against the land, but equity will refuse a decree quieting title against him, until the money is returned.

Where land is sold at a void tax sale to pay off a lien for betterment taxes, the purchaser is subrogated to the tax lien: Reed v. Kalfsbeck, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466; Gregory v. Bartlett, 55 Ark. 30, 17 S. W. 344.

Where a city sold land not belonging to it and used the proceeds to pay bonds, the purchaser was subrogated to the rights of the former bondholders: Vasser v. City of Liberty, 50 Tex. Civ. App. 111, 110 S. W. 119.

A purchaser at a void foreclosure sale is subrogated to the rights of the mortgagee: Bailey v. Bailey, 41 S. C. 337, 44 Am. St. Rep. 713, 19 S. E. 669; Dutcher v. Hobby, 86 Ga. 198, 22 Am. St. Rep. 444, 10 L. R. A. 472, 12 S. E. 356; McCague v. Eller, 77 Neb. 531, 124 Am. St. Rep. 863, 110 N. W. 318; Tualatin Academy v. Keene, 59 Or. 496, 117 Pac. 424. The purchaser must show, however, that he bought believing that he was getting legal title, or that he bought to protect himself against a reasonably doubtful claim: Griffin v. Griffin, 70 S. C. 220, 49 S. E. 561.

Purchaser at sheriff's sale on execution: Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813. See to the contrary, Jewett v. Feldheiser, 68 Ohio St. 523, 67 N. E. 1072.

90 Givins v. Carroll, 40 S. C. 413, 42 Am. St. Rep. 889, 18 S. E. 1030; Brewer v. Nash, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857. See, also, Curran v. Bartlett, 165 Mich. 205, 130 N. W. 633; Griffin v. Griffin, 75 S. C. 249, 117 Am. St. Rep. 899, 55 S. E. 317; 82 S. C. 256, 64 S. E. 160. See Brown v. Rouse, 125 Cal. 645, 58 Pac. 267, holding that subrogation will not be allowed where the mistake was one of law.

§ 2348. (§ 921d.) Volunteers.—A mere volunteer, it is generally agreed, is never entitled to subrogation. The term is used to designate one who, acting upon his own initiative, pays the debt of another without invitation, compulsion, or the necessity of self-protection.<sup>91</sup>

91 See Pom. Eq. Jur., § 1212, and cases cited. The term is applied somewhat indiscriminately in the reports to almost anyone who applies for subrogation and is refused, no matter what the reason be, so that many statements of the courts are misleading. Among persons who have been considered volunteers, and not entitled to subrogation, are the following: A tax-collector entering taxes as "paid," and charging himself with them upon receipt of a bad check: Mercantile Trust Co. v. Hart, 76 Fed. 673, 35 L. R. A. 352, 22 C. C. A. 473, citing In re Wallace's Estate, 59 Pa. St. 401, and other cases; an agent for collection, remitting to his principal without having collected the money: Bennett v. Chandler, 199 Ill. 97, 64 N. E. 1052; a co-surety, bound for a definite amount, and paying a sum in excess of that amount, is, as to the excess, a volunteer: Hanover Fire Ins. Co. v. Brown, 77 Md. 64, 39 Am. St. Rep. 386, 25 Atl. 989.

See, also, in support of the text, McKinnon v. New York Assets Realization Co., 217 Fed. 339, 133 C. C. A. 255; Fast v. State, 182 Ind. 606, 107 N. E. 465; Jones v. Louisville Tobacco Warehouse Co., 135 Ky. 824, 121 S. W. 633, 123 S. W. 307; In re Commonwealth Trust Co. of Pittsburgh, 247 Pa. 508, 93 Atl. 766; Charnock v. Jones, 22 S. D. 132, 16 L. R. A. (N. S.) 233, 115 N. W. 1072.

But payment of a debt by a stranger should, it is submitted, operate as a discharge of the debt and a defense for the debtor only where ratified by the latter: See § 912, note 11, ante. While the debtor should have a perfect right to repudiate such payment, and to refuse to indemnify the stranger, he should not, at the same time, be allowed to claim the benefit of the stranger's payment. The debt, therefore, should be still enforceable by the creditor, and as the creditor has already received its value, he should in all fairness hold the claim in trust for the stranger whose money has paid it. Accordingly, it has been held, in such cases, that the stranger or volunteer is entitled to reimbursement in case of subsequent ratification by the debtor, and otherwise to subrogation: Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794; Crumbish v. Central Imp. Co., 38 W. Va. 390, 45 Am. St. Rep. 872; Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162.

§ 2349. (§ 922.) Nature of the Right—Purely Equitable.—The process of subrogation is analogous to the creation of a constructive trust, the creditor being compelled to hold his rights against the principal debtor, and his securities, in trust for the subrogee. And even where the creditor held an obligation for which the subrogee was jointly bound, so that his payment constituted at law an absolute discharge by performance, so that there was really nothing to hold in trust, equity, by a doctrine somewhat analogous to the principle of estoppel, treats the debt as being still in force, for the benefit of the subrogee. Other courts, adhering more closely to the rules of constructive trusts, refuse subrogation in cases of the latter sort, unless the payment is made in the form of a fictitious purchase by a third party, who

94 This is true of a joint judgment against the principal and surety, even though it is paid by the latter and released of record. The surety is still entitled to subrogation to the creditor's rights thereunder: Neilson v. Fry, 16 Ohio St. 552, 91 Am. Dec. 110; Eddy v. Traver, 6 Paige Ch. 521; Hill v. Manser, 11 Gratt. (Va.) 522; Merryman v. State, 5 Har. & J. (Md.) 423; Richter v. Cummings, 60 Pa. St. 441; Turner v. Teague, 73 Ala. 554.

A joint accommodation maker of a specialty obligation, upon paying it, is subrogated to the rights of the holder, and entitled to rank as a specialty creditor: Lumpkin v. Mills, 4 Ga. 343; Powell's Ex'rs v. White, 11 Leigh (Va.), 309; Davis v. Smith, 5 Ga. 274, 47 Am. Dec. 279; Tinsley v. Oliver's Adm'r, 5 Munf. (Va.) 419; Grider v. Payne, 9 Dana (Ky.), 188; Shultz v. Carter, Speer Eq. (S. C.) 533; Sublett v. McKinney, 19 Tex. 438; Tutt v. Thornton, 57 Tex. 35.

Payment of mortgage notes by the maker when the debt has been assumed by an assignee of the mortgage will not extinguish the notes so as to prevent subrogation of the mortgagor to the mortgagee's

<sup>92</sup> See Henderson-Achert Lithographic Co. v. John Shillito Co., 64 Ohio St. 236, 83 Am. St. Rep. 745, 60 N. E. 295; Collum v. Emanuel, 1 Ala. 33, 34 Am. Dec. 757; quotation from Hart v. Railroad Co., note 77, ante.

<sup>93</sup> See note 91, ante, and § 912, note 11, ante.

will hold the claim in trust for the subrogee.<sup>95</sup> And the surety is allowed to bring a bill in such states to compel the creditor, upon payment of the debt, to make such an assignment.<sup>96</sup>

Subrogation is purely an equitable right,<sup>97</sup> and being an equity, it is subject to the rules governing equities.

rights in the mortgaged property: Nettleton v. Ramsay County Land Co., 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128.

95 Some of the later English cases until altered by statute (Mercantile Law Amendment Act, 19 & 20 Vict., c. 97, § 5), and one or two courts still, in this country, refuse to allow subrogation in the class of cases under discussion, because the debt being discharged, there is no longer a trust res. "As soon as a surety has paid the debt, an equity arises in his favor to have all of the securities which the creditor holds against the principal debtor transferred to him, and to avail himself of them as fully as the creditor could have done. The securities referred to do not include those which are extinguished by the payment of the debt; and unless the surety procures it to be assigned for his benefit to a third person, it is utterly extinguished, both at law and in equity, and he becomes a simple contract creditor": Liles v. Rogers, 113 N. C. 197, 37 Am. St. Rep. 627, 18 S. E. 104. See, as to a joint judgment, Peebles v. Gay, 115 N. C. 38, 44 Am. St. Rep. 429, 20 S. E. 173. See, however, Davison v. Gregory, 132 N. C. 389, 43 S. E. 916.

These courts refuse to adopt the expedient, generally adopted in this country, of considering that as existing which does not exist, and so securing a trust res for their constructive trust. And this expedient, while almost necessary to complete justice, and while somewhat analogous, perhaps, to the doctrine of estoppel, is, it must be admitted, a departure from any form of equitable machinery theretofore known.

<sup>96</sup> McDougald v. Dougherty, 14 Ga. 674. In most states, however, the assignment is considered superfluous: Dearborn v. Taylor, 18 N. H. 153. See, also, Pom. Eq. Jur., § 1214; Boice v. Conover, 69 N. J. Eq. 580, 61 Atl. 159.

97 This paragraph is cited in Wilson v. White, 82 Ark. 407, 12 Ann. Cas. 378, 102 S. W. 201. "Subrogation is an equitable right, and not a legal one, and can be enforced only in equity. It will not be enforced when it would be inequitable to do so, or where it would work injustice to others having equal equities?": Makeel v. Hotchkiss, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524. See, also,

The subrogee can work out his rights only through the creditor, and consequently his rights are limited by those of the creditor and he can enforce no rights that the creditor could not enforce. This equity in the creditor's securities is cut off by an innocent purchase of the latter for value. It is subject to prior equities, as well of the creditor as of third parties. It will, however,

Merchants & Miners' Transp. Co. v. Robinson etc. Towing & Transp. Co., 191 Fed. 769, 113 C. C. A. 427; American Bonding Co. of Baltimore, Md., v. Welts, 193 Fed. 978, 113 C. C. A. 598.

98 Pierson v. Catlin, 18 Vt. 77; Houston v. Branch Bank, 25 Ala. 250; Siegel v. Swartz, 117 Fed. 13, 54 C. C. A. 399; Weaver v. Gray, 37 Ind. App. 35, 76 N. E. 795; Poe v. Philadelphia Casualty Co., 118 Md. 347, 84 Atl. 476; Teter v. Teter, 65 W. Va. 167, 63 S. E. 967. Where a creditor, by accepting other security, has waived a vendor's lien, the surety cannot enforce such a lien by subrogation: Bradford, Adm'r v. Marvin, 2 Fla. 463; Miller v. Miller, Phill. Eq. (N. C.) 85.

99 A subsequent encumbrancer who satisfied a first mortgage and had it discharged of record will not be subrogated to the mortgage as against a judgment creditor of the mortgagor, who later redeems the land from the subsequent encumbrance, relying on the recorded discharge of the first mortgage: Ahern v. Freeman, 46 Minn. 156, 24 Am. St. Rep. 206, 48 N. W. 677. See, also, First Nat. Bank of Seattle v. City Trust Safe Dep. & Surety Co. of Phila., 114 Fed. 529, 52 C. C. A. 313; Orvis v. Newell, 17 Conn. 97; Foster v. Williams, 144 Mo. App. 219, 128 S. W. 797; Wolford v. Bias, 79 W. Va. 349, 90 S. E. 875.

100 Where a security has been given a creditor, for several claims, upon one of which is a personal surety, the surety is not, upon payment of his obligation, entitled to the security held by the creditor. Until all of the claims are paid in full, the equity of the surety is subject to that of the creditor: Crump v. McMurtry, 8 Mo. 408; National Bank of Commerce v. Rockefeller, 174 Fed. 22, 98 C. C. A. 8; Richeson v. National Bank of Mena, 96 Ark. 594, 132 S. W. 913; Kissire v. Plunkett-Jarrell Grocer Co., 103 Ark. 473, 145 S. W. 567. This note is cited in Finnell v. Jas. H. Goodman & Co. Bank, 156 Cal. 18, 103 Pac. 483. For examples of other prior equities, see Massie v. Marn, 17 Iowa, 131; Farmers & Drovers' Bank v. Sherley, 12 Bush (Ky.), 304; Fishback v. Bodman & Co., 14 Bush (Ky.), 117;

prevail over equities arising subsequently, or over a purchaser with notice of it.<sup>101</sup> As between several parties to an obligation who are not ultimately liable for its payment, the equity of anyone paying the obligation is, of course, superior to that of parties whose liability is prior to his own, but subject to the equities of those whose liability is subsequent to his own.<sup>102</sup>

Like any other person seeking equitable relief, the subrogee must come into court with clean hands, and one making a payment in order to defraud another will not be entitled to subrogation.<sup>103</sup> A payment, at the request

Miller v. Stout, 5 Del. Ch. 259; and see Central Trust Co. of New York v. Third Ave. R'y Co., 180 Fed. 710, 103 C. C. A. 492. See, however, note 101, post.

101 A creditor who holds a mortgage to secure a note signed by a principal and surety cannot, even with the consent of the principal, hold the mortgage security for a debt of the principal subsequently incurred, as against the surety's right to subrogation upon payment of the first note: City Nat. Bank v. Dudgeon, 65 Ill. 11; Pierce v. Garrett, 65 Ill. App. 682; Beaver v. Slanker, 94 Ill. 175. See, also, in support of the text, Labbe v. Bernard, 196 Mass. 551, 14 L. R. A. (N. S.) 457, 82 N. E. 688; George v. Crim, 66 W. Va. 421, 66 S. E 526; In re Rock Hill Cotton Factory Co., 68 S. C. 436, 47 S. E. 728 The surety's right of subrogation will also prevail over the right of an assignee of the security with notice of the surety's rights: Albion State Bank v. Knickerbocker, 125 Mich. 311, 7 Detroit Leg. N. 536, 84 N. W. 311; and see Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 52 L. Ed. 547, 28 Sup. Ct. 389; Hardaway v. National Surety Co., 211 U. S. 552, 53 L. Ed. 321, 29 Sup. Ct. 202; Title Guaranty & Surety Co. v. Dutcher, 203 Fed. 167; National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55. Compare First Nat. Bank v. O'Neil Engineering Co. (Tex. Civ. App.), 176 S. W. 74.

102 See § 912, note 4, ante.

103 Bleakley's Appeal, 66 Pa. St. 187. In general, see Dixon v. Thompson, 52 Ind. App. 560, 98 N. E. 738; Brown v. Sheldon State Bank, 139 Iowa, 83, 117 N. W. 289; Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63; Miller v. Kelsay, 114 Mo. App. 598, 90 S. W. 395;

of the debtor, under a contract void for usury will not support a claim for subrogation. Laches may defeat the right of the subrogee, but this seems to be so only where a third party has thereby been led to act to his disadvantage. 105

§ 2350. (§ 923.) Conditions upon Which Subrogation is Allowed—Payment—Other Security.—In the case of a suretyship obligation, a limited equity of the surety in the rights of the creditor against the principal debtor arises as soon as the obligation is assumed, without further condition, and if any of these rights are thereafter released, to the prejudice of the surety, he is released from his obligation. 106 But the right of a subrogee to have the principal obligation and its securities actually applied for his own benefit does not arise until the creditor has been paid in full, 107 or at least until the prin-

Akers v. Lord, 67 Wash. 179, 121 Pac. 51. Compare Adams v. Young, 200 Mass. 588, 86 N. E. 942 (mere constructive fraud does not prevent right).

104 Trible v. Nichols, 53 Ark. 271, 22 Am. St. Rep. 190, 13 S. W. 796.

105 Mercantile Trust Co. v. Hart, 76 Fed. 673, 35 L. R. A. 352, 22 C. C. A. 473; Gring's Appeal, 89 Pa. St. 336; Mercantile Trust Co. v. Kanawha etc. R'y Co., 58 Fed. 6, 7 C. C. A. 3; Nelson v. Munch, 28 Minn. 314, 9 N. W. 863. See, also, American Fidelity Co. v. East Ohio Sewer Pipe Co., 53 Ind. App. 335, 101 N. E. 671; Gulick v. Peckenpaugh, 154 Iowa, 380, 134 N. W. 945.

Munch, 28 Minn. 314, 9 N. W. 863; Smith v. Ferris, 143 N. Y. 495, 39 N. E. 3; Noble v. Murphy, 91 Mich. 653, 30 Am. St. Rep. 507, 52 N. W. 148; Mingus v. Daugherty, 87 Iowa, 56, 43 Am. St. Rep. 354, 54 N. W. 66. This contingent equity enables the subrogee to follow the property into the hands of a purchaser, before payment, with notice, and to charge him as constructive trustee: First Nat. Bank of Bellville v. Wheeler, 12 Tex. Civ. App. 489, 33 S. W. 1093.

107 The text is quoted in Jones v. Harris, 90 Ark. 51, 117 S. W. 1077; and cited in Finnell v. Jas. H. Goodman & Co. Bank, 156 Cal. 18, 103 Pac. 483. See Receiver of N. J. etc. R'y v. Nortendyke, 27

cipal obligation has been discharged in some way. 108 And where a collateral security was given, in the first

N. J. Eq. 658; a mere showing that a surety has made a part payment, for which he is entitled to indemnity from the principal, is insufficient: Musgrave v. Dickson, 172 Pa. St. 629, 51 Am. St. Rep. 765, 33 Atl. 705. See, also, Hollingsworth v. Floyd, 2 Har. & G. (Md.) 87; Kyner v. Kyner, 6 Watts (Pa.), 221; Magee v. Legett, 48 Miss. 139; McConnell v. Beattie, 34 Ark. 113; and these recent cases: United States Fidelity & G. Co. v. Union Bank & T. Co., 228 Fed. 448, 143 C. C. A. 30; Plunkett v. State Nat. Bank, 90 Ark. 86, 117 S. W. 1079; Knaffl v. Knoxville Banking & Trust Co., 133 Tenn. 655, Ann. Cas. 1917C, 1181, 182 S. W. 232; Sipe v. Taylor, 106 Va. 231, 55 S. E. 542. The estate of a bankrupt surety, which cannot pay the claim in full, cannot claim subrogation upon payment of a dividend: Mercantile Nat. Bank of New York v. MacFarlane, 71 Minn. 497, 70 Am. St. Rep. 352, 74 N. W. 287. A stockholder of a corporation who pays a percentage of the claim of a creditor, in discharge of his full liability, is not thereby subrogated to the creditor's rights against the corporation, where the creditor's claim is not yet entirely satisfied: Sacramento Bank v. Pacific Bank, 124 Cal. 147, 71 Am. St. Rep. 36, 56 Pac. 787. Of course, this rule is for the protection of the creditor, and where a part of the debt has already been paid by the principal, payment of the balance by a surety would entitle the latter to subrogation. [This paragraph is cited to this effect in Journal Pub. Co. v. Barber, 165 N. C. 478, 81 S. E. 694.] And it would seem, that a party making a partial payment should be permitted to join the creditor and principal debtor in an action to compel the application of the securities to the satisfaction of the balance of the creditor's claim, and then toward the reimbursement of the surety: See Phila. Underwriters v. Ft. Worth etc. R'v Co., 31 Tex. Civ. App. 104, 71 S. W. 419; Mobile Ins. Co. v. Columbia etc. R. R. Co., 41 S. C. 408, 44 Am. St. Rep. 725, 19 S. E. 858; Home Mut. Ins. Co. v. Or. R'y & Nav. Co., 20 Or. 569, 23 Am. St. Rep. 151, 26 Pac. 857; Regan v. New York & New Eng. R. R. Co., 60 Conn. 124, 25 Am. St. Rep. 306, 22 Atl. 503.

108 If the principal obligation calls for the performance of an act, as the support of the promisee, of course the furnishing of the support is sufficient: Clark v. Marlow, 149 Ind. 41, 48 N. E. 359; or if an obligation calling for a cash payment is discharged in some other way, with the consent of the creditor, as by the subrogee's giving a new note of his own, that is sufficient: City of Keokuk v.

place, to secure other debts, as well as that by which the subrogee was bound, these, too, must be satisfied before the subrogee may share in the collateral. 109 A payment made with the intention of conferring a gratuitous favor on the principal debtor will not give rise to subrogation, but the presumption is against such an intention as this. 110

It has been held that a party seeking subrogation must show that it is necessary to his protection, and that there is no other way in which he can get reimbursement, and that one who has other security is therefore not entitled to subrogation.<sup>111</sup> Other decisions recognize the latter part of the rule, but place it upon the ground that by an express contract for indemnity, the surety has waived subrogation.<sup>112</sup>

Love, 31 Iowa, 119; Stedman v. Freedman, 15 Ind. 86; Journal Pub. Co. v. Barber, 165 N. C. 478, 81 S. E. 694. See Knighton v. Curry, 62 Ala. 404. It is sufficient also if the discharge be by levy of execution on the surety's property: Crawford v. Richeson, 101 Ill. 351.

109 See note 100, ante.

110 Farlee v. Field (N. J. Eq.), 36 Atl. 945; McArthur v. Martin, 23 Minn, 74.

111 Pierson v. Haddonfield, 66 N. J. Eq. 180, 57 Atl. 471; and see Culbertson v. Salinger & Brigham, 131 Iowa, 307, 108 N. W. 454. (subrogation does not apply to one who has been fully reimbursed). It is immaterial, however, that the principal debtor has confessed judgment to the surety, for his indemnity: Saint v. Ledyard, 14 Ala. 244. And the fact that the principal is solvent will not defeat the right to subrogation; the subrogee is not required to show the insolvency of the principal: Spaulding v. Harvey, 129 Ind. 106, 28 Am. St. Rep. 176, 13 L. R. A. 619, 28 N. E. 323.

112 Cooper v. Jenkins, 32 Beav. 337; Cornwell's Appeal, 7 Watts & S. (Pa.) 305. This does not apply, however, to securities received by the creditor, after the taking of the indemnity by the surety: Lake v. Brutton, 8 De Gex, M. & G. 440. And it has been held that the surety in such a case may elect whether to rely on his indemnity or his right of subrogation: Flannagan v. Forrest, 94 Ga. 685, 21 S. E. 712. See, also, Huntington v. The Advance, 72 Fed. 793, 19 C. C. A. 194.

It is not necessary that the subrogee, either at the time he first became bound or at the time of payment, should have known of the securities in the hands of the creditor.<sup>113</sup>

§ 2351. (§ 924.) Rights upon Which Subrogation Operates.—The subrogee is, in general, entitled to stand in the shoes of the creditor, and to enforce every right which the creditor himself could have enforced, so far as necessary to secure reimbursement or contribution.<sup>114</sup> This includes the right to enforce the principal obligation itself, even though it be discharged at law,<sup>115</sup> and to claim all of the incidents of such obligation.<sup>116</sup>

113 A surety may be entitled to securities obtained by the creditor after the surety became bound, and of which he had no notice at the time of payment: Scanland v. Settle, Meigs (Tenn.), 169; Scott v. Featherstone, 5 La. Ann. 306; Smith v. McLeod, 3 Ired. Eq. (N. C.) 390. See, also, Fisk v. Bower, 227 Mass. 315, 116 N. E. 568.

114 The text is quoted in Smith v. Davis, 71 W. Va. 316, 43 L. R. A. (N. S.) 614, 76 S. E. 670. This right, however, being a mere equity, is, as already explained, subject to prior equities, and a surety paying a debt could not be subrogated, for instance, to the creditor's right against another surety only subsequently liable: See § 912, note 4, ante. And as against a co-surety, the right is limited to the amount of contribution to which the subrogee is entitled: See § 918, note 51, ante. In all cases, of course, the subrogee can enforce the rights no further than is necessary for his own reimbursement. He cannot make a profit at the expense of the principal. And the principal can set off any debt due him from the subrogee: Givins v. Carroll, 40 S. C. 413, 42 Am. St. Rep. 889, 18 S. E. 1030.

115 See § 922, notes 94 and 95, ante.

116 This is very forcibly illustrated in Pace v. Pace Adm'r, 95 Va. 792, 44 L. R. A. 459, 30 S. E. 361, in which it is held that one surety, who has paid a debt in full, is subrogated to the creditor's right to prove the full claim against the bankrupt estate, and to recover dividends thereon, up to the amount of the contribution to which he is entitled. The text is cited in Vasser v. City of Liberty, 50 Tex. Civ. App. 111, 110 S. W. 119; and quoted in Smith v. Davis, 71 W. Va. 316, 43 L. R. A. (N. S.) 614, 76 S. E. 670.

it be a preferred specialty debt, the subrogee is usually held entitled to rank as a preferred creditor, 117 and it seems that the period of limitation applicable to the obligation in the hands of the creditor should apply also to an action by the subrogee, although this is not generally recognized. 118 So a provision in a note for

117 See cases cited under § 922, note 94, ante.

118 Some cases hold that the right to subrogation is based on an implied promise, and is barred at the expiration of the period allowed for action of assumpsit: Darrow v. Summerhill, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680; Junker v. Rush, 136 Ill. 179, 11 L. R. A. 183, 26 N. E. 499. This seems to be upon the theory that the right to subrogation is merely incident to the right to reimbursement, and so should perish with the direct action for reimbursement. This view seems confusing, for in many cases of subrogation there can be no simple action for reimbursement at all. See § 916, notes 41 and 39, ante. It seems better, therefore, to recognize two distinct rights in the subrogee, one to sue for simple reimbursement, and the other to enforce the creditor's right, so far as necessary, and, in choosing the latter, to use the period of limitation applicable thereto: See Hopewell v. Kerr, 9 Ind. App. 11, 36 N. E. 48; Hull v. Myers, 90 Ga. 674, 16 S. E. 653; Sublett v. McKinney, 19 Tex. 438. Still other courts consider subrogation, not as a vested right, but as something to be procured in an action against the creditor, and class this, under the statute of limitations, as "an action not otherwise provided for." "Strictly speaking, there are two distinct causes of action in such cases, one consists of the facts that show the right of the plaintiff to be subrogated to the rights of the creditor, in the securities held by the latter, the other consists of those facts which show that the security may be enforced against the principal": Zuellig v. Hemerlie, 60 Ohio St. 27, 71 Am. St. Rep. 707, 53 N. E. 447. See, also, Rittenhouse v. Levering, 6 Watts & S. (Pa.) 190; Joyce v. Joyce, 1 Bush. (Ky.), 474; Guild v. McDaniels, 43 Kan. 548, 23 Pac. 607.

It has been held that where the state is the creditor, the subrogee may claim the benefit of the state's exemption from the statute of limitations: American Bonding Co. v. National Mechanics' Bank, 97 Md. 598, 99 Am. St. Rep. 466, 55 Atl. 395. See, also, United States Fidelity & G. Co. v. Union Bank & T. Co., 228 Fed. 448, 143 C. C. A. 30.

liquidated damages, or attorney's fees in case of suit, may be taken advantage of by the subrogee. 119

The subrogee may also claim any collateral securities in the hands of the creditor, whether they be in the form of a mortgage given by the principal debtor, 120 or a lien arising by operation of law, as in the case of a vendor's lien, 121 landlord's lien, 122 or mechanic's lien. 123 He may also claim the advantage of any securities obtained by the creditor through his own efforts, as in the case of an attachment or judgment lien, 124 or the right to finish an uncompleted suit. 125

- 119 Beville v. Boyd, 16 Tex. Civ. App. 491, 41 S. W. 670.
- 120 Fullerton v. Bailey, 17 Utah, 85, 53 Pac. 1020; Freeburg v. Erksell, 123 Iowa, 464, 99 N. W. 118; First Nat. Bank of Bellville v. Wheeler, 12 Tex. Civ. App. 489, 33 S. W. 1093; Givins v. Carroll, 40 S. C. 413, 42 Am. Rep. 889, 18 S. E. 1030; Dutcher v. Hobby, 86 Ga. 198, 22 Am. St. Rep. 444, 10 L. R. A. 472, 12 S. E. 356; Nettleton v. Ramsay County Land Co., 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128; Brewer v. Nash, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857; Bailey v. Bailey, 41 S. C. 337, 44 Am. St. Rep. 713, 19 S. E. 669, 728; Noble v. Murphy, 91 Mich. 653, 30 Am. St. Rep. 507, 52 N. W. 148. See, also, Tripp v. Harris, 154 N. C. 296, 35 L. R. A. (N. S.) 348, 70 S. E. 470; Smith v. Folsom, 80 Ohio St. 218, 88 N. E. 546.
- 121 Darrow v. Summerhill, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680; Finnell v. Finnell, 159 Cal. 535, 114 Pac. 820. But this is not the prevailing rule in the United States, as respects a vendor's lien after conveyance: See 3 Pom. Eq. Jur., § 1254.
- 122 Mingus v. Daugherty, 87 Iowa, 56, 43 Am. St. Rep. 354, 54
   N. W. 66; Hall v. Hoxsey, 84 Ill. 616.
  - 123 Fitch v. Stallings, 5 Colo. App. 106, 38 Pac. 393.
- 124 Brewer v. Franklin Mills, 42 N. H. 292; Peebles v. Gay, 115 N. C. 38, 44 Am. St. Rep. 429, 20 S. E. 173; Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813. See, also, Moody v. Huntley, 149 Fed. 797 (attachment); Honce v. Schram, 73 Kan. 368, 85 Pac. 535; Boice v. Conover, 69 N. J. Eq. 580, 61 Atl. 159; Smith v. Davis, 71 W. Va. 316, 43 L. R. A. (N. S.) 614, 76 S. E. 670 (judgment lien on after-acquired land of principal); George v. Crim, 66 W. Va. 421, 66 S. E. 526.
- 125 Braught v. Griffith, 16 Iowa, 26. Contra, Griffin v. Thomas, 21 Ga. 198.

Miscellaneous rights to which a subrogee has been held entitled are a charge by will on land;<sup>126</sup> rights in an assignment for the benefit of creditors;<sup>127</sup> the right to set aside a fraudulent conveyance;<sup>128</sup> right to follow trust property into the hands of a purchaser with notice;<sup>129</sup> the right of an administrator to reimbursement from land of the estate for debts paid;<sup>130</sup> the peculiar priority of a purchase-money mortgage;<sup>131</sup> money reserved by order of court as security for a fiduciary's performance of duty;<sup>132</sup> the machinery of collection, including the right to bring a creditor's bill.<sup>133</sup>

A subrogee may be entitled to enforce the creditor's rights against third persons, other than the principal debtor. <sup>134</sup> It extends to rights against a third party liable ex delicto, as a purchaser of converted goods, <sup>135</sup> or one participating in or assisting a breach of trust or other wrong on the part of the subrogee's principal, <sup>136</sup>

- 126 Hunter v. Hunter, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33.
  - 127 Ogburn v. Wilson, 93 N. C. 115.
- 128 Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913; Dudley v. Buckley, 68 W. Va. 630, 70 S. E. 376.
  - 129 Rice v. Rice, 108 Ill. 199.
  - 130 Taylor v. Taylor, 8 B. Mon. (Ky.) 419, 48 Am. Dec. 400.
- 131 Demeter v. Wilcox, 115 Mo. 634, 37 Am. St. Rep. 422, 22 S. W. 613. See, also, Overturf v. Martin, 170 Ind. 308, 84 N. E. 531.
  - 132 In re Rock Hill Cotton Factory Co., 68 S. C. 436, 47 S. E. 728.
- 133 Hull's Adm'r v. Hull's Heirs, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. 49.
- 134 "The equities of sureties to subrogation extend not only to the rights of the creditor as against the principal, but to all rights of the creditor respecting the debt which the sureties pay": City of Keokuk v. Love, 31 Iowa, 119. See, also, National Surety Co. v. State Sav. Bank, 156 Fed. 21, 13 Ann. Cas. 421, 14 L. R. A. (N. S.) 155, 84 C. C. A. 187.
  - 135 Skiff v. Cross, 21 Iowa, 459.
- 136 American Bonding Co. v. National Mechanics' Bank, 97 Md. 598, 99 Am. St. Rep. 466, 55 Atl. 395; Browne v. Fidelity & D. Co.,

and in short, against any co-surety, to the extent of proper contribution, and against any other surety or person in the position of a surety, whose liability is prior to that of the subrogee, or from whom the subrogee would be entitled to indemnity.<sup>137</sup> A joint debtor paying a debt in full is also entitled to the benefit of the creditor's claim against all of the other joint debtors.<sup>138</sup>

Where the state is the creditor, as a rule, no difference is made in the rights of subrogation, and the subrogee is entitled to enforce any lien or preference belonging to the state.<sup>139</sup> This doctrine is limited, how-

98 Tex. 55, 80 S. W. 593. See, also, American Nat. Bank v. Fidelity & Deposit Co., 129 Ga. 126, 12 Ann. Cas. 666, 58 S. E. 867; Caviness v. Fidelity & Deposit Co. of Md., 140 N. C. 58, 52 S. E. 265; United States Fidelity & G. Co. v. Citizens' State Bank, 36 N. D. 16, 161 N. W. 562; United States Fidelity & Guaranty Co. v. People's Bank, 127 Tenn. 720, 157 S. W. 414; Dobbins v. Carroll, 137 Tenn. 133, 192 S. W. 166.

- 137 See § 912, note 4, ante.
- 138 Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913.

139 Sureties on official bonds are entitled to subrogation to the rights of the state in enforcing reimbursement from a principal, or contribution from a co-surety: Cummings v. May, 110 Ala. 479, 20 South. 307; Boone Co. Bank v. Byrum, 68 Ark. 71, 56 S. W. 532; Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286; Bunting v. Ricks, 22 N. C. 130, 32 Am. Dec. 699. See, also, Singleton v. United States Fidelity & Guaranty Co., 195 Ala. 506, 70 South. 169 (citing Pom. Eq. Jur., § 1419); State ex rel. Stewart v. Reid, 122 La. 590, 47 South. 912.

Payment of the taxes of another by a proper party may subrogate the party making the payment to the lien of the state: Taylor v. Wilcox, 167 Mass. 572, 46 N. E. 115; Dunsmuir v. Port. Angeles Gas etc. Co., 30 Wash. 586, 71 Pac. 9. See, also, Northern Inv. Co. v. Frey R. E. & I. Co., 33 Colo. 480, 108 Am. St. Rep. 104, 81 Pac 300; Equitable Trust Co. v. Kelsey, 209 Mass. 416, Ann. Cas. 1912B, 750, 95 N. E. 850; Title Guarantee & Trust Co. v. Haven, 196 N. Y. 487, 17 Ann. Cas. 1131, 25 L. R. A. (N. S.) 1308, 89 N. E. 1082, 1085; New York University v. American Book Co., 197 N. Y. 294, 90 N. E. 819; Childs v. Smith, 51 Wash. 457, 130 Am. St. Rep. 1107, 99 Pac.

ever, by some cases, which, apparently, upon grounds of public policy, deny to the individual the peculiar machinery of collection reserved to the state.<sup>140</sup>

§ 2352. (§ 925.) Subrogation of Creditor or Co-surety to Securities Given to Indemnify a Surety.—Where securities have been given by the principal to a surety, to indemnify him against loss, the creditor is said to be subrogated to the rights of the surety in the securities. 141 Similarly a co-surety who has paid part or all

304; but see Stone v. Tilley, 100 Tex. 487, 123 Am. St. Rep. 819, 15 Ann. Cas. 524, 10 L. R. A. (N. S.) 678, 101 S. W. 201.

Other instances of subrogation to the lien or priority of the state: American Bonding Co. of Baltimore, Md., v. Reynolds, 203 Fed. 356; Brown v. American Bonding Co. of Baltimore, Md., 210 Fed. 844, 127 C. C. A. 406 (none, where state did not ask for priority).

In United States v. Ryder, 110 U. S. 729, 28 L. Ed. 308, 4 Sup. Ct. 196, it was held that a surety on a bail bond cannot become subrogated to the rights of the United States, and cannot even recover reimbursement from the principal. That a subrogee cannot sue in the name of the United States, nor enjoy its peculiar privileges of procedure, see United States v. Preston, 4 Wash. C. C. 446, Fed. Cas. No. 16,087.

140 Griffing v. Pintard, 25 Miss. 173; Hinchman v. Morris, 29 W. Va. 673, 2 S. E. 863; Irby v. Livingston, 81 Ga. 281, 6 S. E. 591. See, also, Brown v. Sheldon State Bank, 139 Iowa, 83, 117 N. W. 289.

141 4 Pom. Eq. Jur., § 1419, and cases cited; Albion State Bank v. Knickerbocker, 7 Detroit Leg. N. 536, 125 Mich. 311, 84 N. W. 311; Blanton v. Bostic, 126 N. C. 418, 35 S. E. 1035; Henderson-Achert Lith. Co. v. John Shillito Co., 64 Ohio St. 236, 83 Am. St. Rep. 745, 60 N. E. 295; First Nat. Bank of Bellville v. Wheeler, 12 Tex. Civ. App. 489, 33 S. W. 1093. See, also, Goff v. Ladd, 161 Cal. 257. 118 Pac. 792; Griffis v. First Nat. Bank of Connersville, 168 Ind. 546, 81 N. E. 490, affirming (Ind. App.), 79 N. E. 230; O'Neill v. State Sav. Bank, 34 Mont. 521, 87 Pac. 970; Johnson v. Martin, 83 Wash. 364, L. R. A. 1916C, 1057, 145 Pac. 429. Compare Hasbrouck v. Carr, 19 N. M. 586, 145 Pac. 133. The creditor is not

of the debt is entitled to the advantage of the securities, equally with the one to whom they were given.<sup>142</sup> These cases depend upon the principle that the securities have been dedicated, as it were, to the payment of the debt, and so a constructive trust for that purpose will be enforced.<sup>143</sup> They belong to a different field of equity jurisdiction, therefore, from cases of subrogation in general.<sup>144</sup>

entitled to the securities given to indemnify the surety by a stranger to the obligation, however: Henderson-Achert Lith. Co. v. John Shillito Co., supra.

142 Scribner v. Adams, 73 Me. 541; Baber v. Hanie, 163 N. C. 588, 80 S. E. 57.

143 Henderson-Achert Lith. Co. v. John Shillito Co., 64 Ohio St. 236, 83 Am. St. Rep. 745, 60 N. E. 295.

144 See § 911, ante.

## CHAPTER XLVIII. SUITS FOR AN ACCOUNTING.

## ANALYSIS.

§ 926. Origin of the equitable jurisdiction.

§ 927. Jurisdiction, when exercised—Inadequacy of legal remedies.

§ 928. Plea of stated account a bar.

§ 929. Mutual accounts.

§ 930. Complicated accounts.

§ 931. Fiduciary relations.

§ 932. Same; principal and agent.

§ 933. Same; profit sharers, part owners, tenants in common and joint tenants.

§ 934. When a discovery is necessary.

§ 935. Accounting as incidental to other relief.

§ 2353. (§ 926.) Origin of the Equitable Jurisdiction.—Historically considered, suits for accounting had their origin in the ancient common-law action of accountrender. This action was so narrow in its operation, so difficult of application, so dilatory and so expensive, that in England it seems not to have been brought more than a dozen times within the last two centuries, and in this country, save in the states where it has been developed and perfected by statute, it has long since given place to other and more adequate remedies. This common-law

1 4 Pom. Eq. Jur., § 1420. The procedure was to give a preliminary judgment, quod computet against the defendant, and then a second judgment that he pay the plaintiff the balance found to be due; 3 Black. Com. 163; Neal v. Keel's Ex'rs, 20 Ky. (4 T. B. Mon.) 162; McMurray v. Rawson, 3 Hill (N. Y.), 59. But if the balance was in the defendant's favor, the plaintiff could not be compelled to pay it: 1 Spence, Eq. Jur., 650. Moreover the auditors before whom the account was taken had no power to examine the parties on

action "lay only in cases where there was either a privity in deed, as against a bailiff or receiver appointed by the party, or a privity in law, ex provisione legis, as against guardians in socage." By the law-merchant, also, the action could be brought by one merchant as such against another merchant as such, charging the defendant as receptor denariorium.

"This action of account-render was the only means which the common law furnished of obtaining a settlement of an account, except that assumpsit might be brought for a determinate balance. But if the balance was disputed, it was necessary for the jury to investigate the items one by one, a task which was practically impossible." From the narrow scope and technical rules of this action, the inability of common-law courts to obtain a discovery from the defendant on his oath, the difficulty met with in cases of mutual and complicated accounts, and the impossibility of otherwise doing complete justice, it is easy to understand why the action of account-render fell into disuse, and a jurisdiction in equity to entertain suits for an accounting grew up."

oath, and all disputes over items had to be settled by as many issues in court: Jeremy, Eq. Jur., 504.

- 2 4 Pom. Eq. Jur., § 1420, note 1; Co. Litt. 90b. The ancient action of account-render was strictly confined to these parties, but statute later extended it to their executors and administrators: 3 & 4 Anne, c. 16; 13 Edw. I., c. 23; 31 Edw. III., c. 11.
  - 3 Co. Litt. 172a; 4 Pom. Eq. Jur., § 1420, note 1.
- 4 3 Black. Com. 162; Fanning v. Chadwick, 20 Mass. 420, 15 Am. Dec. 233.
  - 5 4 Pom. Eq. Jur., § 1420, note 1.
- 6 4 Pom. Eq. Jur., § 1420; Neal v. Keel's Ex'rs, 20 Ky. (4 T. B. Mon.) 162; 1 Spence, Eq. Jur., 649; Mitford, Eq. Pl., 120, 123; Bac. Abr., tit. Accompt. "A useless form of action, into which it is wholly unnecessary for us to undertake the difficult, if not impracticable task of infusing life and vigor": Stewart v. Kerr, 1 Morris (Iowa), 318.

§ 2354. (§ 927.) Jurisdiction, When Exercised—Inadequacy of Legal Remedies.—"The jurisdiction exists, therefore, and is well established; but the question arises, since there is a similar jurisdiction at law, When may a suit in equity for an accounting be brought? This question, of course, does not arise in those cases where an accounting is decreed as an incident to other equitable relief; nor should it arise where the subject-matter is an equitable interest or estate, for here the jurisdiction should be exercised as a necessary consequence, without regard to legal remedies. It is not in every matter of account cognizable at law that the equitable jurisdiction will be exercised, the general rule being that a proper case is presented when the remedies at law are inadequate."

§ 2355. (§ 928.) Plea of Stated Account a Bar.—"A plea of stated account obviously constitutes a bar to a suit in equity for an accounting, since in that case the

7 4 Pom. Eq. Jur., § 1420; see 1 Pom. Eq. Jur., §§ 218, 219. The text is quoted in Balfour v. San Joaquin Valley Bank, 156 Fed. 500.

8 4 Pom. Eq. Jur., § 1420; see 1 Pom. Eq. Jur., §§ 176, 178. The text is quoted in Davis v. Bessemer City Cotton Mills, 178 Fed. 784, 102 C. C. A. 232. Pom. Eq. Jur., § 1420, is cited in Hatticsburg Lumber Co. v. Herrick, 212 Fed. 834, 129 C. C. A. 288; Holland v. Hallahan, 211 Pa. St. 223, 60 Atl. 735; Sprigg v. Commonwealth etc. Co., 206 Pa. St. 548, 56 Atl. 33; Dargin v. Hewlitt, 115 Ala. 510, 22 South. 128°, Dabbs v. Nugent, 11 Jur., N. S., 943; Coffman v. Sangston, 21 Gratt. 263. But equity will not necessarily take jurisdiction even then: Fluker v. Taylor, 3 Drew, 183. The plaintiff must come with clean hands: Nightingale v. Milwaukee Furniture Co., 71 Fed. 234. When the transactions have become obscure and entangled by delay and time, equity will not readily take jurisdiction: Rayner v. Pearsall, 3 Johns. Ch. (N. Y.) 578; Harrison v. Gibson, 23 Gratt. (Va.) 212.

remedy at law is entirely adequate; but of course a stated account may be opened for fraud or error." 10

- § 2356. (§ 929.) Mutual Accounts.—The legal remedies are held to be inadequate and a suit in equity for an accounting will lie in cases where there are mutual accounts between the plaintiff and the defendant. Such accounts exist in cases where each of the two parties has received and paid on account of the other. Such an account does not exist, however, in a case where one of the parties has merely received and paid out on account of the other, and indeed a mutual account never exists where the account is all one on side. Neither is there
- 9 Weed v. Small, 7 Paige, 573; Bullock v. Boyd, 2 Edw. Ch. 293; Dial's Ex'rs v. Rogers, 4 Desaus. Eq. 175; Craig v. McKinney, 72 Ill. 305; Wahl v. Barnum, 116 N. Y. 87, 5 L. R. A. 623, 22 N. E. 280; Hoyt v. McLaughlin, 52 Wis. 280, 8 N. W. 889.
- 10 4 Pom. Eq. Jur., § 1421, at note 5; Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366; 20 Johns. 669; Barrow v. Rhinelander, 1 Johns. Ch. (N. Y.) 550.
- 11 4 Pom. Eq. Jur., § 1421, at note 1; so defined in Phillips v. Phillips, 9 Hare, 471. Pom. Eq. Jur., § 1421, is cited, generally, in Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., 173 Fed. 888, 32 L. R. A. (N. S.) 940, 97 C. C. A. 400; Frankfort Marine A. & P. G. Ins. Co. v. California A. M. & W. Co., 28 Cal. App. 74, 151 Pac. 176; Parks v. Brooks, 188 Mich. 645, 155 N. W. 450; Belcher v. Big Four Coal & Coke Co., 68 W. Va. 716, 70 S. E. 712; and quoted, on this matter, in Price v. Middleton & Ravenel, 75 S. C. 105, 55 S. E. 156; Hulsey v. Walker County, 147 Ala. 501, 40 South. 311; and cited in United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 Fed. 947, 114 C. C. A. 583 (accounts not mutual).
- 12 Phillips v. Phillips, 9 Hare, 471; Chaffee v. Conway, 125 Wis. 77, 103 N. W. 269 (mutual claims between mortgagor and mortgagee).
- 13 Pleasants v. Glascock, 1 Smedes & M. Ch. (Miss.) 17; Taylor v. Tompkins, 2 Heisk. (Tenn.) 89; Pearl v. Nashville, 10 Yerg. (Tenn.) 179; Sprigg v. Commonwealth Title etc. Co., 206 Pa. St. 548, 56 Atl. 33. See, also, Illinois Finance Co. v. Interstate Rural Credit Ass'n (Del. Ch.), 101 Atl. 870; Lee v. Fisk, 222 Mass. 424, 109 N. E. 835.

a mutual account where there is an account on one side and matters of set-off on the other, 14 nor even where there are accounts on both sides which have no connection with each other, 15

- § 2357. (§ 930.) Complicated Accounts. 16—Although courts of equity have refused to entertain jurisdiction of suits for accounting in cases where the items were merely very numerous, 17 they have interposed in many others for the sole reason that the accounts involved were extremely complicated, and even where such accounts were
- 14 Dinwiddie v. Bailey, 6 Ves. 136; Wells v. Cooper, cited 6 Ves. 139; Allison v. Herring, 9 Sim. 583; Phillips v. Phillips, 9 Hare, 471; Padwick v. Hurst, 18 Beav. 575; Fluker v. Taylor, 3 Drew, 183; Northeastern R'y v. Martin, 2 Phill. Ch. 758; Kennington v. Houghton, 2 Younge & C. Ch. 620, 627; Porter v. Spencer, 2 Johns. Ch. 169; Smith v. Marks, 2 Rand. 449; Hickman v. Stout, 2 Leigh, 6; McLin v. McNamara, 2 Dev. & B. Eq. 82; Hay v. Marshall, 3 Humph. 623; Wilson v. Mallett, 4 Sand. 112; Durant v. Einstein, 5 Rob. (N. Y.) 423; Salter v. Ham, 31 N. Y. 321; Walker v. Cheever, 35 N. H. 339; Gloninger v. Hazard, 42 Pa. St. 389; Passyunk Bldg. Ass'n's Appeal, 83 Pa. St. 441; Carter v. Bailey, 64 Me. 458, 18 Am. Rep. 273; Dickinson v. Lewis, 34 Ala. 638; Avery v. Ware, 58 Ala. 475; Garner v. Reis, 25 Minn. 475; Haywood v. Hutchins, 65 N. C. 574. See State v. Churchill, 48 Ark. 426, 3 S. W. 352, 880; Hulsey v. Walker County, 147 Ala. 501, 40 South. 311.
- 15 For in such a case, the defendant's account is a mere matter of set-off which can readily be ascertained and adjusted in a court of law: Haywood v. Hutchins, 65 N. C. 574.
- 16 This paragraph is quoted in full in Oglesby Co. v. Ould Co., 117 Va. 546, 85 S. E. 475; and cited in Balfour v. San Joaquin Valley Bank, 156 Fed. 500; London Guarantee & Accident Co., Ltd., v. Bell Telephone Co., 171 Fed. 278; Terrell v. Southern R'y Co., 164 Ala. 423, 20 Ann. Cas. 901, 51 South. 254, dissenting opinion; State v. Chicago & N. W. R'y Co., 132 Wis. 345, 112 N. W. 515.
- 17 Barry v. Stevens, 31 Beav. 258; American Spirits Mfg. Co. v. Easton, 120 Fed. 440. Mere intricacy of accounts held insufficient to give equity jurisdiction: Galusha v. Wendt, 114 Iowa, 597, 87 N. W. 512.

not mutual but were all on one side.<sup>18</sup> It is important then to determine, if possible, what degree of complication will warrant the interposition of equity. The rule became established in England that equity would step in whenever the account was so complicated that a court of law would be incompetent to examine it at nisi prius with the necessary accuracy,<sup>19</sup> but under the present

18 4 Pom. Eq. Jur., § 1421; which is quoted, on this subject, in Price v. Middleton & Ravenel, 75 S. C. 105, 55 S. E. 156; Hulsey v. Walker County, 147 Ala. 501, 40 South. 311; and cited in Compton v. Gilder, 176 Ala. 309, 58 South. 271. See O'Connor v. Spaight, 1 Schoales & L. 305; O'Mahoney v. Dickson, 2 Schoales & L. 400; Bliss v. Smith, 34 Beav. 508; South Eastern R'y v. Brogden, 3 Macn. & G. 8; Kennington v. Houghton, 2 Younge & C. Ch. 620, 627; Frietas v. Dos Santos, 1 Younge & J. 574; Taff Vale R'y v. Nixon, 1 H. L. Cas. 110; Mitchell v. Great Works etc. Co., 2 Story, 648, Fed. Cas. No. 9662; Governor v. McEwen, 5 Humph. 241; Watt v. Conger, 13 Smedes & M. 412; Kirkman v. Vanlier, 7 Ala. 217; Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Wilson v. Riddle, 48 Ga. 609; Lafever v. Billmyer, 5 W. Va. 33; Blood v. Blood, 110 Mass. 545; Frue v. Loring, 120 Mass. 507; Ward v. Peck, 114 Mass. 121; Farmers' etc. Bank v. Polk, 1 Del. Ch. 167; Trapnall v. Hill, 31 Ark. 345; Nesbit v. St. Patrick's Church, 9 N. J. Eq. 76; Seymour v. Long Dock Co., 20 N. J. Eq. 396; Fenno v. Primrose, 116 Fed. 49; McMullen Lumber Co. v. Strother (C. C. A.), 136 Fed. 295. See, also, Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, 133 C. C. A. 524; Chrichton (Crichton) v. Hayles, 176 Ala. 223, 57 South. 696; Miller v. Russell, 224 Ill. 68, 79 N. E. 434; Ely v. King-Richardson Co., 265 Ill. 148, L. R. A. 1915B, 1052, 106 N. E. 619; Kimmerle v. Dowagiac Gas Co., 159 Mich. 34, 123 N. W. 565; Holden v. Bernstein Mfg. Co., 232 Pa. 366, 81 Atl. 428. Contra. Norwich etc. R. R. v. Storey, 17 Conn. 364.

19 4 Pom. Eq. Jur., § 1421, note 2; O'Connor v. Spaight, 1 Schoales & L. 305, per Lord Redesdale; South Eastern R'y v. Brogden, 3 Macn. & G. 8; Kennington v. Houghton, 2 Younge & C. Ch. 620, 627; Taff Vale R'y v. Nixon, 1 H. L. Cas. 110; Foley v. Hill, 2 H. L. Cas. 28, 46; Buel v. Selz, 5 Ill. App. 116; Hallett v. Cumston, 110 Mass. 32; City of Covington v. Limerick, 19 Ky. Law Rep. 330, 40 S. W. 254; Inhabitants of Crawford Township v. Watters, 61 N. J. Eq. 284, 48 Atl. 316; Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207. See, also,

practice in England, as in New York,<sup>20</sup> matters of account may be referred to officers or referees, so that this rule can now hardly be followed in those jurisdictions. Various tests have been laid down, but the facts of each particular case should govern the court in the exercise of its discretion, and the true principle would seem to be that whenever it is doubtful whether adequate relief could be obtained at law, equity should entertain jurisdiction.<sup>21</sup>

McMullen Lumber Co. v. Strother, 136 Fed. 295, 69 C. C. A. 433 (jurisdiction in federal courts whenever, in an action at law under the state statutes, the matter could be sent to a referee).

20 Marvin v. Brooks, 94 N. Y. 71; Uhlman v. New York Life Ins. Co., 109 N. Y. 421, 433, 4 Am. St. Rep. 482, 17 N. E. 363, per Peckham, J., quoting the last sentence of the paragraph, and holding that the exercise of the jurisdiction, because of a complication of accounts, is largely a matter of discretion, and will be refused when it will be of very great inconvenience and possible oppression to the defendant.

21 4 Pom. Eq. Jur., § 1421, note 2; Foley v. Hill, 2 H. L. Cas. 28; Douler v. Campbell, 178 Pa. St. 23, 35 Atl. 857; Warner v. McMullin, 131 Pa. St. 370, 18 Atl. 1056, 25 Wkly. Not. Cas. 157. See, on the general subject of complexity of accounts, the highly instructive opinion of Stevenson, V. C., in Daab v. New York, C. & H. R. R. Co., 70 N. J. Eq. 489, 62 Atl. 449.

In the important case of Pierce v. Equitable Life Assur. Soc., 145 Mass. 56, 12 N. E. 858, the defendant company was compelled to account to the holder of a "tontine" policy, to show that it had complied with its promise "equitably to apportion" to the plaintiff his share in the accumulations made through the operation of the tontine provisions in his policy. Relief was granted on the ground of the extreme complexity of the accounts. See, also, Equitable Life Assur. Soc. v. Winn, 137 Ky. 641, 28 L. R. A. (N. S.) 558, 126 S. W. 153; Peters v. Equitable Life Assur. Soc., 200 Mass. 579, 86 N. E. 885; Grange v. Penn Mutual Life Ins. Co., 235 Pa. 320, 84 Atl. 392. But in Uhlman v. N. Y. L. Ins. Co., supra, note 20, relief was refused on similar facts. The view of the Uhlman case was adopted in Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 L. Ed. 682, 29 Sup. Ct. 404. For instances of accounts not so complicated as to require equitable interference, see Randolph v. Tandy, 98 Fed. 939; Beggs

§ 2358. (§ 931.) Fiduciary Relations.<sup>22</sup>—"Where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account"<sup>23</sup> to the plaintiff, equity will entertain jurisdiction of a suit for an accounting, although the account is neither mutual nor complicated. The most common of such cases are those involving trustees,<sup>24</sup> guardians,<sup>25</sup> executors and administrators,<sup>26</sup> partners,<sup>27</sup> agents<sup>28</sup> and co-tenants.<sup>29</sup>

v. Edison, El. L. & I. Co., 96 Ala. 295, 11 South. 381; Ely v. Crane, 37 N. J. Eq. 157; Terrell v. Southern R'y Co., 164 Ala. 423, 20 Ann. Cas. 901, 51 South. 254; Forster v. Brown Hoisting Machinery Co., 266 Ill. 287, Ann. Cas. 1916B, 795, 107 N. E. 588 (recovery of royalties under a contract); Faville v. Lloyd, 140 Iowa, 501, 118 N. W. 871.

<sup>22</sup> This paragraph is quoted in full in Wilson v. Kennedy, 63 W. Va. 1, 59 S. E. 736; and cited in Hall v. McKeller, 155 Ala. 508, 46 South. 460; Hurlburt v. Morris, 68 Or. 259, 135 Pac. 531. Sections 931-933 are cited in Reece v. Rhoades (Wyo.), 165 Pac. 449.

23 Pom. Eq. Jur., § 1421, at note 3; quoted in Price v. Middleton & Ravenel, 75 S. C. 105, 55 S. E. 156; Hulsey v. Walker County, 147 Ala. 501, 40 South. 311; and cited in Hall v. McKeller, 155 Ala. 508, 46 South. 460 (confidential agent); Phillipps v. Birmingham Industrial Co., 161 Ala. 509, 135 Am. St. Rep. 156, 50 South. 77; People v. Bordeaux, 242 Ill. 327, 89 N. E. 971 (trustee of town funds).

24 Crothers v. Lee, 20 Ala. 337; Colonial etc. Co. v. Hutchinson etc. Co., 44 Fed. 219; Taylor v. Benham, 5 How. (U. S.) 233, 12
L. Ed. 130; see 3 Pom. Eq. Jur., §§ 1058, 1063.

<sup>25</sup> Davis v. Davis, 1 Del. Ch. 256; State v. Quinn, 74 N. C. 359. See 3 Pom. Eq. Jur., § 1097.

26 Kirkwood v. Mitchell, 1 Del. Ch. 130; the jurisdiction of equity to compel guardians, executors and administrators to account, is governed to a great extent in the United States by the powers given to courts of probate: See 1 Pom. Eq. Jur., §§ 77, 78, 347-350; 3 Pom. Eq. Jur., § 1154, and notes.

27 Garr v. Redman, 6 Cal. 575; Ferry v. Henry, 4 Pick. (Mass.) 74; Hallett v. Cumston, 110 Mass. 32.

28 Davis v. Wilson (N. J.), 56 Atl. 704; Halsted v. Rabb, 8 Port. (Ala.) 63; Webb v. Fuller, 77 Me. 568, 1 Atl. 737 (quoting Pom. Eq. Jur., § 1421, note); Thornton v. Thornton, 31 Gratt. (Va.) 212 Parsons on Partnership, 508.

29 McLellan v. Osborne, 51 Me. 118; Hodges v. Pingree, 10 Gray V-327 &

Although it is the trust relation involved in such cases which gives jurisdiction to a court of equity, the relation need not be the strictly technical relation of trustee and cestui que trust, a quasi trust relation being sufficient.<sup>30</sup>

§ 2359. (§ 932.) Same; Principal and Agent.—The principal difficulty is in determining in what cases equity will take jurisdiction of an accounting between principal and agent. "The mere relation of principal and agent, without more,—the relation not being really fiduciary in its nature, and no obstacle intervening to a recovery at law,—is insufficient to enable a principal to maintain the action against his agent.<sup>31</sup> But where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought

(Mass.), 14; Ferry v. Henry, 4 Pick. (Mass.) 74; Early v. Friend, 16 Gratt. (Va.) 21, 78 Am. Dec. 649; Dyckman v. Valiente, 42 N. Y. 549.

- 30 Western Union Tel. Co. v. American Bell Tel. Co., 125 Fed. 342, 60 C. C. A. 220. As to suits against directors of corporations for accounting, see 2 Pom. Eq. Jur., § 881; 3 Pom. Eq. Jur., § 1092.
- 31 4 Pom. Eq. Jur., § 1421, note 3; quoted in Phillipps v. Birmingham Industrial Co., 161 Ala. 509, 135 Am. St. Rep. 156, 50 South. 77; Haaland v. Miller, 67 Or. 346, 136 Pac. 9. See King v. Rossett, 2 Younge & J. 33; Navulshaw v. Brownrigg, 1 Sim., N. S., 573, 2 De Gex, M. & G. 441; Hemings v. Pugh, 4 Giff. 456; Moxon v. Bright, L. R. 4 Ch. 292; Crothers v. Lee, 29 Ala. 337 (attorney and client); Knotts v. Tarver, 8 Ala. 743 (agency for a single transaction); Coquillard v. Suydam, 8 Blackf. 24 (ditto); Blakely v. Biscoe, 1 Hemp. 114, Fed. Cas. No. 18,239; Powers v. Cray, 7 Ga. 206 (attorney and client); Long v. Cochran, 9 Phila. 267; County of Clinton v. Shuster, 82 Ill. 137 (not maintainable against a treasurer and assessor, as everything was a matter of record); Kuhl v. Pierce County, 44 Neb. 584, 62 N. W. 1066 (ditto). See, also, Brown v. Corey, 191 Mass. 189, 77 N. E. 838 (broker and customer); Franklin Township v. Crane, 80 N. J. Eq. 509, 43 L. R. A. (N. S.) 604, 85 Atl. 408 (town collector).

are peculiarly within the knowledge of the latter, equity will assume jurisdiction."<sup>32</sup>

"While the rules are thus settled in favor of a principal, it does not follow that the reverse is true, and that an agent may come into equity for an accounting against his principal, since generally there is no trust or confidence reposed in the latter, and no duty on his part to account.<sup>33</sup> But there are cases where an agent may maintain the action against his principal."<sup>34</sup>

32 4 Pom. Eq. Jur., § 1421, note 3; quoted in Phillipps v. Birmingham Industrial Co., 161 Ala. 509, 135 Am. St. Rep. 156, 50 South. 77; Haaland v. Miller, 67 Or. 346, 136 Pac. 9; Wilson v. Kennedy, 63 W. Va. 1, 59 S. E. 736; and cited in Hall v. McKeller, 155 Ala. 508, 46 South. 460; Hurlburt v. Morris, 68 Or. 259, 135 Pac. 531. See Makepeace v. Rogers, 11 Jur., N. S., 215; Hemings v. Pugh, 4 Giff. 456; Mackenzie v. Johnston, 4 Madd. 373; Moxon v. Bright, L. R. 4 Ch. 292; Southampton Dock Co. v. Southampton etc. Board, L. R. 11 Eq. 254; Thornton v. Thornton, 31 Gratt. 212; Taylor v. Thompson, 2 Heisk. 89; Kerr v. Camden Steamboat Co., Cheves Eq. 189; Halsted v. Rabb, 8 Port. 63; Hale v. Hale, 4 Humph. 183; Marvin v. Brooks, 94 N. Y. 71; Webb v. Fuller, 77 Me. 568, 1 Atl. 737; Vilwig v. B. & O. R. R. Co., 79 Va. 449; Rippe v. Stogdill, 61 Wis. 38, 20 N. W. 645; Decell v. Hazlehurst etc. Co., 83 Miss. 346, 35 South. 761 (to compel agent to account for misappropriated funds). See, also, United States v. Carter, 217 U. S. 286, 19 Ann. Cas. 594, 54 L. Ed. 769, 30 Sup. Ct. 515 (secret profits); Providence Mining & Milling Co. v. Nicholson, 178 Fed. 29, 101 C. C. A. 157; Campbell v. Cook, 193 Mass. 251, 79 N. E. 261.

33 4 Pom. Eq. Jur., § 1421, note 3; cited in Davis v. Marshall, 114 Va. 193, Ann. Cas. 1914B, 1025, 76 S. E. 316. See Padwick v. Stanley, 9 Hare, 627; Smith v. Levaux, 2 De Gex, J. & S. 11. An agent cannot have an accounting against his principal in order to recover commissions: Skilton v. Payne, 18 Misc. Rep. 332, 42 N. Y. Supp. 111.

34 "As for example, where his salary depends on the profits made by his employer": 4 Pom. Eq. Jur., § 1421, note 3; Harrington v. Churchward, 9 Jur., N. S., 576; Shepard v. Brown, 4 Giff. 208; Buel v. Selz, 5 Ill. App. 116; Sowles v. Martin, 76 Vt. 180, 56 Atl. 579 (where agent in such a case was treated as a co-tenant); Channon v. Stewart, 103 Ill. 541; Alpaugh v. Wood, 45 N. J. Eq. 153, 16 Atl. 676;

§ 2360. (§ 933.) Same; Profit Sharers, Part Owners, Tenants in Common and Joint Tenants.—The relation between partners necessarily gives rise to the right of an accounting in equity, "and persons, although not technically partners, who are to receive a certain share of the profits of an undertaking, may likewise have an accounting." "The foregoing rules are applicable, for similar reasons, to part owners and to tenants in common and joint tenants taking more than their share of the rents and profits." "At the common law, no ac-

.Street v. Thompson, 229 Ill. 613, 82 N. E. 367. See, also, Fenno v. Primrose, 116 Fed. 49 (matters in dispute very numerous). See, also, California Raisin Growers' Ass'n v. Abbott, 160 Cal. 601, 117 Pac. 767 (ancillary to other relief); Hurlburt v. Morris, 68 Or. 259, 135 Pac. 531.

35 4 Pom. Eq. Jur., § 1421, note 3. The text is cited to this effect in Reece v. Rhoades (Wyo.), 165 Pac. 449 (joint adventure). See Bentley v. Harris, 10 R. I. 434, 14 Am. Rep. 695; Garr v. Redman, 6 Cal. 574; Ferry v. Henry, 4 Pick. 75; Hallett v. Cumston, 110 Mass. 32; see King v. Barnes, 109 N. Y. 267, 16 N. E. 332; Darrah v. Boyce, 62 Mich. 480, 29 N. W. 102; Pratt v. Tuttle, 136 Mass. 233; Harvey v. Sellers, 115 Fed. 757; Marston v. Gould, 69 N. Y. 221; Parker v. John Pullman Co., 36 App. Div. 208, 56 N. Y. Supp. 734. See, also, McArthur v. Blaisdell, 159 Cal. 604, 115 Pac. 52; Botsford v. Van Riper, 33 Nev. 156, 110 Pac. 705; Campbell's Automatic Safety Gas Burner Co. v. Hammer, 78 Or. 612, 153 Pac. 475; Causten v. Barnette, 49 Wash. 659, 96 Pac. 225.

36 Strelly v. Winson, 1 Vern. 297; McLellan v. Osborne, 51 Me. 118; Dyckman v. Valiente, 42 N. Y. 549, 563; Shirley v. Goodnough, 15 Or. 642, 16 Pac. 871.

37 4 Pom. Eq. Jur., § 1421, note 3; Sowles v. Martin, 76 Vt. 180, 56 Atl. 979; Armijo v. Neher, 11 N. M. 645, 72 Pac. 12; Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Leach v. Beattie, 33 Vt. 195; Wiswell v. Wilkins, 4 Vt. 137 (more than two tenants concerned); Darden v. Cowper, 7 Jones, 210, 75 Am. Dec. 461; Wright v. Wright, 59 How. Pr. 176; Hodges v. Pingree, 10 Gray, 14; Blood v. Blood, 110 Mass. 545; Gates v. Frazer, 9 Ill. App. 624 (no legal liability on one joint owner to account to another with respect to the use of a patent right, but the action maintained under an agreement); Dodson v. Hays, 29 W. Va. 577, 2 S. E. 415; Almy v. Daniels, 15 R. I. 312, 4 Atl.

tion of account for taking rents and profits lay against a joint tenant or tenant in common by another, unless the defendant was constituted bailiff;<sup>38</sup> but this was remedied by statute,<sup>39</sup> and the action could be brought against the defendant as bailiff for recovering more than his share or proportion. This statute has been substantially re-enacted in many of the American states, but the equity jurisdiction exists notwithstanding."<sup>40</sup>

§ 2361. (§ 934.) When a Discovery is Necessary.—
"The rule is sometimes laid down by text-writers and judges, that where accounts are all on one side, but a discovery is necessary, a proper case is presented for equitable interference, but such a rule seems to be only applicable to cases partaking of a fiduciary character,"

41

753, 10 Atl. 654. "An action by one tenant in common against another in exclusive possession to recover a share of rents, profits, and issues, amounting in the aggregate to a certain sum, cannot be maintained in equity": 4 Pom. Eq. Jur., § 1421, note 3; Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550.

- 38 Co. Litt. 200b.
- 39 4 Anne, c. 16, § 27.
- 40 "Leach v. Beattie, 33 Vt. 195; Wright v. Wright, 59 How. Pr. 176. See, also, Schuster v. Schuster, 84 Neb. 98, 18 Ann. Cas. 1078, 29 L. R. A. (N. S.) 224, 120 N. W. 948. An accounting is often an incident to a suit for partition between joint tenants and tenants in common: See Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Jones v. Massey, 14 S. C. 292; Tyner v. Fenner, 4 Lea, 469; Scott v. Guernsey, 48 N. Y. 106.

"The relation of banker and customer is not fiduciary in its character, and unless there are other circumstances, there can be no accounting between them in equity: Foley v. Hill, 2 H. L. Cas. 28"; 4 Pom. Eq. Jur., § 1421, note 3.

41 4 Pom. Eq. Jur., § 1421, note 3; Walker v. Spencer, 13 Jones & S. 71; Halsted v. Rabb, 8 Port. 63; Taylor v. Tompkins, 2 Heisk. 89; Colonial etc. Mortgage Co. v. Hutchinson Mortgage Co., 44 Fed. 219.

or to cases wherein the accounts are extremely complicated. 42

§ 2362. (§ 935.) Accounting as Incidental to Other Relief.—"The remedy of accounting is in most instances a necessary incident and part of the relief granted in suits brought by those beneficially interested, against trustees, either express or implied, and persons standing in fiduciary relations, such as administrators, executors, guardians, directors, and the like. The equitable jurisdiction is also practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm affairs between the co-partners themselves; suits for a settlement of the firm affairs between the survivors and the executors or administrators of the deceased, when a partner has died; and suits to settle the affairs of an insolvent firm, and to adjust the demands of the firm creditors and the creditors of the individual partners. equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief."43

<sup>42</sup> If one were entitled to an accounting in every case where he would be entitled to a discovery, every demand would come within the purview of equity: Foley v. Hill, 2 H. L. Cas. 28. See, further, as to this subject, 1 Pom. Eq. Jur., § 223 et seg.

<sup>43 4</sup> Pom. Eq. Jur., § 1421; cited in Cobb v. Martin, 32 Okl. 588, 123 Pac. 422. As to partnership accounting, see next chapter.

## CHAPTER XLIX. PARTNERSHIP BILLS.

## ANALYSIS.

- § 936. In general—Suits for dissolution.
- § 937. Suits for accounting-Legal remedy.
- § 938. Same—Dissolution necessary.
- § 939. Exceptions—Accounting without dissolution.
- § 940. Who may bring suit.
- § 941. Grounds for refusal of relief.
- § 942. Statute of limitations—Laches.
- § 943. Disposition of partnership property upon dissolution.
- § 944. Rights of creditors in partnership property.
- § 945. Rights of creditors in separate property.

§ 2363. (§ 936.) In General—Suits for Dissolution.— Courts of equity have a wide jurisdiction over partnership affairs, arising out of the peculiar relationship between the parties. Thus, where there is a demand existing in favor of one partnership against another, both having a common member, there can be no remedy at law, for one party cannot be both a plaintiff and a defendant. In equity, however, this can be adjusted and justice done. The commonest bills are those for a dissolution and for an accounting. A bill of the former class generally includes the latter; but the converse is not true. A partnership may be dissolved in several ways without the interposition of the courts; such matters, however, are beyond the scope of this work, and for their discussion, the reader must be referred to treatises on the law of partnership. There are cases in which the aid of a court of equity is needed in order to work a dissolution; and when the facts show the neces-

<sup>1</sup> Code v. Reynolds, 18 N. Y. 74; 1 Pom. Eq. Jur., §§ 175, note, 189.

sity and right of one party, equity will take jurisdiction. Thus, where one partner has abused his trust, as for example, by misappropriating funds, or by excluding the other, equity may interfere to decree dissolution.2 And such relief may be proper when it is impracticable to go on with the business,3 and "when the disagreements and disputes between the parties have become so violent and lasting as to prevent any beneficial results from the continuance of the connection." Where a person has been induced, by fraudulent representations, to enter into a partnership, equity may rescind the contract at his instance, and put an end to it ab initio.5 Upon determining that dissolution is proper, the court will proceed to administer the affairs of the partnership, ordering an accounting, the payment of debts, the disposition and distribution of the property, and a settlement of balances. To accomplish these ends, a receiver may be appointed;6 and an injunction may be awarded to prevent the partners or others from interfering in the settlement of the partnership affairs.7

<sup>&</sup>lt;sup>2</sup> Holladay v. Elliott, 3 Or. 340; Sutro v. Wagner, 23 N. J. Eq. 388; Werner v. Leisen, 31 Wis. 169 (exclusion of partner); Kennedy v. Kennedy, 3 Dana, 239; Cottle v. Leitch, 35 Cal. 434 (fraud); false entries in books).

<sup>3</sup> Sebastian v. Booneville Academy Co., 22 Ky. Law Rep. 186, 56 S. W. 810.

<sup>4</sup> Singer v. Heller, 40 Wis. 544. See, also, Whalen v. Stephens, 193 Ill. 121, 61 N. E. 921; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; Blake v. Dorgan, 1 G. Greene (Iowa), 537; Whitman v. Robinson, 21 Md. 30. For an enumeration of the grounds for dissolution, see 69 Am. St. Rep. 420, ff., note.

<sup>5</sup> Oteri v. Scalzo, 145 U. S. 578, 36 L. Ed. 824, 12 Sup. Ct. 895.

<sup>6</sup> For a full discussion of the appointment of receivers in such cases, see ante, volume I, chapter III.

<sup>7</sup> It is a general principle that an injunction will be freely granted, when it will serve a useful purpose, in aid of another equitable remedy: Pom. Eq. Jur., § 1345. A few cases are given by way of illustration of the application of the principle to partnership bills:

§ 2364. (§ 937.) Suits for Accounting—Legal Remedy. When a dissolution is sought or has occurred, equity has jurisdiction of an action to compel an accounting of the partnership assets. There was originally a remedy by an action of account at law, but the superior advantages of the equity procedure have caused the legal action to fall into disuse. The main superiority of the equitable remedy lies in the fact that the complainant may compel a discovery of the items of account. The legal action was not maintainable when there were more than two partners; consequently, in such a case, the remedy in equity is, and always has been, exclusive. The superior of the remedy in equity is, and always has been, exclusive.

§ 2365. (§ 938.) Same — Dissolution Necessary.—In general, a court of equity will not interfere to order an

See Wilkinson v. Tilden, 9 Fed. 683; Fletcher v. Vandusen, 52 Iowa, 448, 3 N. W. 488; Zimmerman v. Chambers, 79 Wis. 20, 47 N. W. 947.

- 8 In general, see Reese v. McCurdy, 121 Ala. 425, 25 South. 918;
  Tarabino v. Nicoli, 5 Colo. App. 545, 39 Pac. 362; Miller v. Rapp, 7
  Ind. App. 89, 34 N. E. 125; Kisling v. Barrett, 34 Ind. App. 304, 71
  N. E. 507; Lamb v. Rowan, 83 Miss. 45, 35 South. 427, 690; Zimmerman v. Chambers, 79 Wis. 20, 47 N. W. 947.
- 9 Spear v. Newell, 2 Paine C. C. 267, Fed. Cas. No. 13,224 ("at common law joint partners may sustain this action against each other when the proceeds of the partnership business have been received by one of the partners, who refuses to account for the same"); Lee v. Abrams, 12 Ill. 111 ("In England it seems to have fallen almost entirely into disuse, and although expressly authorized by our statute, a case is seldom to be met with in our courts"); Neal v. Keel, 4 T. B. Mon. 162; Hunt v. Gordon, 52 Miss. 194; Jessup v. Cook, 6 N. J. L. 434; Appleby v. Brown, 24 N. Y. 143.
- 10 "However, it is found by experience that the most ready and effectual way to settle these matters of account is by bill in equity, where a discovery may be had on the complainant's oath, without relying merely on the evidence which the plaintiff may be able to produce; wherefore actions of account to compel a man to bring in and settle accounts are now very seldom used": 3 Bl. Com. 162, 163.
- 11 Foster v. Ives, 53 Vt. 458; Stevens v. Coburn, 71 Vt. 261, 44 Atl. 354.

accounting, unless a dissolution has occurred or is sought by the bill.<sup>12</sup> The reasons given for this rule are that interference will tend to strife, which will lead to a dissolution, and that it is impracticable to take an account of the affairs of a going concern because they are constantly changing.<sup>13</sup> It is not the province of equity "to enter into a consideration of mere partnership squabbles";<sup>14</sup> such matters should be settled by the members themselves. Where there has been a dissolution, however, or that relief is sought by the bill, these reasons do not apply, and it becomes the duty of equity to see that

12 Davis v. Davis, 60 Miss. 615 (not as to an isolated portion of the business, where course of business has been to treat all as a whole); Lord v. Hull, 178 N. Y. 9, 102 Am. St. Rep. 484, 70 N. E. 69. See, also, Nisbet v. Nash, 52 Cal. 540 ("If on a re-trial the district court shall find that the partnership has been dissolved, the decree must be for an accounting. If the court shall find that it has not been dissolved, it will become its duty to determine whether or not plaintiff is entitled to a decree of dissolution; and if it shall find that plaintiff is entitled to such decree, the decree should also provide for an accounting"). To the effect that in general there cannot be an accounting of particular items alone, see Baird v. Baird, 1 Dev. & B. Eq. 524, 31 Am. Dec. 390.

13 The reasons for the rule are well summarized in the recent case of Lord v. Hull, 178 N. Y. 9, 102 Am. St. Rep. 484, 70 N. E. 69. In that case, Vann, J., said: "If the members of a firm cannot agree as to the method of conducting their business, the court will not attempt to conduct it for them. Aside from the inconvenience of constant interference, as litigation is apt to breed hard feelings, easy appeals to the courts to settle the differences of a going concern would tend to do away with mutual forbearance, foment discord, and lead to dissolution. It is to the interest of the law of partnership that frequent resort to the courts by copartners should not be encouraged, and they should realize that, as a rule, they must settle their own differences, or go out of business." Upon the second reason given in the text, the learned judge quoted 2 Bates on Partnership, § 910, to the effect that the "fluctuations of a continuing business will make an accounting which is correct to-day incorrect to-morrow."

14 Wray v. Hutchinson, 2 Mylne & K. 235, 238.

justice is done to all parties. It seems to be the rule that no demand for an accounting need be made before applying to the court.<sup>15</sup>

(§ 939.) Exceptions — Accounting Without § 2366. Dissolution.—To the rule stated in the preceding section there are several well-defined exceptions. Bearing in mind the reasons given for the rule, it will be seen that cases may arise in which neither will apply. A leading text-writer mentions three classes of cases as exceptions to the general rule: "(1) Where one partner has sought to withhold from his co-partner the profits arising from some secret transaction; (2) where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner, or drive him to a dissolution; (3) where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all." To this classification must be added the class of cases (4) where the agreement of partnership contemplates settlements of distinct transactions, or at stated times.17

15 Hanna v. McLaughlin, 158 Ind. 292, 63 N. E. 475; McCung v. Capehart, 24 Minn. 17 (no demand-necessary prior to bringing suit for accounting); Wright v. Ross, 30 Tex. Civ. App. 207, 70 S. W. 234 (no notice necessary in partnership at will).

16 Lindley on Partnership, quoted by Vann, J., in Lord v. Hull,
 178 N. Y. 9, 102 Am. St. Rep. 484, 70 N. E. 69.

Cases of exclusion.—Richards v. Davies, 2 Russ. & M. 347 (exclusion from means of ascertaining the state of the partnership affairs); Sanger v. French, 157 N. Y. 213, 51 N. E. 979 ("an accounting may be had without dissolution, to enable him to obtain his share of the partnership profits, from the benefits of which he has been excluded").

Cases of numerous partners.—Wallworth v. Holt, 4 Mylne & C. 619; Richardson v. Hastings, 7 Beav. 323.

17 Miller v. Freeman, 111 Ga. 654, 51 L. R. A. 504, 36 S. E. 961 (dictum—"the contract did not in terms provide for an annual ac-

§ 2367. (§ 940.) Who may Bring Suit.—The general rule is that anyone who has a direct interest in the partnership settlement, and who is not otherwise represented, may sue for an accounting. Clearly, a partner comes within this class, and his right is admitted. 18 An assignment of the interest of a partner merely transfers his rights after an accounting and settlement; and consequently the assignee is entitled to compel an accounting.19 For the same reason, a purchaser of one partner's share on execution may maintain such a bill.20 The administrator of a deceased partner is the proper party to sue on behalf of the estate.<sup>21</sup> The heirs are not allowed to sue, even though a conspiracy between the administrator and the surviving partner is alleged.22 They have a sufficient remedy by application to the probate court to remove the delinquent administrator; and if any loss has occurred by virtue of his negligence or wrongful acts, redress may be had in a suit upon his official bond. Employees who, in payment for services, are entitled to a definite share of the profits, may also maintain the bill.23 Without such accounting, it would be difficult, if not impossible, to establish the claim.

counting and settlement between the parties, but this was evidently their intention").

- <sup>18</sup> Sharp v. Hibbins, 42 N. J. Eq. 543, 9 Atl. 113; and see cases cited in preceding paragraphs.
- 19 Mathewson v. Clarke, 6 How. 122, 12 L. Ed. 370; Miller v. Brigham, 50 Cal. 615.
  - 20 Farley v. Moog, 79 Ala. 148, 58 Am. Rep. 585.
  - 21 Tate v. Tate, 35 Ark. 289; Freeman v. Freeman, 136 Mass. 260.
- 22 Tate v. Tate, 35 Ark. 289; Hutton v. Laws, 55 Iowa, 710, 8 N. W. 642; Rosenzweig v. Thompson, 66 Md. 593, 8 Atl. 659.
- 23 Cornell v. Redrow, 60 N. J. Eq. 251, 47 Atl. 56 ("Suing at law before ascertaining whether there were profits, and to what amount, his claim would lack the elements of certainty which the law courts require. An accounting of all the transactions of the business would be necessary, and this the mode of procedure in those courts is un-

§ 2368. (§ 941.) Grounds for Refusal of Relief.—"It is no doubt the general rule, when a partnership is alleged and admitted, to order an account as a matter of course, unless the right of the complainant to relief is barred by lapse of time. But where it manifestly appears from the proof, that the party asking the interposition of the court has no real cause of complaint, and that no good purpose or end can be accomplished by directing an account to be taken, it ought not to be ordered."24 Accordingly, it has been held that no account will be allowed when, for any reason, it is unnecessary; as where complainant has access to the books, which contain no complications.<sup>25</sup> No relief will be given to an absconding partner who seeks an accounting, the denial being based upon the maxim that he who comes into equity must come with clean hands.26

§ 2369. (§ 942.) Statute of Limitations—Laches.—It is the general rule that bills for partnership accounting are subject to the operation of the statute of limitations.<sup>27</sup> Where such actions are not expressly men-

fitted to accomplish"); Bentley v. Harris, 10 R. I. 434, 14 Am. Rep. 695. See, also, Hallett v. Cumston, 110 Mass. 32; McCabe v. Sinclair, 66 N. J. Eq. 24, 58 Atl. 412.

- 24 McKaig v. Hebb, 42 Md. 227. For a statement of the requisites of the bill, see Dugger v. Tutwiler, 129 Ala. 258, 30 South. 91. Compare Harvey v. Pennypacker, 4 Del. Ch. 445, 486.
- 25 McKay v. Joy, 70 Cal. 581, 11 Pac. 832 (surviving partner denied an accounting, because he can take possession and wind up the affairs). See Demarest v. Rutan, 40 N. J. Eq. 356, 2 Atl. 647, where an account was allowed, but complainant was compelled to pay costs.
  - 26 Hart v. Dietrich, 69 Neb. 685, 96 N. W. 144.
- 27 Knox v. Gye, L. R. 5 H. L. 656; Taylor v. Taylor, 28 L. T. Rep. 189; and see cases cited in the following notes. But see contra, Rencher v. Anderson, 95 N. C. 208, holding that "partners stand in relation of trustee to each other, and something must be

tioned in the statute, the courts will act by analogy to the legal rule, and impose upon the remedy they afford the same limitation. In many states, the statute is made applicable to proceedings in equity; and in such jurisdictions the courts apply the provisions directly. While there is little dissent from the proposition that the statute will be applied, there is a great diversity as to when the period begins. In cases where the partnership is dissolved by death, the general rule is that the statute begins to run from the death.<sup>28</sup> The courts adopting this rule hold that the surviving partner is not a trustee in the technical sense, and that accordingly the rules as to trustees do not apply. Upon the same theory, the time, in cases of dissolution otherwise, should run from the date of dissolution.<sup>29</sup> In some jurisdictions it is held

done to render that relation adversary, and put the statute in motion." It is generally held that the partner's interest is a mere chose in action.

<sup>28</sup> Knox v. Gye, L. R. 5 H. L. 656; Taylor v. Taylor, 28 L. T. Rep. 189; Bonney v. Stoughton, 122 Ill. 536, 13 N. E. 833; King v. Wartelle, 14 La. Ann. 740.

29 Richardson v. Gregory, 126 Ill. 166, 18 N. E. 777; Richards v. Grinnell, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668 ("the statute cannot commence to run until the partnership is dissolved, or until a sufficient time has elapsed after a demand for an accounting and settlement"); Petty v. Haas, 122 Iowa, 257, 98 N. W. 104; Currier v. Studley, 159 Mass. 17, 33 N. E. 709 ("in the absence of an express contract in regard to the matter, or of conduct of the parties which works an extension of the time for bringing a suit, the statute begins to run at the date of the dissolution"); King v. Wartelle, 14 La. Ann. 740; Gray v. Kerr, 46 Ohio St. 652, 23 N. E. 136; McKelvy's Appeal, 72 Pa. St. 409; Allen v. Woonsocket Co., 11 R. I. 288. But see Riddle v. Whitehill, 135 U. S. 621, 34 L. Ed. 282, 10 Sup. Ct. 924, where it is held that where the affairs of a partnership are being wound up in due course, without antagonism between the parties, and assets are being realized and debts extinguished, and no settlement has been made between the partners, the statute of limitations has not begun to run, and that when the right of action accrues for an accounting so as to put the statute of limitation in motion.

that the statute does not begin to run until the debts due to and by the partnership are paid;<sup>30</sup> in some, that it runs from the date of the last item on the books;<sup>31</sup> and in others that it runs from the time the partnership accounts are settled and the balance is struck.<sup>32</sup> As in all equitable actions, the doctrine of laches is applicable; but mere delay short of the statutory period of limitation will not bar relief.<sup>33</sup> "Where the partners fail to

"depends upon the circumstances of each case, and cannot be held, as matter of law, to arise at the date of the dissolution, or to be carried back by relation to that date." See, also, Thomas v. Hurst, 73 Fed. 372 (bill against surviving partner); Gilmore v. Ham, 142 N. Y. 1, 40 Am. St. Rep. 554, 36 N. E. 826; Gray v. Green, 142 N. Y. 316, 40 Am. St. Rep. 596, 37 N. E. 124.

- 30 "After the dissolution of a partnership, the statute of limitations would not begin to run in favor of one partner and against another until the partnership affairs, as to debtors and creditors of the partnership, had been wound up and settled, or, at least, a sufficient time had elapsed since the dissolution to raise the presumption that such was the fact": Prentice v. Elliott, 72 Ga. 154. See, also, Logan v. Dixon, 73 Wis. 533, 41 N. W. 713 (claim against estate of deceased partner); Miller v. Harris, 9 Baxt. 101.
- 31 "Such a suit is barred in equity, unless commenced within six years of the last item of debit or credit, or other like partnership transaction, on account between the partners, from which a promise on the part of the defendant may be implied to pay any balance that might be due by him on final settlement": Wells v. Brown, 83 Ala. 161, 3 South. 439. See, also, Dugger v. Tutwiler, 129 Ala. 258, 30 South. 91; McClung v. Capehart, 24 Minn. 17; Todd v. Rafferty's Adm'rs, 30 N. J. Eq. 254 (suit by surviving partner against administrator of deceased partner). In Bluntzer v. Hirsch, 32 Tex. Civ. App. 585, 75 S. W. 326, it is said: "The cause of action in such case is considered as having accrued on a cessation of the dealings in which they were interested together."
- 32 Hendy v. March, 75 Cal. 566, 17 Pac. 702. See, also, McDonald v. Holmes, 22 Or. 212, 29 Pac. 735 (statute begins to run against right to contribution at such time).
- 33 For cases applying the doctrine of laches, see Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086; Lawrence v. Rokes, 61 Me. 38; Stout v. Seabrook's Ex'rs, 30 N. J. Eq. 187; Appeal of Andriessen,

keep books, or fail to keep such books as will show the *status* of the firm's affairs, and they postpone a settlement till one of them dies, or till important witnesses die, or till necessary records are lost or destroyed, equity will not interfere to relieve such misfortune." <sup>34</sup>

§ 2370. (§ 943.) Disposition of Partnership Property upon Dissolution.—Upon a partnership accounting, the firm debts must be paid before any distribution can be made to the individual partners or to the representatives of their interests. To pay such debts, all of the partnership property, both real and personal, may, if necessary, be sold.<sup>35</sup> After the debts are paid and the rights of the parties are determined, the property should be distributed. In England it is held that all of the property must be sold, and the proceeds divided, unless there is some agreement to the contrary.<sup>36</sup> In America this rule applies to personal property, but there is a conflict of authority as to the realty. The better rule seems to be that a partner may compel a partition of the realty, if that is possible.<sup>37</sup> There is also a conflict between the

123 Pa. St. 303, 16 Atl. 840, 23 Wkly. Not. Cas. 46; King v. White, 63 Vt. 158, 25 Am. St. Rep. 752, 21 Atl. 535. For a discussion of the subject of laches, see *ante*, volume I, chapter I.

- 34 Garnett v. Wills, 24 Ky. Law Rep. 617, 69 S. W. 695.
- <sup>35</sup> Shanks v. Klein, 104 U. S. 18, 26 L. Ed. 635; Barton v. Love-joy, 56 Minn. 380, 45 Am. St. Rep. 482, 57 N. W. 935.
- 36 Wild v. Milne, 26 Beav. 504; Featherstonhaugh v. Fenwick, 17 Ves. 298; Burdon v. Barkus, 4 De Gex, F. & J. 42.
- 37 Gray v. Palmer, 9 Cal. 116; Hughes v. Devlin, 23 Cal. 501; Jackson v. Deese, 35 Ga. 84; Patterson v. Blake, 12 Ind. 436; Aiken v. Ogilvie, 12 La. Ann. 353; Danvers v. Dorrity, 14 Abb. Pr. 206; Greene v. Graham, 5 Ohio, 264; Pierce v. Covert, 39 Wis. 252. For American cases supporting the English rule, see Lyman v. Lyman, 2 Paine C. C. 11, Fed. Cas. No. 8628; Sigourney v. Munn, 7 Conn. 11; Dickinson v. Dickinson, 29 Conn. 600; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Pierce v. Trigg, 10 Leigh, 406. See, also, Rovelsky v. Brown, 92 Ala. 522, 25 Am. St. Rep. 83, 9 South. 182

English and the American rules as to succession to partnership property. In England, both real and personal property descend as personalty.<sup>38</sup> In America, the property descends according to its true nature, the personalty going as personalty and the realty as realty. This prevails even in some jurisdictions where the right to a partition is denied.<sup>39</sup>

§ 2371. (§ 944.) Rights of Creditors in Partnership Property.—The interest of an individual partner may be reached by his creditor, and may be sold by him under execution.<sup>40</sup> In levying, the sheriff may take actual, manual possession of the property; and he may do the same under an attachment before judgment.<sup>41</sup> By the weight of authority, the partner whose interest is levied upon, or any of the other partners, may come into equity to have an account taken before sale;<sup>42</sup> and to render this right effectual, the sale will be enjoined. And it has been held that a partner against whom an execution issues is entitled to an account even after the sale is

("so far as the partners and their creditors are concerned, real estate belonging to the partnership is in equity treated as mere personalty"); Lang's Heirs v. Waring, 17 Ala. 145.

- 38 Darby v. Darby, 3 Drew. 495; Phillips v. Phillips, 1 Mylne & K. 649; Broom v. Broom, 3 Mylne & K. 443.
- 39 Darrow v. Calkins, 154 N. Y. 503, 61 Am. St. Rep. 637, 48 L. R. A. 299, 49 N. E. 61; Shearer v. Shearer, 98 Mass. 107. See cases collected in note to Goldthwaite v. Janney, 102 Ala. 431, 48 Am. St. Rep. 56, 28 L. R. A. 161, 15 South. 560.
- 40 Smith v. Orser, 42 N. Y. 132; Newhall v. Buckingham, 14 Ill. 405; Hubbard v. Curtis, 8 Iowa, 1, 74 Am. Dec. 283; Sanders v. Young, 31 Miss. 111.
  - 41 Smith v. Orser, 42 N. Y. 132.
- 42 Crane v. Morrison, 4 Sawy. 138, Fed. Cas. No. 3355; Newhall v Buckingham, 14 Ill. 405; Hubbard v. Curtis, 8 Iowa, 1, 74 Am. Dec. 283, and cases cited; Sanders v. Young, 31 Miss. 111; Place v. Sweetzer, 16 Ohio, 142. *Contra*, Moody v. A. & H. Payne, 2 Johns. Ch. 548.

made.<sup>43</sup> It must be borne in mind, however, that it is only the individual's interest that is sold. A "party coming in the right of the partner comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner; and it is an item in the account that enough must be left for the partnership debts." Each partner has an equity to have the partnership debts paid before the property is distributed.

§ 2372. (§ 945.) Rights of Creditors in Separate Property.—It was settled at an early day in England that when equity has jurisdiction over firm and separate funds "the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner, and if there be a surplus of the joint estate, beside what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors."45 This is an application of the equitable doctrine of marshaling assets; and so far as it gives priority to separate creditors, it has been justly criticised as an arbitrary rule. It must be remembered that it is not a legal rule: for at law a firm creditor may by attachment or execu-

<sup>43</sup> Habershon v. Blurton, 1 De Gex & S. 121:

<sup>44</sup> Taylor v. Fields, 4 Ves. 396. See, also, to the effect that partnership creditors are entitled to first payment, Osborn v. McBride, 3 Sawy. 590, Fed. Cas. No. 10,593; Crooker v. Crooker, 46 Me. 250; Thompson v. Frist, 15 Md. 24; Doner v. Stauffer, 1 Penr. & W. 198. See, also, Farwell v. Huston, 151 Ill. 239, 42 Am. St. Rep. 237, 37 N. E. 864; Himmelreich v. Shaffer, 182 Pa. St. 201, 61 Am. St. Rep. 698, 37 Atl. 1007.

<sup>45</sup> Ex parte Cook, 2 P. Wms. 500.

tion acquire a priority.<sup>46</sup> While the doctrine is primarily equitable, it is most frequently applied in bankruptcy and in proceedings for winding up the estate of a deceased partner. In its general scope, the rule is supported by the weight of authority in the United States.<sup>47</sup> An exception allows firm creditors to prove against the separate property when there is no joint property, and there is no living, solvent partner within the jurisdiction.<sup>48</sup> In probate proceedings upon the estate of a deceased partner, the same rule of distribution applies.<sup>49</sup> In America, it is generally held that the remedy against the surviving partner must be exhausted before firm

46 Meech v. Allen, 17 N. Y. 300, 72 Am. Dec. 465; Stevens v. Perry, 113 Mass. 380.

47 Pott v. Schmucker, 84 Md. 535, 57 Am. St. Rep. 415, 35 L. R. A. 392, 36 Atl. 592; Hundley v. Farris, 103 Mo. 78, 23 Am. St. Rep. 863, 12 L. R. A. 254, 15 S. W. 312; Thayer v. Humphrey, 91 Wis. 276, 51 Am. St. Rep. 887, 30 L. R. A. 549, 64 N. W. 1007. See, also, cases collected in note, 43 Am. St. Rep., pp. 367, 368. The rule is recognized in the bankruptcy act of 1898, § 5, f: "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

48 Ex parte Peake, 2 Rose, 54; Ex parte Hill, 2 Bos. & P. (N. R.) 191, note (a); In re Downing, 1 Dill. 33, Fed. Cas. No. 4044; In re Knight, 8 N. B. R. 436, 2 Biss. 518, Fed. Cas. No. 7880; Brock v. Bateman, 25 Ohio St. 609; Thayer v. Humphrey, 91 Wis. 276, 51 Am. St. Rep. 887, 30 L. R. A. 549, 64 N. W. 1007.

49 Gray v. Chiswell, 9 Ves. 118.

creditors can resort to the estate of the deceased partner; 50 in England, however, this is not necessary. 51

50 Troy etc. Factory v. Winslow, 11 Blatchf. 513, Fed. Cas. No. 14,199; Leake & Watts Orphan House v. Lawrence, 11 Paige, 80; Voorhis v. Childs, 17 N. Y. 354; Voorhis v. Baxter, 18 Barb. 592. For an excellent discussion of the reasons for the rules in England and in America, see Voorhis v. Childs, supra. See, also, cases collected in note, 43 Am. St. Rep., at 367.

51 Wilkinson v. Henderson, 1 Mylne & K. 582.

